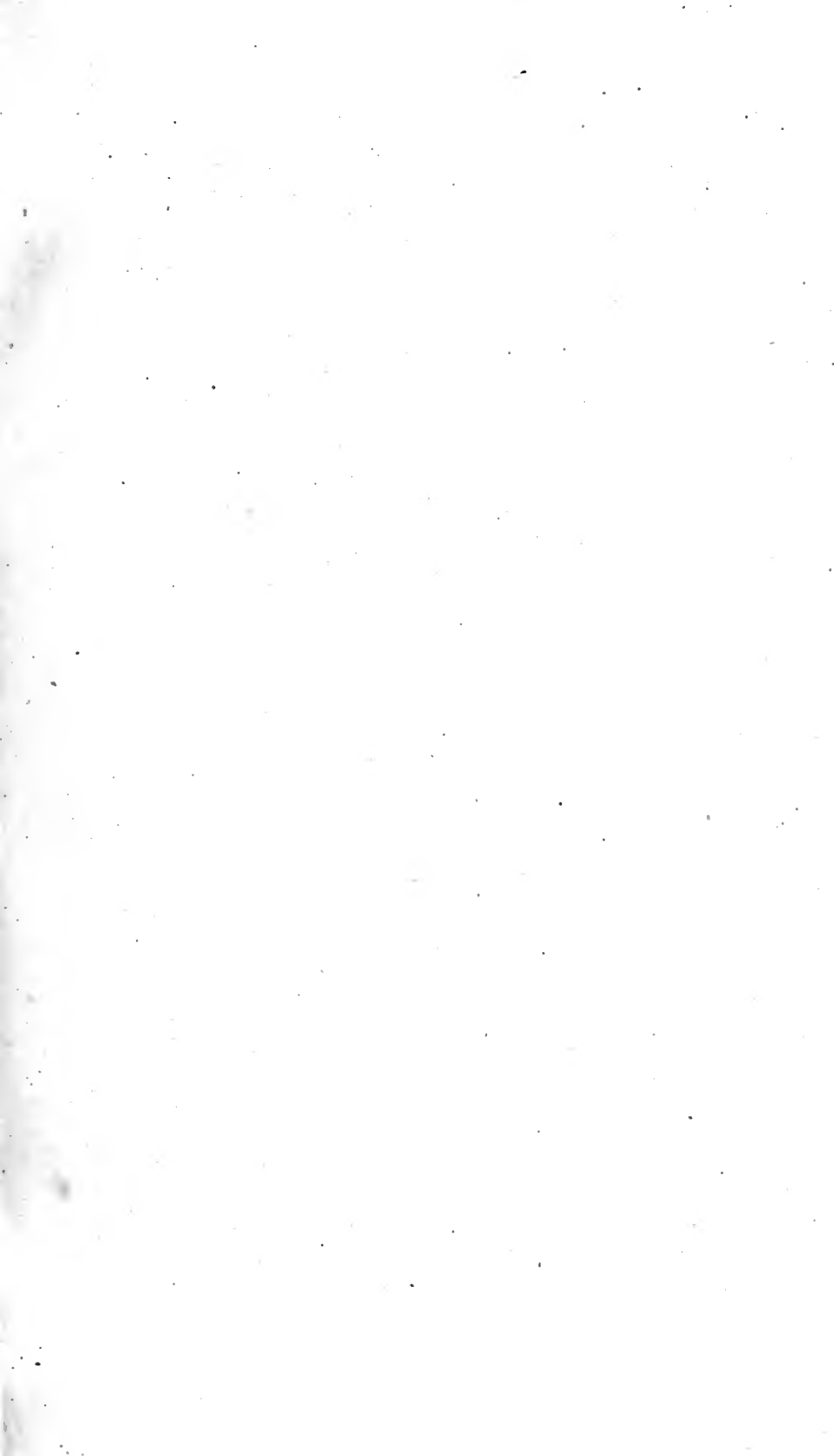
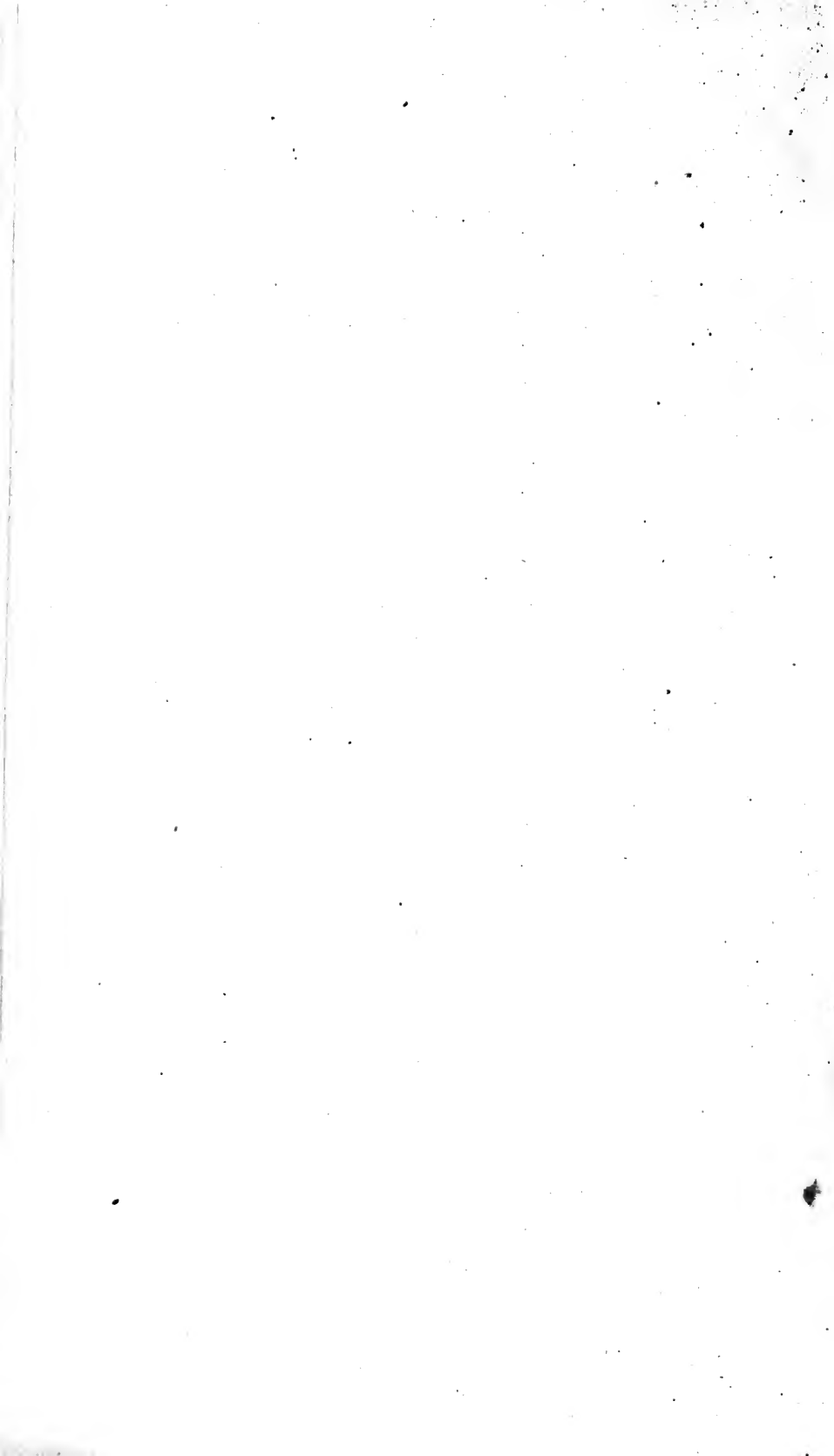


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NEW
Abridgement of the Law.

BY MATTHEW BACON,
OF THE MIDDLE TEMPLE, ESQ.

THE SEVENTH EDITION, CORRECTED;
WITH LARGE ADDITIONS, INCLUDING THE LATEST STATUTES AND AUTHORITIES.

VOLUMES II. III. AND IV. (EXCEPT THE ADDENDA,)

BY SIR HENRY GWILLIM,
OF THE MIDDLE TEMPLE, KNIGHT;
LATE ONE OF THE JUDGES OF HIS MAJESTY'S SUPREME COURT
AT MADRAS.

VOLUMES I. V. VI. VII. AND VIII. AND THE ADDENDA TO THE
OTHER VOLUMES,

BY CHARLES EDWARD DODD,
OF THE INNER TEMPLE, ESQ. BARRISTER AT LAW.

IN EIGHT VOLUMES.

VOL. VI.

LONDON:

PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY;

FOR J. AND W. T. CLARKE; LONGMAN, REES, ORME, BROWN, AND GREEN;
T. CADELL; J. RICHARDSON; J. M. RICHARDSON; R. SCHOLEY; C. J. G. AND F.
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1832.

255-45-8
6. 6. 31

OFFICES AND OFFICERS.

- (A) Of the Nature of an Office, and the several kinds of Offices.
- (B) Offices, by what Authority created.
- (C) Who hath a Right of granting or assigning an Office : And herein of one Office's being incident to another.
- (D) Of the Grant of Offices by Ecclesiastical Persons.
- (E) Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.
- (F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus disposed of.
- (G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.
- (H) Of the Nature of Offices as to their Duration and Continuance : And herein of their being grantable in Fee, for Life, Years, at Will, and Reversion.
- (I) Offices by whom to be executed, and who are incapable thereof.
- (K) Of the Manner of executing them : And herein of Offices that are incompatible, and where an Office may be executed by two or more Persons.
- (L) Of the Execution of an Office by Deputy : And herein of Superiors being answerable for their Deputies.

OFFICES AND OFFICERS.

(M) Of the Forfeitures of an Office.

(N) Where for Corruption and oppressive Proceedings Officers are punishable: And herein of Bribery and Extortion.

(A) Of the Nature of an Office, and the several Kinds of Offices.

Carth. 478.
(a) Signifies a place of trust, and therefore the statute 3 Jac. 1. c. 5. enacts, that no popish recusant shall exercise any office or charge. 5 Mod. 431.

IT is said that the word *officium* principally implies a duty, and in the next place the (a) charge of such duty; and that it is a rule, that where one man hath to do with another's affairs against his will, and without his leave, that this is an office, and he who is in it is an officer.

2 Sid. 142. There is a difference between an office and an employment, every office being an employment; but there are employments which do not come under the denomination of offices; such as an agreement to make hay, plough land, herd a flock, &c. which differ widely from that of steward of a manor, &c.

2 Inst. 32. 456. By the ancient common law, officers ought to be honest men, legal and sage, *et qui melius sciant et possint officio illi intendere*; and this, says my Lord Coke, was the policy of prudent antiquity, that officers did ever give grace to the place, and not the place only to grace the officer.

Carth. 479. Officers are distinguished into civil and military, according to the nature of their several trusts.

Carth. 479. Offices are distinguished into those which are of a public, and those which are of a private nature. And herein it is said, that every man is a public officer, who hath any duty concerning the public; and he is not the less a public officer, where his authority is confined to narrow limits; because it is the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority.

Sid. 94. 152.
Lev. 75.
Keb. 349.
Raym. 94.
Hurst's case. It hath been held, that the commissioners for purging corporations could not take notice of or remove an attorney of a court, it not being a public office in which the government was concerned.

5 Mod. 431.
Carth. 478.
The King v. Dr. Burrel. It hath been doubted whether the censor of the college of physicians be such an officer as is compellable to take the oaths prescribed by the statute 25 Car. 2. c. 2. it being urged that the oversight and inspection of medicines was of a private nature; and that no offices were within the intent of that statute but such as relate to the revenue, or to the conservation of the peace; and that particular powers created for particular purposes were not within that statute.

Also,

Also, offices are distinguished into ancient offices and those, which are of (a) new creation. And herein it is observable, that constant usage hath not only sanctified the first establishment of such ancient offices as have existed time out of mind, but also hath prescribed and settled the manner in which they have and are to continue to exist, in what manner to be exercised, how to be disposed of, &c.

parliament, hath more authority than the act that creates him, or some subsequent act of parliament doth give him; for he cannot prescribe as an officer at common law may do.

9 Co. 97.
Cro. Eliz. 636.
2 Roll. Abr.
182. Cro. Car.
513. 2 Co. 16.
Show. 436.
(a) No officer,
that is constitu-
tuted by act of

There is also another distinction of offices into such as are judicial, and such as are ministerial offices only; the first, relating to the administration of justice, or the actual exercise thereof, must be executed by persons of sufficient capacity, and by the persons themselves to whom they are granted; and herein also ancient usage and custom must govern.

Jon. 109.
Dav. 35.
9 Co. 97.

¶ (Vide as to Offices of Registrars of Admiralty, 50 Geo. 3. c. 118.; as to Offices of the House of Commons, 52 Geo. 3. c. 11.; as to Office of Works, 54 Geo. 3. c. 157.; as to Offices of Clerks of the Signet and Privy Seal, 57 Geo. 3. c. 63.; as to Offices in *Irish* Exchequer, 57 Geo. 3. c. 60.; as to other Offices in *Ireland*, 57 Geo. 3. c. 62.; as to Offices in *Scotland*, 57 Geo. 3. c. 64.; as to Offices of Board of Trade, 57 Geo. 3. c. 66.; as to Offices in the Mint, 57 Geo. 3. c. 67.; as to the Office of Clerk of Parliament, 5 Geo. 4. c. 82.)

(B) Offices, by what Authority created.

THE king is the universal officer and disposer of justice within this realm, from whom all others are said to be (b) derived: but yet he cannot create any new office inconsistent with our constitution, or prejudicial to the subject.

the king, where the king may grant or nominate to the office, but hath not the use or execute. Co. Lit. 3. b. 2 Vent. 270. [1 H. 7. 29. Plowd. 381. 2 Bulst.

12 Co. 116.
Roll. R. 206.
Carth. 478.
(b) Offices are
said to be in
office in him to
4. 8 Co. 55. b.]
2 Inst. 540.

There are three things, says my Lord *Coke*, which have fair pretences, yet are mischievous: 1st. New courts; 2d. New offices; 3d. New corporations for trade. And as to new offices, either in courts or out of them, these, he says, cannot be erected without act of parliament; for that under the pretence of the common good, they are exercised to the intolerable grievance of the subject.

An office granted by letters patent for the sole making of all bills, informations, and letters missive in the council of *York*, was held unreasonable and void.

Jon. 251.
Mounson v.
Lyster.

One *Chute* petitioned the king to erect a new office for registering all strangers within the realm, except merchant strangers, and to grant the said office to the petitioner with or (c) without a fee; and it was resolved by all the Judges at *Serjeants' Inn*, that the erection of such new offices, for the benefit of a private man, was against all law, of what nature soever.

Co. 116. and
several cases
there cited to
this purpose.
(c) It hath been
held clearly,
that in the
constitution of

a new office or officer, it is not necessary that an annual or casual fee should at first be annexed to such office. Moor, 809.

4 Inst. 200.

Pasch. 6 Jac. 1.

Bishop of Salisbury's case.

Moor, 808.

S. C. [The

question, according to

Moor, was,

Whether the

Bishop of Salisbury had,

under this

grant, by suc-

cession, such a title to the office, that he ought to be admitted to it? It appeared, that *Beau-*

champ accepted the office, executed it, and died Bishop of Salisbury in the 22d year of Ed. 4th: but there was no proof extant of any succeeding bishop of Salisbury being admitted to the office, but the kings of *England*, one after another, had appointed chancellors at their pleasure. The three judges to whom the matter was referred, viz. the Chief Justices *Flemming* and *Coke*, and the Chief Baron *Tanfield*, agreed in opinion, and so reported to the king, that the bishop by *succession* had no title to the office, for two reasons: 1st. Because the patent originally was void as to the appointment of any succeeding bishop to the office, for *Beauchamp* took the estate for his life in the office in his natural capacity, not in his politic capacity; since if it had happened, that he had been removed from the bishoprick of Salisbury, yet, in respect of the express limitation to him for his life, he must have continued in the office, and his successor in the see could not have taken it: then the consequence is, that he did not take an inheritance of succession in the office; and he could not take in his natural capacity for life, and also in his politic capacity; nor could the grant enure by such a fraction. Wherefore they all thought the grant void as to the succession. The other reason was, because there had been no use or exercise of this office by any succeeding bishops of Salisbury. — But this state of facts, from which the above judgment was formed, does not seem to be correct; for, in truth, this office was enjoyed and executed by bishops of Salisbury from the time of the above grant to *Richard Beauchamp* to the reign of *Edward* 6th. Upon the reformation of the order by that king, his statutes wholly leave out the ecclesiastics, and appoint that the office shall be executed by one of the knights companions; and from that time till the reign of *Charles* 2. it remained in the hands of laymen. It appearing, however, that there were several charters granted to the see of Salisbury, particularly one in the 4th of *Elizabeth*, which confirmed charters of Queen *Mary*, King *Henry* 8th., and *Henry* 7th., and also another in the 4th of *Charles* 1., in which last the letters patent of *Eduard* 1. are recited *totidem verbis*, and expressly confirmed, the pretensions of the see of Salisbury to the office were revived in the last-mentioned reign, and the claim was agitated in a chapter of the order, but the troubles which shortly afterwards followed prevented a decision. The claim, however, was renewed soon after the restoration, and at a chapter of the order in 21st of *Charles* 2. was allowed on the ground of the above grant. It was declared, that the Bishop of Sarum, and his successors for ever, should have and execute the office of chancellor of the most noble Order of the Garter, and receive and enjoy all the rights, privileges, and advantages thereunto belonging, immediately upon the first vacancy. Ashmole's Institution, &c. of the Garter, c. 8. § 2.] (a) So, if the king grants an office by the name of an office *cum feodis inde spectantibus*, and it appears to the court to be new, the grant is void. 9 East, 4. 10. 2 Sid. 141.

Hob. 63. [(b)

But it is said,

that courts of

equity may be

holden by pre-

scription, 4 Inst. 87., which implies a legal inconsistency, (unless we believe the royal authority

to have varied in this respect at different periods,) since prescription, as a title to any franchise,

pre-supposes a royal grant. It is also asserted, 4 Inst. 204. marg. Dav. 60. b., that counties palatine (to which courts of equity are thought incident, Hob. 65.) may be erected by the king with-

out parliament. *Chester*, *Durham*, *Lancaster*, are said to be counties palatine by prescription.

4 Inst. 204. However, the doctrine in the text is supported by the resolution of many of the

judges, amongst whom was Sir *E. Coke*, that the king cannot grant a commission to determine

any matter of equity, but it ought to be determined in the court of chancery, which hath had

jurisdiction in such case immemorially, and had always such allowance by the law; but such

com-

King *Edward* IV. by his letters patent bearing date 10 Oct. anno 15. of his reign, reciting, that whereas there was no office of the chancellor of the garter, that there should be such an office of the chancellor of the garter, and that none should have it but the Bishop of *Salisbury* for the time being, willed and ordained, that *Richard Beauchamp*, then Bishop of *Salisbury*, should have it for his life, and, after his decease, that his successors should have it for ever. And amongst divers other points it was resolved unanimously, that this grant was void (a); for that a new office was erected, and it was not defined what jurisdiction or authority the officer should have, and therefore for the uncertainty it was void.

It appeared, that *Beau-*
champ accepted the office, executed it, and died Bishop of Salisbury in the 22d year of Ed. 4th: but there was no proof extant of any succeeding bishop of Salisbury being admitted to the office, but the kings of *England*, one after another, had appointed chancellors at their pleasure. The three judges to whom the matter was referred, viz. the Chief Justices *Flemming* and *Coke*, and the Chief Baron *Tanfield*, agreed in opinion, and so reported to the king, that the bishop by *succession* had no title to the office, for two reasons: 1st. Because the patent originally was void as to the appointment of any succeeding bishop to the office, for *Beauchamp* took the estate for his life in the office in his natural capacity, not in his politic capacity; since if it had happened, that he had been removed from the bishoprick of Salisbury, yet, in respect of the express limitation to him for his life, he must have continued in the office, and his successor in the see could not have taken it: then the consequence is, that he did not take an inheritance of succession in the office; and he could not take in his natural capacity for life, and also in his politic capacity; nor could the grant enure by such a fraction. Wherefore they all thought the grant void as to the succession. The other reason was, because there had been no use or exercise of this office by any succeeding bishops of Salisbury. — But this state of facts, from which the above judgment was formed, does not seem to be correct; for, in truth, this office was enjoyed and executed by bishops of Salisbury from the time of the above grant to *Richard Beauchamp* to the reign of *Edward* 6th. Upon the reformation of the order by that king, his statutes wholly leave out the ecclesiastics, and appoint that the office shall be executed by one of the knights companions; and from that time till the reign of *Charles* 2. it remained in the hands of laymen. It appearing, however, that there were several charters granted to the see of Salisbury, particularly one in the 4th of *Elizabeth*, which confirmed charters of Queen *Mary*, King *Henry* 8th., and *Henry* 7th., and also another in the 4th of *Charles* 1., in which last the letters patent of *Eduard* 1. are recited *totidem verbis*, and expressly confirmed, the pretensions of the see of Salisbury to the office were revived in the last-mentioned reign, and the claim was agitated in a chapter of the order, but the troubles which shortly afterwards followed prevented a decision. The claim, however, was renewed soon after the restoration, and at a chapter of the order in 21st of *Charles* 2. was allowed on the ground of the above grant. It was declared, that the Bishop of Sarum, and his successors for ever, should have and execute the office of chancellor of the most noble Order of the Garter, and receive and enjoy all the rights, privileges, and advantages thereunto belonging, immediately upon the first vacancy. Ashmole's Institution, &c. of the Garter, c. 8. § 2.] (a) So, if the king grants an office by the name of an office *cum feodis inde spectantibus*, and it appears to the court to be new, the grant is void. 9 East, 4. 10. 2 Sid. 141.

The king cannot grant to any person to hold a court of equity (b), though he may grant *tenere placita*; for the dispensation of equity is a special trust committed to the king, and not by him to be intrusted with any other, except his chancellor.

which implies a legal inconsistency, (unless we believe the royal authority to have varied in this respect at different periods,) since prescription, as a title to any franchise, pre-supposes a royal grant. It is also asserted, 4 Inst. 204. marg. Dav. 60. b., that counties palatine (to which courts of equity are thought incident, Hob. 65.) may be erected by the king without parliament. *Chester*, *Durham*, *Lancaster*, are said to be counties palatine by prescription. 4 Inst. 204. However, the doctrine in the text is supported by the resolution of many of the judges, amongst whom was Sir *E. Coke*, that the king cannot grant a commission to determine any matter of equity, but it ought to be determined in the court of chancery, which hath had jurisdiction in such case immemorially, and had always such allowance by the law; but such

commissioners, or new courts of equity, shall never have such allowance, but have been adjudged to be against law. 12 Co. 115. See 1 Wooddes. 188.]

¶ By 6 Geo. 4. c. 95. it is enacted, "That it shall and may be lawful for his majesty at any time before the commencement of the next *Michaelmas* term, and during any succeeding vacation, from time to time, to cause a writ to be issued out of his majesty's high court of chancery, directed to any such person, being a barrister at law, as his majesty shall think fit, returnable immediately in the said court, commanding such person to appear in the said court, and to take upon himself the state and dignity of a serjeant at law; and such person shall and may thereupon forthwith appear before the lord high chancellor, lord keeper, or lords commissioners for the custody of the great seal for the time being, at such time and place as the said chancellor, keeper or commissioners shall appoint; and such person so appearing, and taking the oaths usually administered to a serjeant at law, shall, without any further act or ceremony, be, and be deemed and taken to be, a serjeant at law sworn, to all intents and purposes."¶

6 G. 4. c. 95. enabling the creation of serjeants at law in vacation

(C) *Who hath a Right of granting or assigning an Office: And herein of one Office being incident to another.*

WHEREVER one office is (a) incident to another, such incident office is regularly grantable by him who hath the principal office. On this foundation it hath been held, that the king's grant of the office of county-clerk was void, it being inseparably incident to the office of sheriff, and could not by any law or contrivance be taken away from him.

4 Co. 32. Mitton's case. (a) If a house or land belong to an office, by the grant of the office by deed the house

or land passeth, as belonging thereto. Co. Lit. 49. a. Vaugh. 178. cited.

So, the office of chamberlain of the King's Bench prison is inseparably incident to the office of marshal; and therefore a grant of the office of marshal with a reservation of the office of chamberlain, is void.

2 Salk. 439. pl. 3. Per Holt C. J. Leon. 320, 321. Like point.

So, it hath been resolved, that the office of exigenter of *London* and other counties in *England*, is incident to the office of C. J. of C. B. and that therefore a grant thereof by the king, though in the vacancy of a chief justice, is null and void.

Dyer, 175. a. pl. 25. and 152.; et vide Show. Par. Ca. Sir Rowland Holt's case.

My Lord *Coke* says, that the justices of courts did ever appoint their clerks, some of which after by prescription grew to be officers in their courts; and this right which they had of constituting their own officers, is further confirmed to them by *Westm.* 2. 13 Ed. 1. c. 30. the reasons whereof are twofold. 1st. For that the law doth ever appoint those who have the greatest knowledge and skill, to perform that which is to be done. 2dly. The officers and clerks are but to enter, enrol, or effect that which the justices do adjudge, award, or order; the insufficient doing whereof maketh the proceedings of the justices erroneous, than the which

2 Inst. 425. 4 Mod. 173. cited.

nothing can be more dishonourable and grievous to the justices, and prejudicial to the party.

Harding v.

Pollock,

6 Bing. R. 25.

in *Dom. Proc.*

This judgment is according to the opinion of the judges, except *Bayley J.*, who dissented. *Qu.* Whether the profits of this office are assignable? 3 Swanst. 173.

(D) Of the Grant of Offices by Ecclesiastical Persons.

Co. Lit. 44. a.
Co. 58. 61.

Bishop of Sarum's case.

Cro. Car. 49.

Ley, 71. 79.

[Notwith-

standing what

is said here

and in several

other cases

concerning the

necessity of the

office, yet that

point is not at

all material.

For it hath

been deter-

mined upon

solemn hear-

ing, that an

office and fee

which existed

before the first

of Eliz. are

not within the

restraint of

that statute,

but that they

may be granted

as before the statute;

and that the utility or necessity of the office is not more material since,

than it was before the statute. Sir John Trelawney v. the Bishop of Winchester, 1 Burr. 219.

10 Co. 61.

Cro. Car. 49.

11 Co. 4.

HERE it will be proper to take notice how far bishops, and other ecclesiastical persons may grant offices to bind their successors, and how far not: wherein the rule is, that such offices as are ancient, and of necessity to be exercised by some other person, they may grant, together with the ancient fee for exercising thereof; and as these offices are not within 32 Hen. 8. c. 28. to be granted by the bishops or other ecclesiastical persons solely; so neither are they construed to be within the restraint of 1 Eliz. c. 19. and 13 Eliz. c. 10., and therefore remain perfectly at the common law, and, by consequence, to bind the successors, must be confirmed in the same manner as all other grants or alienations of ecclesiastical persons at common law must have been. These grants appear generally to have been made for the life of the grantee; for it were too severe and rigid a construction to confine them to be made determinable on the death, translation, or other promotion of the bishop, dean, &c. who made them; and would discourage men of ability and capacity to undertake the exercise thereof; and to grant such offices for twenty-one years, or any other term of years, would introduce many inconveniences, by letting in executors, strangers, and other unqualified persons to the exercise thereof; and therefore any grant of such offices for years, seems against the policy of the common law and the benefit of the successors, which those statutes intended to provide for, and by consequence will not bind them.

But if such offices have been anciently granted to one for life, this induces no necessity of their being granted to two for their lives; and therefore such grant to two for their lives, will not bind the successors, though one of the grantees should die in the life of the grantor, so as there were but one life in being against the successor: because by such grant to two, the grant was faulty in its foundation, and therefore shall not be helped by any accident after. So if the office have been anciently granted to one with an ancient fee, and after a grant is made to another in reversion, after the death of the first grantee; this shall not bind the successor, for there can be no necessity urged to justify this; besides that, the grantee in reversion, by sickness or other accident, may become incapable to exercise such office before it comes into possession; and if the bishop, or other spiritual person, might grant such offices to two, or grant them in reversion,

sion, they might abuse that power, and grant them to twenty, or for twenty lives in reversion one after another, which as they cannot be justified from any necessity, so they would be inconvenient, by tying up the successor's hands from choosing such officers as he thought necessary and proper for the discharge of such offices; and therefore no confirmation will make good such grants against the successor.

The Bishop of *Norwich* having the office of high steward of his courts, to which a fee of 10*l.* per annum appertained, and also the office of under steward of the same court, to which a fee of 4*l.* per annum appertained, granted the office of under steward to three for their lives, whereof one was within age, and the other two being dead, the infant grants over the office to the defendant, and then the bishop grants both these offices to the plaintiff, with the fees. By the books both these grants seem to be void: the first because it was granted to three, where the custom warranted a grant thereof only to one; and also, because the surviving grantee was an infant, and so not capable of a judicial office, as the steward of a court is. The second, because both were granted to one person, where they had usually been granted to two severally, with distinct fees, and therefore the grant of both to one person neither necessary nor convenient, and, by consequence, not binding against the successor. Also, such grant of either the said offices in reversion would not bind the successor, for the reasons before given.

But, although the bishoprick, deanery, &c. were founded but of late times, yet the grant of such offices as are necessary, and cannot be exercised by the bishop, dean, &c. in person, may be allowed, together with a reasonable fee for the exercise thereof (the reasonableness whereof the court where the cause depends is to be judge); for these cannot be said to tend to the impoverishment of the successor, but rather for his benefit, by providing officers fit and qualified to take care of the revenues; and therefore such grants are not within the restraint of 1 Eliz. c. 19. and 13 Eliz. c. 10.; but not being warranted by 32 H. 8. c. 28. they must be confirmed by all persons interested therein; because they remain at common law, untouched by any of the statutes.

In an action upon the case, for disturbing the plaintiff in his office of registrar to the Bishop of *Bristol*, which was a new bishoprick taken out of the bishoprick of *Sarum*, and founded in the time of Hen. 8., and which had been granted *separalibus temporibus* after the foundation, to one and his assigns for three lives, &c. these differences were taken and agreed to by the court. First, that the bishop of a new bishoprick may grant offices of necessity for life. Secondly, If an office hath been usually granted by the bishop of a new bishoprick, for three lives, with the consent or confirmation of the dean and chapter, (a) before 1 Eliz. c. 19. it may be now granted accordingly. Thirdly, Be the bishoprick new or old, if it was not so granted, but granted always before 1 Eliz. c. 19. for one or two lives, it cannot be granted by the bishop after 1 Eliz. c. 19. for three lives. Fourthly, If

Cro. Eliz. 636.
Scambler v.
Watts. 10 Co.
61. Cro. Car.
50. Ley, 74.
Dyer, 80. b. in
margin.

10 Co. 61. b.
Cro. Car. 48.
2 Brownl. 137.
Bishop of Ely's
case. Ley, 78.
80.

2 Lev. 136.
3 Keb. 472.
506. Ridley
v. Pawnal.

(a) Cro. Car.
258. 279.
Jon. 311.
March 38.
accord., that

such grant before 1 Eliz. is a badge of their having been anciently so granted.

Bridg. 30. 32.
Cro. Car. 47.
Ley, 71.
Bishop of
Chichester v.
Freeland. Cro.
Car. 16. Cook
v. Younger.
Ley, 75.

If it was granted before 1 Eliz. c. 19. for three lives, and after the statute but for one life, yet this shall not a bridge the power of the bishop, but he may grant it for three lives, &c. And in the principal case, the verdict finding that it had been granted *separabilibus temporibus* after the foundation to one and his assigns for three lives, was held defective, because it might be so granted after the foundation, and yet be after 1 Eliz. c. 19., and therefore a *venire facias de novo*, was awarded to supply that defect.

The Bishop of *Chichester* was seised in fee of a park in right of his bishoprick, and had the office of park-keeper, which he by deed 44 Eliz. granted to the defendant for his life, *et ulterius concessit pro executione officii prædicti* five marks, with a clause of distress, *una cum a livery*, or 13s. 4d. per annum, *nec non pasturam pro duobus equis* in the said park yearly, *una cum* the windfalls, with clause of distress for the said rent, or annuity of five marks, and livery, or 13s. 4d.; and this grant was confirmed by the dean and chapter; and for nonpayment of the five marks the defendant distrains, and avers the office and fee of five marks to be anciently granted, but makes no averment for the residue. The plaintiff, in bar of the avowry, pleads the statute 1 Eliz. c. 19. and says, that the pasturage was never granted before, and derives a title to himself under the present bishop, successor to the grantor. In this case it seems to be agreed by all, that if the new additional fees had been in another clause, distinct from the grant of the office and five marks; or had been granted for another consideration; or, if the bishop had granted the office and five marks for him and his successors, and had granted the pasturage, and other additional fees, during his own life only; that in these cases the grant had been good, for the ancient office and fee, to bind the successor, but not for the additional fees: or, if the grant of the office had been with a fee of 5*l.*, where the ancient fee was but five marks, there, the grant being entire, would have been void *in toto* against the successor: but whether these grants were distinct or entire seemed the only dispute in the case; wherein the court was divided—two judges holding that they were several and distinct, and two, that they were entire and depending on each other, and therefore void in the whole against the successor. But a variation in the days of payment of the ancient fee, as if it were formerly payable at one day, and be now reserved payable at two, will not vitiate the grant.

Brownl. 182.
Humphrey v.
Parcel.

In replevin, defendant avows upon a grant to him by the dean and chapter of, &c. of the office of catership of the church for life, with an annuity of 6*l.* per annum, for the exercising thereof, and a clause of distress; and avows for the annuity, and avers that it was an ancient office pertaining to the dean and chapter, &c., but does not aver that the annuity was an ancient annuity: the defendant pleads 13 Eliz. c. 10., &c. and shews the death of the dean grantor, and the election of another, &c., and upon demurrer adjudged, that the grant was void.

4 Mod. 16, 17,
18. Jones v.

The Bishop of *Llandaff*, in 1672, granted the office of chancellor of his diocese to *A.* and *B.* and the survivor of them for life,

life, and this was confirmed by the dean and chapter; and now *A.* being dead it became a question, Whether this grant to two were good against the successor? And the court held, that if it had been anciently so granted, it would bind the successor; and to prove it anciently so granted, four grants were produced, three of which were made in the time of one bishop, and the last in the year 1620, from which time to this present grant in 1672 no such grant to two had been made; and the first of these grants was about fifty years after 1 Eliz. c. 19., yet the court held this sufficient evidence to prove this office anciently grantable to two, before the statute 1 Eliz. c. 19. (as the prescription must be to warrant it); and one *Ridley's* case was mentioned of the office of registrar of *Bristol*, wherein my Lord *Hale* was of opinion, that if it could be shewn that such grants were made some time after the first Eliz. c. 19. it would be an evidence that such were also made before the statute; and upon a special verdict finding this matter, the court gave judgment accordingly, that the grant was sufficiently warranted by ancient usage, and had no great regard to the objection of its being a judicial office, which cannot by law be granted to two, being supported by such usage, and no diminution of the successor's revenue, which those statutes were made to secure.

Some hold that when such ancient office and ancient fee are granted together, with some new additional fees, yet, if the distress and avowry be only for the ancient fee, that the avowant need only make averment, for that fee for which he distrains, that it was ancient; and the plaintiff, if the other fees were new, ought to shew it in avoidance of the grant; for the avowry, being only for the ancient fee, needs meddle with no more, that being only in question.

and is to make a title. *Vide* Cro. Car. 48, 49, 50. 10 Co. 58. 9. But *quare*; for others hold that the avowant ought to make averment for all, because he is in the nature of a plaintiff, Ley, 73. 77.

In an action upon the case, for disturbing him in the exercise of the office of commissary of the bishop of *Lincoln*, and of official to the archdeacon of *Leicester*, upon not guilty pleaded, it was found that these were ancient offices of judicature, always granted to one person for life, the one by the bishop, and the other by the archdeacon, till 1609, when they were granted by the bishop and archdeacon severally to *A.* and *B.* for their two lives: and after 1614, were likewise granted to *B.* and *C.*, with confirmation of the bishop's grant, by the dean and chapter, and of the archdeacon's grant by the bishop, dean and chapter; and that after the death of that bishop and archdeacon, their successors severally granted both the said offices to the plaintiff; who, being disturbed by *C.*, brought this action and had judgment; for all the court held these offices parcel of the possessions of the bishoprick and archdeaconry, and expressly within the word *hereditaments* in the 1 Eliz. c. 19. and 13 Eliz. c. 10., and therefore being usually granted in possession, the grant thereof in reversion is without warrant, and no necessity can be urged for so doing; and the acceptance by *B.* of the second grant, where *C.*

was

Bean. Show. 288. 12 Mod. 10. 2 Salk. 465. pl. 1. Carth. 213.

Supra, 2 Lev. 156.

Cro. Car 258. Jon. 263. Walker v. Sir John Lamb.

was joined, was no surrender of the first, and, by consequence, the respective successors were not bound by these grants, but might lawfully, as they have done, grant both these offices to the plaintiff for his life; and therefore he had judgment.

Cro. Car. 279.
555. Jon. 310.
2 Roll. Abr.
155. Young
v. Stowel.
March, 38.
3 Leon. 31.
4 Mod. 279.

But where the office of registrar of a bishop hath been usually granted as well in reversion as in possession, there a grant to one of such office for life, where by the death or surrender of the present officer it shall become void, is good, and shall bind the successor, and is not within the restraint of either of the said statutes; because, being usually so granted, it might proceed at first from a reason of convenience and necessity, that the office might always be kept full, and a person always ready to execute it, for the benefit of the king's subjects; for though there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habend.* after the death of the present officer; which is no more than a provision of a person to supply it, when it becomes void; and if such provision has been usually made, the custom and usage gives sanction to it. But then such grant must be confirmed, as is said before; and therefore, where some books hold such grant of offices in reversion not good, it must be taken with this diversity, that they have not usually been so granted, but only in possession, and then to grant them in reversion is not warranted by the custom, nor shall bind the successor.

Cro. Car. 279.
555. 557.
Jon. 310.
2 Roll. Abr.
123.

But in the last case, where the office of registrar was granted by the bishop to an infant, then about eleven years of age, *habend.* after the death or surrender of the present officer, *exercend. per se vel suffic. deput. suum cum vadiis*, &c., and when the tenant for life died, the grantee in reversion was then thirty years of age; all the court held his infancy, at the time of the grant, no cause to avoid it; because, at the time it fell into possession, he was of sufficient age to execute it; and though it had fallen vacant during his minority, yet, as this case is, the grant would have been good, because it is to be exercised *per se vel per suffic. deputat.*, &c., and therefore though he were not capable of exercising it himself, (as writing and a little *Latin* would sufficiently qualify him for, it being only to write and register acts done in court,) yet he might have put in a sufficient deputy; and therefore they denied the opinion Co. Litt. 3. b. that the grant of the office of steward of the court of a manor, either in possession or reversion, to an infant was void, as incapable and wanting knowledge to exercise it, unless it were to be understood that there was no clause of exercising it, *per se vel sufficit deputat.*, and that the infant himself was of such tender age, that by no intendment he was incapable of exercising it himself. But they held, that (a) if there were such clause, then it would be good. and he might appoint a sufficient deputy: and if he did not, it would be a forfeiture of his office, notwithstanding his infancy; and of the sufficiency of the deputy the lord of the manor, or judge of the court, were to be judges; and if the deputy should misdeemean himself, or prove unskilful in his office, it would be
a for-

(a) *Vide* Cro.
Jac. 18. Hob.
148. 11 Co.
87. 8 Co. 44.

a forfeiture at the infant's peril; and this seems to be the diversity taken in the books. Besides, if the case in Co. Litt. be meant of the office of steward of a court-leet, it may be good law, because that is a judicial office, which perhaps cannot be executed by deputy; but, if it be meant of a court-baron, then, the general opinion of the (a) books is against it, which hold, that the steward of a court-baron may make a deputy, though there were no express power given him for that purpose; for that it is an office purely ministerial, (for the suitors are judges in the court-baron,) and consists in entering plaints, surrenders, admittances, &c. in the nature of a registrar; and though an infant should have the stewardship of both courts, viz. the court-leet and court-baron together, and that he should be incapable to exercise that of the court-leet, and therefore the grant thereof to him should be void; yet for the court-baron the grant would continue good, and he might either exercise it in person or by a sufficient deputy. And perhaps upon this diversity the books may be reconciled; for they agree, that if an office of judicature or learning be given to a man utterly incapable of it, no clause of exercising it by deputy, or otherwise, will mend the case, or make the grant good; for it must radically vest in the grantee before it can go in title of procurator, or deputation to another.

But where the dean of *Windsor* having ordinary jurisdiction, by deed made such a one his commissary, which was confirmed by the dean and chapter, yet, after his death, it was held the successor was not bound thereby, because this was a judicial office and authority; which, though it may be exercised by a substitute, yet it is in law in the ordinary himself; and though excommunication, probate of testaments, and such like, may be transacted by the commissary, yet it must be in the name of the ordinary, and if the substitute offends the ordinary shall be punished. And therefore this grant can continue no longer than the ordinary himself who grants it; for if it should bind the successor, then he could not remove him, though he were answerable for his acts and offences, which would be hard; therefore this grant determines with the death or remotion of the ordinary, and then no confirmation can make it good after; and the archbishops, in their several provinces, have the ordinary jurisdiction *sede vacante*: and the archbishop, dean, and chapter, cannot grant the jurisdiction of guardian of the spiritualities after the death of the bishop; which is a stronger case.

|| See 10 Geo. 4. c. 53. an act to regulate the duties, salaries, and emoluments of the officers, clerks, and ministers of certain ecclesiastical courts in *England*. ||

(E) *Of the Ceremony requisite to a complete Creation or Grant, and of the Oaths required by Statute.*

WHEREVER the right of granting and erecting new offices is vested in the king as the head and fountain of justice, he must use proper words for that purpose; as, in the erection of a new

(a) *Vide* 2 Co. 48, 49. 2 Lev. 245. 2 Jon. 126. Hob. 148. 12 Co. 87. Cro. Jac. 18. || But it is now decided that the steward of a court-baron is a judicial officer. *Holroyd v. Breare*, 2 Barn. & A. 473. ||

Noy, 153. Prebend of *Hatcherley's* case.

17 E. 3. 23.

Roll. Abr. 152. Co. 121. 2 Sid. 137.

new

Dyer, 200. b.
pl. 62.
Hardw. 351.

new office the words *erigimus*, *constituimus*, &c. must be made use of; and it hath been adjudged, that the word *concessimus* is not sufficient, unless there be an office already in being, and then a grant by the word *concessimus* is good.

Mod. 123.

If an officer be created by letters patent, he is a complete officer before he is sworn, and before any investiture.

Leon. 248.
Mod. 123.
Cont. Roll.
Abr. 154.

But if a person be created at herald at alms, investiture is necessary before he is a complete officer.

Leon. 219.
3 Mod. 147.
5 Mod. 388.

An office being a thing which lies in grant cannot regularly be granted or transferred from one to another but by deed duly executed, which is an instrument the law hath appointed instead of livery.

Co. Litt. 61. b.
[Some have
thought, that
stewards with-

But it is said, that one may retain (a) a steward to keep his court-baron and court-leet without deed, and that such retainer shall continue until he be discharged.

out deed cannot take surrenders out of court. Godb. 142. and 1 Ld. Raym. 159. But this hath been frequently denied, and indeed seems unsupported by any good reason. Cro. Jac. 526. Com. R. 83. Hargr. Co. Litt. 59. a. n. 6. (a) That a corporation may make a bailiff without deed, tit. *Corporations*, Letter (E). [But a patent is necessary to the making of stewards of the king's manors. Co. Comp. Cop. 56. § 45.]

Carth. 426.
2 Salk. 467.
pl. 4. 5 Mod.
386. Sanders
v. Owen.
12 Mod. 200.
S. C. Lill.
Entr. 278.
S. C.

Also it hath been adjudged, that a parol appointment of clerk of the peace by the *custos rotulorum*, by the words following, spoken in open court, is good. *I do nominate the said Philip Owen to be clerk of the peace according to the act of parliament.* But in *B. R.*, though the parol appointment was held good, yet that court reversed the judgment, because the form of the words used in the nomination were insufficient; for he did not name any certain county of which he should be clerk of the peace; nor distinguish which statute he intends; for there are two statutes which concern this matter, viz. 37 H. 8. c. 1. § 3. and 1 W. & M. stat. c. 21. § 5. and moreover by his adding this word, viz. said *Philip Owen*, it is altogether insensible. But the judgment of *B. R.* was reversed in the House of Lords.

Serra v.
Wright,
6 Taunt. 45.;
et vide Rex
v. Radley, Forr. 150.

|| In stating in pleading a party's appointment to a voluntary office not cast upon him by law, it seems necessary also to allege his acceptance of the office.||

13 Car. 2. st. 2.
c. 1.

(b) It hath
been adjudged,
that it is no
excuse that
the oaths were
not tendered.
5 Mod. 316.
2 Jon. 121.
Salk. 428.

By the 13 Car. 2. stat. 2. c. 1. it is enacted, " That no person shall be placed, elected, or chosen to any office or place of mayor, alderman, recorder, bailiff, town-clerk, common council man, or other office of magistracy, place of trust, or other employment relating to the government of any city, corporation, borough, cinque-port, or other port-town, who shall not have received the sacrament according to the rites of the church of England within one year next before such election; and that every person so placed or elected shall take the oath of allegiance and supremacy at the same time when the oath for the due execution of the said office, &c. shall be administered; and that the said oaths shall be administered and (b) tendered

" by

“ by those who administer the oath of office ; and in default of (a) Which makes it necessary in a return to a *mandamus*,
 “ such, by two (c) justices of peace of the corporation ; and that
 “ in default hereof every such election, placing, and choice shall
 “ be void.”

setting forth that the party did not take the oaths before the mayor, &c. to add, that he did not take them before two justices of peace. 5 Mod. 517. 2 Salk. 428. pl. 5.

[But now by stat. 5 Geo. 1. c. 6. for quieting and establishing 5 G. 1. c. 6.
 corporations, it is enacted, “ That all persons in the actual pos-
 “ session of any office that were required by the above act to take
 “ the sacrament within one year next before their election into
 “ such office shall be confirmed in their several offices, and shall
 “ be indemnified and discharged from all incapacities and penal-
 “ ties arising from such omission ; and that none of their acts shall
 “ be questioned by reason of such omission ; nor shall any per-
 “ sons who shall be hereafter placed or elected in or to any of
 “ the offices aforesaid, be removed by the corporation, or other-
 “ wise prosecuted for or by reason of such omission ; nor shall
 “ any incapacity, disability, forfeiture, or penalty, be incurred (a) If neither of these events have hap-
 “ by reason of the same, unless such person be so removed, or pened within the time
 “ such prosecution be commenced (a) within six months after
 “ his election.”

limited, the election becomes absolute and unavoidable ; for the statute operates rather as a protection to the possession, than as a bar to the remedy. 1 Black. R. 229. 2 Burr. 1015. Cowp. 539.

However, by 1 Geo. 1. stat. 2. c. 13. amended by 2 Geo. 2. c. 21. & 9 Geo. 2. c. 26. all persons who bear any office, civil or military, &c. shall take the oaths of allegiance and supremacy (b), and the oath of abjuration. And all persons who were before, shall still continue, obliged to receive the sacrament ; and shall subscribe the doctrine against transubstantiation. And by 11 Geo. 1. c. 4. § 4. mayors, bailiffs, or other chief officers of corporations, elected pursuant to the directions of that statute, shall take the oaths by law required at the time of their admission into such office, *before* such officer as shall preside at such election.]

enabling Roman Catholics to sit in parliament, and to hold offices, without taking the oaths in the text, see *post*, tit. *Papists*, &c.]

By the 25 Car. 2. c. 2. (commonly called the Test Act) it is 25 Car. 2. c. 2.
 enacted, “ That all officers civil and military, (except those of [The acts which are annually passed to indemnify persons in office who have omitted to qualify themselves, have the effect of repealing this salutary statute.]
 “ inheritance appointing sufficient deputies,) and all who have
 “ any fee, &c. by patent from the king, (except such as shall be
 “ granted for valuable consideration for life or years, and not re-
 “ late to any office or place of trust,) and also all who have any
 “ place of trust or employment in the king’s household,) shall
 “ take the oaths of allegiance and supremacy, and test, the next
 “ term, (in the King’s Bench or Chancery, or quarter sessions,)
 “ and receive the sacrament within three months, and give in a
 “ certificate thereof, proved by two witnesses, to the court
 “ wherein they take the said oaths ; and in case of neglect, shall
 “ be disabled to hold the said offices, &c. and (c) forfeit five
 “ hundred pounds, except feme coverts, &c.” (c) It hath been adjudged, that the persons

so disabled lose only their right to the profits of their offices from the time of such disability, but that they lose nothing vested in them before. Lutw. 910.

(a) It hath been made a *quære*, Whether it extends to the Censor of the

But it is provided by the last-mentioned statute, "That the said act shall not extend to constables or churchwardens, or (a) such like inferior civil officers, or to a bailiff of a manor or lands, or such like private officers."

College of Physicians? 5 Mod. 431.

2 Jon. 81.
137. 2 Lev.
184. 242.
2 Mod. 195.
3 Keb. 606.
665. 682. 721.
Hawk. P. C.
c. 8. 10 Mod.
185. Ld.
Raym. 299.

Though the words of the above act of 13 Car. 2. are so very strong as to make such election, &c. void, and those of the 25 Car. 2. to make such persons disabled in law to all intents and purposes whatsoever, to have, occupy, or enjoy the said offices; yet it hath been strongly holden, that the acts of one under such a disability, being instated in such an office, and executing the same without any objection to his authority, may be valid as to strangers; for otherwise, not only those who no way infringe this law, but even those whose benefit is intended to be advanced by it, might be sufferers for another's fault, to which they are no way privy; and one chasm in a corporation, happening through the default of one head officer, would perpetually vacate the acts of all others, whose authority in respect of their admission into their offices, or otherwise, may depend on his.

[The design of the statute of 13 Car. 2. was to exclude men, who were not of the church of *England*, from all offices which concern the government: and is to be considered as prohibitory upon the electors *quoad* such persons. A dissenter therefore being ineligible to such office, cannot of course be fined for refusing to accept it. Upon this simple point, however, there hath heretofore been some difference of opinion. (b) And it became necessary to appeal to the court of sovereign jurisdiction, in order to settle the law upon it. That was done in the case of *Harrison v. Evans* (c), which case was as follows:—In 1748, the corporation of *London*, by a bye-law, imposed a fine of six hundred pounds upon every person, who, being elected, should refuse to serve the office of sheriff. The plaintiff, the Chamberlain of *London*, levied debt in the sheriff's court against the defendant for the penalty. The defendant pleaded the 13 Car. 2., averring that he was a Protestant dissenter within the toleration act 1 & 2 W. & M. c. 18. of scrupulous conscience; and therefore had not received the sacrament. The plaintiff replied the 5 G. 1. which confirms members of corporation in their respective offices, although they have not received the sacrament according to the directions of 13 Car. 2. To this replication the defendant demurred, and judgment was given upon it in favour of the city. The defendant appealed to the Court of *Hustings*, where the judgment was affirmed. A special commission was sued out, directed to *Willes C. J.*, *Parker C. B.*, and *Foster, Bathurst, and Wilmot, Js.*, by whom the judgments in the courts below were unanimously reversed. The plaintiff brought a writ of error in parliament; and on the 4th of *February* 1767, Lord *Mansfield* with five other judges, against *Perrot B.*, were of opinion, that upon the facts admitted by the pleadings in this cause, the defendant should be allowed to object to the validity of

(b) *Larwood's* case.
1 Ld. Raym. 29.
4 Mod. 269.
Guildford Town v. Clarke,
2 Vent. 247.
Rex v. Grosvenor,
2 Stra. 1193.
1 Wils. 18.
(c) 2 Burn's E. L.
(8vo. ed. 185.)
6 Br. P. C. 181.

of his election to the office of sheriff, in bar to the action, by reason that he had not taken the sacrament within the time limited.]

¶ By the annual Indemnity Act (a), for quieting the minds of his majesty's subjects, and for preventing any inconveniences that might otherwise happen by means of omissions to take the oaths, &c. required by law, it is enacted, "That all and every person or persons who, at or before the passing of this act, hath or shall have omitted to take and subscribe the oaths and declarations in the act mentioned, or to receive the sacrament of the Lord's Supper, or otherwise to qualify him, her, or themselves, within such time, and in such manner, as in and by the said recited acts, or any of them, or by any other act of parliament in that behalf made, is required; and who, after accepting any such office, place, or employment, or undertaking any profession or thing, on account of which such qualifications ought to have been had, and is required before the passing of this act, hath or have taken and subscribed the said oaths, or made the declarations required by law, and also received the sacrament of the Lord's Supper, according to the usage of the Church of *England*; or who, on or before the 25th day of *March* one thousand eight hundred and fifteen, shall take and subscribe the said oaths, declarations, and assurance respectively, in such cases wherein by law the said oaths, declarations, and assurance ought to have been taken and subscribed, in such manner and form, or at or in such place or places as are appointed in and by the said act, made in the first year of the reign of his said late majesty king *George* the First, or by any other act or acts of parliament in that behalf made and provided, and also hath or have received, or shall on or before the said 25th day of *March* 1815, (then next,) receive the sacrament of the Lord's Supper according to the usage of the Church of *England*, in such cases wherein the said sacrament ought to have been received; and hath or ought to (b) have made and subscribed, or shall, on or before the said 25th day of *March* one thousand eight hundred and fifteen, make and subscribe the said declaration against transubstantiation; and also hath or have made and subscribed, or shall, on or before the said 25th day of *March* one thousand eight hundred and fifteen, make and subscribe the said declaration in the said statute made in the thirtieth year of King *Charles* the Second, in such cases wherein the said declaration ought to have been made and subscribed; or take and subscribe the oath directed by the said act made in the 18th year of the reign of his late majesty King *George* the Second, in such cases wherein the said oath ought to have been taken and subscribed, in such manner as by the said act is directed; shall be and are hereby indemnified, freed, and discharged, from and against all penalties, forfeitures, incapacities, and disabilities incurred, or to be incurred for or by reason of any neglect or omission previous to the passing of this act, of taking or subscribing the said oaths or assurance

(a) The last annual indemnity act is 10 G. 4. c. 12. The act is prospective as well as retrospective, and extends to those who may be in default during the time for which it is made, as well as those who had incurred penalties before it passed. *In re Stevenson*, 2 Barn. & C. 34.

(b) *Qu.* the words *ought to*?

" or

“or receiving the sacrament, or making or subscribing the said declaration, or taking or subscribing the said oath according to the above mentioned acts or any of them, or any other act or acts; and such person or persons is and are, and shall be fully and actually recapacitated and restored to the same state and condition as he, she, or they were in before such neglect or omission, and shall be deemed and adjudged to have duly qualified him, her, or themselves, according to the above-mentioned acts, and every of them and that all elections of, and acts done or to be done by any such person or persons, or by authority derived from him, her, or them, are and shall be of the same force and validity as the same or any of them would have been if such person or persons respectively had taken the said oaths or assurance, and received the sacrament of the Lord’s Supper, and made and subscribed the said declaration, and taken and subscribed the said oath according to the directions of the said acts, and every or any of them; and that the qualifications of such person or persons qualifying themselves in manner and within the time appointed by this act shall be, to all intents and purposes, as effectual as if such person or persons had respectively taken the said oaths and assurance, and received the sacrament and made and subscribed the said declaration, and taken and subscribed the said oath, within the time and in the manner appointed by the several acts before mentioned.”

9 G. 4. c. 17.
§ 1. repealing
the acts re-
quiring the sa-
crament to be
taken as a
qualification
for offices.

By 9 Geo. 4. c. 17. intituled *An act for repealing so much of several acts as imposes the necessity of receiving the sacrament of the Lord’s Supper as a qualification for certain offices and employments*, it is enacted, “That so much and such parts of the said several acts passed in the thirteenth and twenty-fifth years of the reign of King *Charles* the Second, and of the said acts passed in the sixteenth year of the reign of King *George* the Second, as require the person or persons in the said acts respectively described to take or receive the sacrament of the Lord’s Supper according to the rites or usage of the Church of *England*, for the several purposes therein expressed, or to deliver a certificate or make proof of the truth of such his or their receiving the said sacrament in manner aforesaid, or as impose upon any such person or persons any penalty, forfeiture, incapacity, or disability whatsoever, for or by reason of any neglect or omission to take or receive the sacrament within the respective periods and in the manner in the said acts respectively provided in that behalf, shall, from and immediately after the passing of this act, be, and the same are hereby repealed.”

§ 2.

And by § 2. reciting that the Protestant Episcopal Church of *England* and *Ireland*, and the doctrine, discipline, and government thereof, and the Protestant Presbyterian Church of *Scotland*, and the doctrine, discipline, and government thereof, are by the laws of this realm severally established, permanently and

and inviolably, and that it is just and fitting that on the repeal of such parts of the said acts as impose the necessity of taking the sacrament of the Lord's Supper according to the rites or usage of the Church of *England*, as a qualification for office, a declaration to the following effect should be substituted in lieu thereof, it is enacted, "That every person who shall hereafter be placed, elected, or chosen, in or to the office of mayor, alderman, recorder, bailiff, town clerk or common councilman, or in or to any office of magistracy, or place, trust, or employment relating to the government of any city, corporation, borough or cinque port within *England* and *Wales*, or the town of *Berwick upon Tweed*, shall, within one calendar month next before or upon his admission into any of the aforesaid offices or trusts, make and subscribe the declaration following:—

"I *A. B.* do solemnly and sincerely in the presence of God, profess, testify, and declare, upon the true faith of a Christian, that I will never exercise any power, authority, or influence which I may possess by virtue of the office of ——— to injure or weaken the Protestant church as it is by law established in *England* or to disturb the said church, or the bishops and clergy of the said church, in the possession of any rights or privileges to which such church, or the said bishops and clergy, are or may be by law entitled."

And by § 3. it is enacted, "That the said declaration shall be made and subscribed as aforesaid, in the presence of such person or persons respectively, who, by the charters or usages of the said respective cities, corporations, boroughs, and cinque ports, ought to administer the oath for due execution of the said offices or places respectively, and in default of such, in the presence of two justices of the peace of the said cities, corporations, boroughs, and cinque ports, if such there be, or otherwise in the presence of two justices of the peace for the respective counties, ridings, divisions, or franchises, wherein the said cities, corporations, boroughs, and cinque ports are; which said declaration shall either be entered in a book, roll, or other record, to be kept for that purpose, or shall be filed amongst the records of the city, corporation, borough, or cinque port."

§ 3.

And by § 4. it is enacted, "That if any person placed, elected, or chosen into any of the aforesaid offices or places, shall omit or neglect to make and subscribe the said declaration in manner above mentioned, such placing, election, or choice shall be void; and that it shall not be lawful for such person to do any act in the execution of the office or place into which he shall be so chosen, elected, or placed."

§ 4.

And by § 5. it is enacted that every person who shall be admitted into any office or employment, or who shall accept from his majesty any patent, grant, or commission, and who by his admittance into such office, &c. or by acceptance of such patent, &c. would before the act have been required to take the

§ 5.

sacrament, shall within six calendar months after his admission to such office, &c. or his acceptance of such patent, &c. make and subscribe the aforesaid declaration, or in default thereof his appointment, &c. shall be void.

§ 6. By § 6. the aforesaid declaration shall be made and subscribed in the Court of Chancery or the Court of King's Bench, or at the quarter sessions of the county or place where the person shall reside, and shall be preserved among the records of the court.

§ 7. By § 7. it is provided that no naval officer below a rear admiral, and no military officer below a major general in the army or colonel of militia, shall be required to make the declaration in respect of his commission, and that no commissioner of customs, excise, stamps, or taxes, or any person holding any office in the collection, &c. of the revenues subject to the said commissioners, or any officer concerned in the collection, &c. of the revenues subject to the postmaster-general, shall be required to make the said declaration; and provided that no naval or military officer or other person as aforesaid upon whom any office, place, &c. shall be conferred during his absence from *England*, or within three months previous to his departure from thence, shall be required to make the said declaration until after his return, or within six months thereafter.

§ 8. By § 8. it is enacted that all persons now in the actual possession of any office, command, &c. or in receipt of any pay, &c. in respect of which they ought to have heretofore taken or or to take the sacrament shall be confirmed in their offices, &c. notwithstanding their omission to take the sacrament in manner aforesaid, and shall be indemnified against all disabilities, penalties &c. incurred in consequence of such omission; and that no election or act to be done by any such person or under his authority, and not yet avoided, shall be hereafter questioned or avoided by reason of any such omission, but that every such election and act shall be as valid as if such person had duly received the sacrament.

§ 9. And by § 9. it is provided that no act done in the execution of any of the corporate or other offices, &c. aforesaid by any person omitting as aforesaid, shall by reason thereof be void or voidable as to the rights of any other person not privy to such omission or neglect, or render such last-mentioned person liable to any action or indictment.||

(F) Of the Offence of buying and selling an Office, and what Offices are prohibited to be thus disposed of.

3 Inst. 184.
Hawk. P.C.
c. 67.

It is said to
be *malum in se*
and indictable
at common
law.

THE taking or giving of a reward for offices of a public nature is said to be bribery. And surely, says *Hawkins*, nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people doth depend, disposed of, not to those who are most able to execute

execute them, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue, than to see those places of trust and honour, which ought to be the rewards of those who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation, but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expense they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations.

Noy, 102.
Moor, 781.

For which reasons, among many others, it is expressly enacted by 12 Ric. 2. c. 2. "That the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the exchequer, and all other that shall be called to ordain, name or make justices of the peace, sheriff escheators, customers, comptrollers, or any other office or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any of the above-mentioned officers for any gift or brokerage, favour or affection; nor that none that sueth by himself, or by others, privily or openly, to be in any manner of office, shall be put in the same office, or in any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient, to their estimation and knowledge."

12. R. 2. c. 2.
For the ex-
position
hereof, *vide*
the Earl of
Macclesfield's
trial.
[State Trials,
vol. 6. 447.]

And by the 4 Hen. 4. c. 5. it is enacted, "That nos heriff shall let his bailiwick to farm to any man for the time that he occupieth such office."

4 H. 4. c. 4.

¶ And by stat. 1 W. & M. c. 21. § 8. it is enacted, that it shall not be lawful for any *custos rotulorum*, or other person to whom it belongs to appoint a clerk of the peace, to sell that office; but that every *custos rotulorum* who shall sell the clerkship of the peace, and every clerk of the peace who shall buy his place, are disabled to hold their respective places, and shall forfeit double the sum given and taken for the same. The 10th section of the act provides, that it shall not extend to the clerkship of the peace for *Lancashire*.¶

1 W. & M.
c. 21. §. 8.

But the principal statute relating to this matter is the 5 & 6 E. 6. c. 16. which is *verbatim* as follows, § 1. "For avoiding of corruption which may hereafter happen to be in the officers and ministers in those courts, places, or rooms, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced to the place where justice is to be ministered, or any service of trust executed, shall hereafter be preferred to the same, and no other."

5 & 6 E. 6.
c. 16. § 1.
¶ Vide 49 G. 3.
c. 146. *post*.¶

§ 2. "Be it therefore enacted, That if any person or persons at any time hereafter bargain or sell any office or offices, or deputation of any office or offices, or any part or parcel of any

§ 2

“ of them, or receive, have, or take any money, fee, reward, or
 “ any other profit, directly or indirectly, or take any promise,
 “ agreement, covenant, bond or any assurance to receive or have
 “ any money, fee, reward, or other profit, directly or indirectly,
 “ for any office or offices, or for the deputation of any office or
 “ offices, or any part of any of them ; or to the intent that any
 “ person should have, exercise or enjoy any office or offices or
 “ the deputation of any office or offices, or any part of any of them,
 “ which office or offices, or any part or parcel of them, shall in
 “ anywise touch or concern the administration or execution of
 “ justice, or the receipt, controlment, or payment of any of the
 “ king’s highness’ treasure, money, rent, revenue, account, au-
 “ neage, auditorship, or surveying of any of the king’s majesty’s
 “ honors, castles, manors, lands, tenements, woods, or heredita-
 “ ments, or any the king’s majesty’s customs, or any administra-
 “ tion or necessary attendance to be had, done or executed in any
 “ of the king’s majesty’s custom-house or houses, or the keeping
 “ of any the king’s majesty’s towns, castles, or fortresses, being
 “ used, occupied, or appointed for a place of strength and defence ;
 “ or which shall concern or touch any clerkship to be occupied in
 “ any manner of court of record wherein justice is to be ministered
 “ that then all and every such person and persons that shall so
 “ bargain or sell any of the said office or offices, deputation or
 “ deputations, or that shall take any money, fee, reward, or profit,
 “ for any of the said office or offices, deputation or deputations,
 “ of any of the said offices, or any part of any of them, or that
 “ shall take any promise, covenant, bond, or assurance for any
 “ money, reward, or profit, to be given for any of the said office
 “ or office, deputation or deputations of any of the said office
 “ or offices, or any part of any of them, shall not only lose
 “ and forfeit all his and their right, interest, and estate, which
 “ such person or persons shall then have of, in, or to any of the
 “ said office or offices, deputation or deputations, or any part of
 “ any of them, or of, in, or to the gift or nomination of any the
 “ said office or offices, deputation or deputations, for the which
 “ office or offices, or for the deputation or deputations of which
 “ office or offices, or for any part of any of them, any such per-
 “ son or persons shall so make any bargain or sale, or take or re-
 “ ceive any sum of money, fee, reward, or profit, or any promise,
 “ covenant, bond, or assurance to have or receive any reward,
 “ money, or profit ; but also that all and every such person or
 “ persons that shall give or pay any sum of money, reward, or
 “ fee, or shall make any promise, agreement, bond, or assurance
 “ for any of the said offices, or for the deputation or deputations
 “ of any the said office or offices, or any part of any of them,
 “ shall immediately, by and upon the same fee, money, or reward
 “ given or paid, or upon any such promise, covenant, bond, or
 “ agreement had or made for any fee, sum of money, or reward,
 “ to be paid as is aforesaid, be adjudged a disabled person in the
 “ law to all intents and purposes to have, occupy, or enjoy the
 “ said office or offices, deputation or deputations, or any part of

“ any

“ any of them, for the which such person or persons shall so give
 “ or pay any sum of money, fee, or reward, or make any pro-
 “ mise, covenant, bond, or other assurance to give or pay any
 “ sum of money, fee, or reward.”

§ 3. “ It is further enacted, That all and every such bargains, § 3.
 “ sales, promises, bonds, agreements, covenants, and assurances,
 “ as be before specified, shall be void to and against him and
 “ them by whom any such bargain, sale, bond, promise, cove-
 “ nant, or assurance shall be had or made.”

§ 4. “ Provided always, that this act, or any thing therein con- § 4.
 “ tained, shall not in anywise extend to any office or offices
 “ whereof any person or persons is, are, or shall be seised of any
 “ estate of inheritance; nor to any office of parkership, or of the
 “ keeping of any park-house, manor, garden, chase, or forest, or
 “ to any of them; any thing in this act heretofore mentioned to
 “ the contrary thereof in anywise notwithstanding.”

§ 5. “ Provided also, that if any person or persons do hereafter § 5.
 “ offend in any thing contrary to the tenor and effect of this act,
 “ yet that notwithstanding, all judgments given, and all other act
 “ or acts, executed or done, by any such person or persons so
 “ offending by authority or colour of the office or deputation,
 “ which ought to be forfeited, or not occupied, or not enjoyed,
 “ by the person so offending, as is aforesaid, after the said offence
 “ so by such person so committed or done, and before such per-
 “ son so offending for the same offence be removed from the ex-
 “ ercise, administration, and occupation of the said office or
 “ deputation, shall be and remain good and sufficient in law to
 “ all intents, constructions, and purposes, in such like manner
 “ and form as the same should or ought to have remained and
 “ been, if this act had never been had or made.

“ Provided also, that this act shall not extend to be prejudicial
 “ or hurtful to any of the chief justices of the king's courts,
 “ commonly called the King's Bench or Common Pleas, or to any
 “ of the justices of assize that now be, or hereafter shall be; but
 “ that they and every of them may do in every behalf, touching
 “ or concerning any office or offices to be given or granted by
 “ them or any of them, as they or any of them might have done
 “ before the making of this act; any thing above mentioned to
 “ the contrary in anywise notwithstanding.”

In the construction of the last-mentioned statute, the following
 opinions have been holden :

1. That the offices of chancellor, registrar, and commissary
 in ecclesiastical courts are within the meaning of the statute, in-
 asmuch as those courts do not only determine matters which are
 brought before them *pro salute animæ*, but also have the decision
 of disputes concerning the lawfulness of matrimony, and legiti-
 mation of children, which touch the inheritance of the subject;
 and also hold plea of legacies and tithes, &c. in which respects
 they are courts of justice.

¶ Therefore a bond given by a person appointed to the office
 of registrar of an archdeacon's court, conditioned to permit the
 arch-

Cro. Jac. 269.
 3 Inst. 148.
 pl. 12 Co. 78.
 Salk. 468. pl. 6.
 3 Lev. 289.
 2 Vent. 187.
 267.

Layng v.
 Paine, Willes
 R. 571. But

the office of clerk to the deputy registrar of the prerogative court of *Canterbury* is not within the act.

archdeacon to receive the profits, and also to surrender the office when the archdeacon requires, is void within the third section of the statute.||

2 Lev. 151.
Ellis v. Rud-
dle.

2. It hath been adjudged, that offices in fee are out of the statute : so, if the king be seised in fee of a bailiwick, and he demise the same to *A.* who demises to *B.* rendering rent, the demise to *B.* is not within the statute ; for offices in fee being excepted out of the statute, under-leases of such offices are also excepted inclusively.

7 Bulst. 91.
Sir Arthur
Ingram's case.
Co. Lit. 234.
S. C. and
there said, that
385. S. C. cited.

3. It hath been resolved, that the place of cofferer is within this statute, and a person having once purchased this place is for ever disabled to enjoy the same ; and that the king is bound by this statute.

4 Leon. 33.
Godbolt's
case. 4 Mod.
223. S. C.
cited.

4. It hath been agreed that the sale of a bailiwick of a hundred is not within the statute, for such an office doth not concern the administration of justice, nor is it an office of trust.

2 And. 55. 107.
Smith v.
Cotleshill.

5. If *A.* being surveyor of the customs agrees with *B.* that *B.* shall be his deputy, and that in consideration thereof *B.* shall pay *A.* 600*l.* and 100*l.* annually, and it is further agreed, that *A.* will surrender his patent, and procure a new one in the name of *A.* and *B.*, which is done accordingly, and *B.* gives *A.* a bond for performance of the whole agreement, the bond is void, as being within this statute ; for though part of the condition, such as procuring a new patent, &c. may not be void within the statute, yet being joined with that which is so, it makes the whole void.

Pasch. 26. Car.
2. in C. B.
Sparrow v.
Reynold.

6. It hath been adjudged, that a seat in the Six-Clerks' Office is not within the statute, being a ministerial office only ; and they are but under-clerks, who have so much a sheet for copying, &c. But one judge held it not saleable at common law, for the following reasons : 1*st.* Discouragement of merit and industry. 2*dly.* Its being the occasion of extortion and exaction of excessive fees. 3*dly.* From its being a great charge to suits. 4*thly.* It exempts the persons, who enter by these means, in a great measure from the due regulations under which they ought to be ; for they are not so easily removed, as if they were at the will of him who hath the disposal of them.

Huggins v.
Bambridge,
Willes Rep.
241.

2 G. 2. c. 32.

|| 7. It hath been decided, that the office of Warden of the Fleet is within the statute, as being an office concerning the execution of justice, and therefore, an agreement with the grantee *for life* of the office, that the grantee should for a sum of money surrender the office to the king, for the intent to procure a grant of it from the king to the defendant, was held void within the statute, and a bond given for payment of the consideration-money could not be enforced in a court of law. In this case it was contended that the office came within the exception in the fourth section, the inheritance of it being in the crown, and the case of (a)

(a) Reported
under name

Ellis

Ellis v. Ruddle, 2 Lev. 151. (*Ante*, p. 22.), was relied on as shewing that the exception extended to offices whereof the fee was in the crown, as well as to those where it was vested in a subject. That case was respecting a demise for years, at a rent of the office of Bailiff of the Savoy; which appears to have been held not an office within the statute, inasmuch as the inheritance was in the crown. But *Willes* C. J. after remarking on the imperfect manner in which the case is reported, both in *Levinz* and *Keble*, observes in explanation of the decision, (which he considered otherwise absurd,) that the bailiwick of the Savoy was in the king as Duke of Lancaster, and was therefore probably considered as on the same foot as if the office were the inheritance of a subject. And, if so, the case of *Ellis v. Ruddle*, was no authority in the principal case. If the court did not go upon this, the construction was absurd, and would almost overturn the whole act; for as to most of the offices there enumerated, and many others, the inheritance was undoubtedly in the king. The exception, therefore, only meant where the inheritance was in a subject.

of *Ellis v. Audle*, 3 Keb. 552. of *Ellis v. Nulso*, *ibid.* 659. 678.

8. It hath been holden, that an assignment of all the income and emoluments of the office of clerk of the peace for the city and liberty of *Westminster* is invalid, even although the assignment is expressly subject to the deduction of the salary or allowance of the deputy.

Palmer v. Bate, 2 Brod. & B. 675. 6 Moo. 28.

But an assignment of all the profits of the office of private secretary to Lord *Holderness*, was held valid.||

Harrington v. Klopogge, *ibid.* 678. n. 2 Chitt. R. 475.

9. It hath been held, that this statute doth not extend to military officers (*a*); and that the 7 W. & M. which requires that every commission officer, before his commission is registered, should take the oath there mentioned, that he had not, directly or indirectly, given any thing for procuring the commission but the usual fees, extends only to horse, foot, and dragoons, but not to the marines.

Ive v. Ash, Prec. Chan. 199; || *et vide* 49 G. 3. c. 126. § 7, 8. || ((a) 1 Vern. 98. Nor to the pursuer of a ship. 2 Vern.

308. Ca. temp. Talb. 140. But see 1 H. Bl. 326., where it is said by Lord *Loughborough* C. J. that this case in 2 Vern. is contrary to an evident principle of law. And clearly, if the Lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted. *Purdy v. Stacey*, 5 Burr. 2698.]

10. It hath been adjudged, that the sale of the deputation of the office of Provost Marshal of *Jamaica*, is not within this statute (*b*); because this statute does not extend to the plantations.

4 Mod. 222. 2 Salk. 411. *Blankark v. Galdy*.

2 Ld. Raym. 1245. S. C. cited. (*b*) 2 Mod. 45. S. P. undetermined, and there said *arguendo*, that so good a law should have as extensive a construction as possible. || But the 49 G. 3. c. 126. extends the act to the plantations. See 9 Barn. & C. 462. ||

11. In a writ of error on a judgment in *Ireland*, it was held clearly, that the office of clerk of the crown, and clerk of the peace, was within the statute; but that this law did not extend to *Ireland*, not being enacted there. || But it is now extended to *Ireland* Vide 49 Geo. 3. c. 126. s. 1. ||

Trin 9 G. 2. in *B. R.* *Maccarty v. Wickford*.

Hob. 75.
Co. Lit. 234.
Cro. Car. 361.
Cro. Jac. 386.
Ca. temp.
Talb. 107.

12. It hath been held, that one who makes a contract for an office, contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatsoever.

2 Salk 468.
6 Mod. 234.
Godolphin v. Tudor,
Comb. 356.
S. P. ||more
fully reported
in Durnford's
Willes R.
575.note (f).||

13. It is held, that where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a less sum out of the salary, it is good: so if the profits be uncertain arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay, unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute.

Bellamy v.
Burrow, Ca.
temp. Talb.
97.

(a) Fordyce v.

Willis, 3 Bro. Ch. Rep. 579. Parsons v. Thompson, 1 H. Bl. 322. Garforth v. Fearn, *id.* 327. These two last cases have determined, that if an action for money had and received be brought upon the foot of an agreement, to allow the plaintiff a certain proportion of the profits of the office, in consideration of his having procured, or been aiding to the defendant's appointment to it, the plaintiff cannot recover; || and see Card v. Hope, 2 Barn. & C. 661. Greville v. Atkins, 9 Barn. & C. 462. ||

[14. It hath been adjudged, that a trust may be created of an office clearly within this statute. But subsequent determinations (a) have made this doctrine exceedingly questionable, if not entirely over-ruled it.]

Trin. 9 G. 2.
in B. R.

Maccarty v.
Wickford.

(b) Hornby v.
Comfort,

Fitz. 45.

||See 2 Maul.
& S. 539.

1 Term R. 645, 646. *acc.* ||

15 It hath been holden, that this being a public law the judges *ex officio* are to take notice of it; yet it seems the more regular and safe way to plead it (b). But it hath been resolved, that a person in pleading this statute need not allege, that the party against whom it is pleaded is not within any of the provisoes or exceptions in the statute; but that if he be, it must come on his side to shew it.

[As the provisions of this statute do not extend to all cases within the mischief which it was intended to prevent, it has become necessary for courts of equity, in many cases, to interpose; for though it be true, that penal laws are not to be extended as to penalties and punishments, yet, if there be a public mischief, and a court of equity see private contracts made to elude laws enacted for the public good, it ought to interpose, and that, upon the public policy of the law, though the office be not within the statute of E. 6. For it is a rule of equity, "that if a man sells his interest, to procure a person an office of trust or service under the government, it is a contract of turpitude: "it is acting against the constitution, by which the government "ought to be served by fit and able persons, recommended
" by

“ by the proper officers of the crown for their abilities and with “ purity.”

The defendant, who was a linen draper, entered into a treaty with the plaintiff, who was a livery servant, to procure him a commission in the marines for 200*l.*, which the defendant effected by means of a lady, who was intimately connected with one of the lords of the Admiralty, and afterwards received the money. The plaintiff, after six months, being discovered to have worn a livery, was discharged, upon which he filed a bill to be repaid the sum he had advanced to the defendant. Lord *Henley* decreed the money to be repaid with interest; for though commissions in the army may be sold, yet that is with leave of the crown, and the person to succeed is examined by the Secretary at War, and approved as a proper person: that that was not the case here; but the defendant sold his interest with the lady to procure a commission. The case of *Ive v. Ash*, he said, was very different; the commission was sold by leave of the crown, the defendant surrendered, and it was the plaintiff's fault that he did not take it.

The offices of collector and supervisor of the excise are clearly within the statute; and though a bond given to a person to influence a commissioner to appoint one to either of those offices, be not directly a sale within the statute, yet in effect it is so, and equity will therefore relieve against it.

The late Lord *Rochford*, being groom of the stole to his majesty, and, in consequence of that office, recommending pages of the presence, &c., treated with the plaintiff's testator, to recommend him upon a vacancy, on condition that he should grant two annuities, one of 100*l.* to *St. Ferrol*, the defendant's testator, who had been Lord *Rochford's* travelling tutor, and was then a bond creditor of his lordship for 600*l.*, and the other of 40*l.* to another person. An action being brought upon the annuity bonds by defendant's testator for the arrears of the annuity, the plaintiffs filed their bill for an injunction. The defendants had demurred, and the demurrer had been over-ruled, and upon the motion to continue the injunction upon the merits, the answer being put in; it was argued on the part of the plaintiffs, that this bond was *pro turpi causâ*; that Lord *Rochford* having a confidence placed in him by the king, had abused that confidence, by selling his recommendation, and that upon the public policy of the law, such an agreement ought not to stand. On the other hand, it was argued, that it was allowed this was not an office within the statute of E. 6.; that it was merely an office respecting the king's private, not his public character; and that if it was *turpis contractus*, that might have been pleaded at law. Lord *Thurloxe* expressed his doubts, whether it might not have been brought upon the record at law by a plea, and made a defence there to the action, but thought that not a sufficient reason to prevent his interposition, the court of law never having determined that it could be so brought there as a defence. He then, admitting that it was not within the statute of E. 6., but treating it as a matter of public policy of the law, and similar to marriage

Morris v. M'Culloch,
Ambl. 432.

Law v. Law.
Ca. temp.
Talb. 140.
3 P. Wms.
391. S. C.

Haneington v. Du-Chatel,
1 Bro. Ch.
Rep. 124.

That the illegality of the consideration can be pleaded to an action on a bond is denied by the court in *Andrews v. Eaton*, Fitzg. 75.; but see *Collins v. Blantern*, 2 Wils. 341. *|| Paxton v. Popham*, 9 East, 408. *Greville v. Atkins*, 9 Barn. & C. 462., which settle that the illegality may be shown by plea. ||

brokage

brokage bonds, where, though the parties are private persons, the practice is publicly detrimental, ordered the injunction to be continued till the hearing; and afterwards, upon the hearing, ordered it to be perpetual.]

Blachford v. Preston,
8 Term R. 89.;
and see Card v. Hope,
2 Barn. & C. 661. Richardson v. Mellish,
2 Bing. 229.

|| So also it has been decided, that the appointment of captain of an *East Indiaman*, although not within the statute, cannot be legally sold by the owner without the consent of the *East India Company*. Such a sale was held contrary to a by-law of the company, and a fraud on the company, and contrary to principles of public policy.

49 G. 3. c. 126,
§ 1.

The provisions of the statute of 5 & 6 Edw. 6. c. 16. have been very materially enlarged and extended by the 49 Geo. 3. c. 126., intituled *An act for the further prevention of the sale and brokerage of offices*. The 1st section, after reciting at length the act of Edw. 6., declares, and enacts, that the said act and all its provisions shall extend to *Scotland* and *Ireland*, and to all offices in the gift of the crown, or of any office appointed by the crown, and all commissions, civil, naval, or military; and to all places and employments, and all deputations to any such offices, commissions, places, or employments in the departments, or under control of the treasury, the secretary of state, the commissioners of the office of lord high admiral, the master-general and officers of ordnance, the commander-in-chief, secretary at war, paymaster-general, commissioners for affairs of *India*, and of excise, treasurer, and commissioners of navy, commissioners of victualling and transports, the commissary and store-keeper-general, and, also, the principal officers of any other public department in any part of the United Kingdom and colonies, and also to all offices commissions, and employments, under the *East India Company*.

§ 2. Section 2. enacts, that where the right of any person shall be forfeited under the former act or this act, the right of such appointment shall immediately vest in his majesty.

§ 3. Section 3. renders it a misdemeanor either to buy or sell, or to receive, or give any money, reward, or profit, or any promise, agreement, bond, or assurance, directly or indirectly, for any office, commission, place, or employment specified in or within the meaning of the former or the present act, or for any deputation thereto, or any participation of the profits thereof, or for any appointment thereto, or resignation thereof, or for the consent, or voice of any person to any such appointment or resignation.

§ 4. It appears to have been a misdemeanor at common law to offer a bribe for procuring an appointment to a public office. Rex v. Vaughan, 4 Burr. 2494. Rex v. Pollman, 2 Camp. 230.

Section 4. renders it a misdemeanor in any person, either to receive or give any money, reward, or profit, or any promise, agreement, bond, or assurance, directly or indirectly, for any interest, solicitation, or recommendation in any way touching any nomination or appointment to any such office, place or employment as aforesaid, or for any person in expectation of money, reward, or profit, to solicit, recommend, or negotiate for any person touching any such nomination or appointment.

Section 5. renders it a misdemeanor to open any house or office for soliciting, transacting, or negotiating any business relating to the sale or purchase, resignation or exchange, of any office or employment under any public department.

§ 5.

Section 6. imposes a penalty of 50*l.* (a), on any person advertising or publishing any such house or office, or the names of any brokers, agents, or solicitors, or any advertisements or proposals for any of the purposes aforesaid, the whole of the penalty to go to the person suing.

§ 6.

(a) See *Clarke v. Harvey*, 1 Stark. Ca. 92.

Section 7. provides that the act shall not extend to any commissions and appointments in the band of Gentlemen Pensioners, the Yeoman Guard (b), the *Marshalsea* and *Pulace Court*, nor to purchases and exchanges of commissions in his majesty's forces at the regulation prices.

§ 7. (b) Nor to His Majesty's Battle Axe Guards in *Ireland*, 53 G. 3. c. 54.

Section 8. provides that any officer in his majesty's forces receiving, or paying more than the regulation price for any commission, or paying any sum to any agent for negotiating the purchase, sale, or exchange of any commission, shall forfeit his commission and be cashiered, and his commission shall be sold, and half the regulated value (not exceeding 500*l.*), be paid to the informer, and the remainder applied as his majesty shall direct; and if any officer retiring from the service shall receive for his commission more than the regulation price, he and his aiders and abettors shall be guilty of a misdemeanor.

§ 8.

Sections 9, 10, & 11, provide that the act shall not extend to an office excepted from the act of Edw. 6., or to any office legally saleable before the passing of this act, or to invalidate any agreement, bond, &c. which, before the passing of this act, was valid; or to prevent or make void any deputation to any office in any case in which it is lawful to appoint a deputy, or any agreement, bond, &c. in respect of any allowance or salary out of the fees of such office; nor to any annual reservation or payment out of the fees of any office to any person having held such office, provided that the amount of such reservation, and the circumstances under which the same shall have been permitted, shall be stated in the commission or appointment of the person succeeding to such office, and paying such money.

§ 9, 10, 11.

Section 12. enacts that the present masters, six clerks (c), and first and second examiners of the Court of Chancery in *Ireland*, may proceed touching the disposition and appointment of their offices in such manner as has been accustomed; but that after their death, resignation or removal, the provisions of the statute of Edw. 6. and of this act shall be applicable to their offices.

§ 12. (c) But 53 G. 3. c. 129. provides that 49 G. 3. c. 126. shall not extend to the six clerks' offices in *Ireland*; so, that this clause

seems in effect repealed, except as to the masters and examiners in Chancery.

(*Vide* also sections 13, 14 and 15.)

A bond was given by *A. B.* to *C. D.* colonial secretary of *Tobago*, reciting, that *C. D.* had appointed *A. B.* his deputy, and to receive the fees of office in consideration of his paying him 450*l.* per annum thereout, and the condition was for punctual payment of that sum without saying "out of the fees." To an

Greville v. Atkins, 9 Barn & C. 462.; and see *Godolphin v. Tudor*, 2 Salk. 468. 1 Bro. P. C. 155.

action

action on the bond *A. B.* pleaded that the bond was given in pursuance of a corrupt agreement against the statute, that *A. B.* should pay the 450*l.* per annum, *at all events*, to *C. D.* Issue was taken on this plea, and found for *A. B.* The court held, that the fact found shewed the bond to be illegal and void by the 49 Geo 3. c. 126., and also that the plea, shewing the illegal agreement, was good.||

(G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.

8 Co. 47. a.
John Webb's
case. 2 Inst.
412. S. P.

IT was held clearly, that an assize lay at common law for an office, and that therefore though the statute of *West. 2. 13 Ed. 1.* stat. 1. c. 25. speaks only of offices in fee, yet an assize lies for an office in tail or for life. But this is to be understood of offices of profit, for of an office of charge and no profit an assize does not lie.

8 Co. 49. b.
2 Inst. 412.

But a man shall not have an assize of the whole office, unless he be disseised of the whole; for if a man be disseised of parcel of the profits of an office he may have an assize of that parcel only.

8 Co. 49.
Webb's case.

In an assize for an office newly erected and constituted, the demandant in his plaint must shew what fee or profit is granted for the exercise thereof; for this office cannot have a fee or profit appurtenant to it, as an ancient office may, and for an office without fee or profit no assize lies.

8 Co. 49.

But in an assize for an ancient office, the demandant in his plaint need not shew what fee or profit is belonging to it, for it shall be intended there is some fee or profit.

Roll. Abr. 270.

In an assize for an office the demandant must shew a seisin; but it hath been held, that the taking of 3*d.* for a *capias* against *B.*, is a sufficient seisin of the office of filazer *de banco*.

2 Lev. 108.
Cragg v.
Norfolk,
adjudged.

So if one be committed by the House of Commons to *A.*, who before and long after was in possession of the office of *serjeant at arms* to the House, and the prisoner compound with *B.* for his fees, and gave him twenty shillings; this is a good seisin of the office by *B.*, for he cannot be disseised thereof, but at his election. It was likewise held, that proving that *B.* being in the lobby of the House of Commons, took hold of the door of the House, and laid his hand upon the mace, then being in the hands of *A.* to take it, but hindered by *A.*, was good evidence both of a *seisin* and *disseisin*.

Lev. 108.;
et vide
Mod. 122.
where such
recovery is
held to be a
sufficient
seisin.

But where the serjeant of the mace to the House of Commons, in an action upon the case for a disturbance, recovered damages; whether this was a sufficient seisin, the damages being recovered in satisfaction of the fees, and he then being out of possession of his office, was doubted; some of the judges inclining one way and some the other; and it was intended to have been found specially, but the plaintiff being unwilling to stand to it was non-suit.

Also,

Also, in an assize for an office, the demandant in his plaint must set forth a title. 3 Mod. 273.
Savies v.
Lenthol; by

which book it appears, that the demandant not being ready to set forth a title, the assize was adjourned till the next day, when he appeared and set forth a title, and process was prayed against the defendant. — But by Salk. 82. S.C. the demandant was nonsuited the second day for not counting; and the court told him, he might bring a new assize. Comb. 173. S.C.
and the plaintiff nonsuited; et vide Dyer, 114. pl. 65. 149. pl. 81. 152. pl. 9. 8 Co. 45. b.

An assize lies for the office of registrar of the (a) Admiralty; 8 Co. 47.
for though their proceeding are according to the civil law, yet 2 Inst. 412.
the (b) right of their offices is determinable at common law. 11 Co. 99. b.
of the mastership of an hospital, being a lay fee. Dyer, 152.
(a) So, the
right of the office of registrar to a bishop is to be determined at common law, and not to be tried in the spiritual court, though the subject-matter is spiritual; because the office itself being matter of freehold, is for that reason of temporal cognizance. — For this *vide* Roll. Abr. 285. 4 Mod. 27, 28. Carth. 169. (b) So, chancellors, registrars, proctors, &c. being officers of temporal profit, are to sue for their fees in the temporal courts. — For this *vide* tit. *Fees*, letter (D).

A man may bring an action on the case (c) for the profits of an office, though he never had seisin. Mod. 122.
per Hale C. J.
[But if the

perquisites of an office are mere gratuities, not known and accustomed fees, neither an assize, nor an action for money had and received, will lie to recover them. *Boyter v. Dodsworth*, 6 Term R. 681.] (c) An action on the case for disturbing a person in the exercise of the office of parish clerk. 2 Salk. 468. pl. 7. But not so advisable as an assize; because a jury may not well compute the damages in proportion to the loss of a man's livelihood. *Carth. 169.*

If the king grant the office of comptroller of the customs to *A.* 2 Mod. 160.
and *B. durante beneplacito*, and *A.* die, and afterwards the king adjudged, upon
grant the said office to *C.*, and yet *B.* under pretence of survivorship exercise the said office, and receive the profits thereof, *C.* a special ver-
may have an *indebitatus assumpsit* for so much money had and dict between
received to his use. Arris v. Stuke-
ly, 2 Jon. 126.
2 Lev. 245.

Haward v. Wood; where the defendant, under pretence of title, received the fees belonging to the plaintiff as steward of a court-baron. ¶ Where there are no fees, an information in nature of *quo warranto* is the only convenient mode of trying the right to the office. 2 East R. 312.¶

[The head of a college hath not such an estate in his office as will entitle him to maintain an assize for it, for he hath no sole seisin.] Per Holt C. J.
in Philips v.
Bury, 2 Term
R. 535.

(H) *Of the Nature of Offices as to their Duration and Continuance: And herein of their being grantable in Fee, for Life, Years, at Will and Reversion.*

OFFICES, in respect to their duration and continuance, are 9 Co. 97.
distinguished into those which are of inheritance, or in fee, or fee-tail, those of freehold or for life, those for years or a limited time, and those which are at will only. And here we must again observe, that though all offices, in relation to the administration of justice, are originally and inherently lodged in the crown, yet cannot the king himself grant these in any other manner than warranted by ancient usage, or so as to be injurious or inconvenient to the public.

But, where no inconvenience can ensue to the public, there, Dyer, 285.
offices

7 Co. 33. offices are allowed to descend as inheritances; as, the offices
 Plow. 2. of (a) Earl Marshal of *England*; so, of park-keeper, forester,
 2 Inst. 382. gaoler (b), sheriff, &c.
 2 Roll. Abr. 153.

(a) So the office of Seneschal of England formerly belonged to the earldom of Leicester, and came afterwards to the Staffords, and dukes of Buckingham, and the last who had it in fee was Edward Duke of Buckingham, who was attainted 13 H. 8.; but now it is never granted to any subject only *pro hac vice*. 4 Inst. 58. 127. 7 Mod. 125. cited. (b) The mayor and citizens of London have the shrievalty of London in fee, and the sheriffs of London are guardians under them, and removeable from year to year. 2 Inst. 382.

Plow. 379. b. And if one hath the office of park-keeper, forester, gaoler,
 381. a. sheriff, &c. to him and his heirs, he may grant these offices to one
 9 Co. 48. 97. for life, remainder to another for life, &c., for *omne majus continet in se minus*; and as they are grantable over in fee, so may they be granted in succession to one for life, with remainders over.

7 Co. 33. So offices may be entailed; as the office of Earl Marshal of
 Co. Lit. 20. a. *England*, or the office of steward, bailiff, or receiver of a manor,
 Roll. Abr. 838. may be entailed; because they are demandable in a *præcipe ut tenementa*, and being exercisable within the manor are therefore looked upon as members or branches of it.

Perk. § 342. So a woman may be endowed of an office; as of the office of
 Co. Lit. 32. the *Marshalsea* to have the third part of the profits, and in such
 Roll. Abr. 676. case she shall be contributory to a third part of the charge. So,
 Plow. 379. b. she may be endowed *de tertiâ parte exituum provenient. de custo-*
 F. N. B. 149. *diâ gaolæ abbatthiæ Westm.*, or of the third part of the profits of courts, fines, heriots, &c.

4 Mod. 167. It is said, that, at common law, all officers of justice had estates
 Show. 428. in their respective offices during life, and could not be removed
 said *arguendo*. but for misdemeanors: so, was the office of clerk of the crown in
 [(c) Previous *B. R.* and in Chancery: so are the clerks in the Exchequer,
 to the Middle- and the filazers in C. B. (c) And in this respect the wisdom and
 sex Ca. 1804, policy of the law was very great; because, when men held their
 2 Peckwell's offices for life, it was an encouragement to the faithful execution
 Ca. 89., the of their duties; it was then also they endeavoured to acquire
 owners of all knowledge and experience in their employments, having a dur-
 offices, having able and fixed estate therein, and not liable to be displaced at
 a freehold in- the pleasure of those who put them in.
 terest in their
 office, were ad-
 mitted to vote

for members of the counties where their offices were situate, if the value was sufficient: in that case, however, all such officers were held not entitled to vote, unless their profits were derived from land; and the votes of Masters in Chancery, and other life officers, *ejusdem generis*, were held bad. See Dodd's Doubtful Questions in Election Law, ch. 4.]

Co. Lit. 42. If an office be granted to a man to have and enjoy so long as
 Roll. Abr. 844. he shall behave himself well in it, the grantee hath an estate of
 Show. Parl. freehold in the office; for since nothing but his misbehaviour can
 Cases, 161. determine his interest, no man can prefix a shorter time than his
 [(The king by life; since it must be his own act (which the law does not pre-
 letters patent sume to foresee) which only can make his estate of shorter
 may suspend a continuance than his life. So if the office be granted to a man
 public officer *quandiu se bene gesserit tantum*, his estate will not be less for the
 though the word *tantum*; for the grant is of equal extent with the former,
 office be for and his misbehaviour in each case determines his interest.
 lite, Slingsby's
 Ca. from Lord
 Nottingham's

MSS. 3 Swanst. 178.]

Therefore,

Therefore, where by the statutes (a) directing in what manner the *custos rotulorum* shall be appointed, &c. it is among other things provided, that the *custos* shall appoint and nominate the clerk of the peace, when void, who may execute it by himself or deputy, for so long time only as he shall demean himself well; in the construction of these words it was held, that the clerk had an office for life, and that it did not determine with the *custos*. 4 Mod. 167. Show. 426 to 536. Harcourt v. Fox: Show. Parl. Cases, 158. S. C. Ld. Raym. 161. S. C. Comb. 209. 12 Mod. 42. S. C. [(a) By stat. 37 H. 8. c. 1. § 3. the *custos rotulorum* is authorized to appoint a fit and able person to hold the office of clerk of the peace, during the time that the said *custos rotulorum* shall occupy the said office of *custos*, so as the said clerk of the peace demean himself justly and honestly. By stat. 1 W. & M. c. 21. the *custos* is authorized to nominate a clerk of the peace, for so long a time only as such clerk of the peace shall well demean himself in his said office; and if he do not well demean himself in his office, the sessions of the county, on application and proof made as the act requires, may remove him.]

The judges of the several courts at *Westminster* held formerly their places *durante bene placito*, but now by the 12 & 13 W. 3. their commissions are *quamdiu se bene gesserint*, by which they hold their offices for life; but upon the address of both Houses of Parliament it may be lawful to remove them. 4 Inst. 74. 117.

It hath been determined, that at common law the patents of the judges (b), sheriffs, escheats, commissioners of oyer and terminer, gaol-delivery, and of the peace, and of the attorney and solicitor general, are determined by the death of the king, in whose name they are made. And. 44. Dyer, 165. Cro. Car. 1, 2. N. Bendl. 79. (b) But the office of sheriff in such places where he is chosen by a corporation, having by its charter the inheritance of the office, does not determine by the demise of the king. 7 Co. 30. b. — Nor the authority of a coroner or verderer. Dalis. 15. Dyer, 165. 2 Inst. 175. Lev. 120. — Nor does any corporation officer, who by the charter is invested with judicial authority, lose it by such demise. 2 Hawk. P. C. 3.; *et vide* the statutes 7 & 8 W. 3. c. 27. and 1 Ann. c. 1., for continuing all patent officers for six months after such demise, tit. *Courts*, letter (C). — [And by stat. 1 G. 3. c. 23. the offices of the judges do not become vacant on the demise of the crown.]

It hath been adjudged in *Sir George Reynold's* case, that the office of the King's Bench prison (c) could not be granted for years, for that being an office of great trust concerning the administration of justice, in keeping of prisoners till they pay their debts, if it should be granted for years, might be injurious to the public, in that it would go to the executors or administrators, or might be in suspense till probate of the will, or administration taken out; and if the officer should die indebted, so that none would prove his will, or take out administration, then there would be no officer at all, and executors or administrators would be in by act of law, without allowance of the court. Also, it might be a question, if such office should not be forfeited by outlawry, or be assets in the executor's hands; and many other inconveniences would follow if such grant for years were allowed. For the same reasons it was held likewise, that the offices of *custos brevium*, chirographer, clerk of the pipe of the king's silver, or of the crown, remembrancer, or chamberlain of the Exchequer, prothonotaries, and other officers in the several courts of justice, could not be granted for years. 9 Co. 27. Roll. Abr. 847. 2 Roll. Abr. 153. Cro. Car. 587. Jon. 563. Hob. 153. 3 Mod. 145. (c) The power of appointing the Marshal of the King's Bench prison, revested in the crown, by 27 G. 2. c. 17. which *vide*.

But such offices as do not concern the administration of justice, but only require skill and diligence, may be granted for years, because Hard. 46. 553. Jones v. Clerk.

because they may be executed by deputy, without any inconvenience to the public; therefore, where a grant for years was made of the office of garbler of spices in *London*, it was adjudged to be a good grant, or at least a good appointment for years, within the intent of the statute of 1 Jac. 1. c. 19.

Hard. 351, &c.

Hob. 146.

Dyer, 303.

3 Keb. 80.

1 Vern. 11, 12.

The office of registrar of policies of assurance in *London*, concerning merchants, was granted by the king for years, and adjudged to be a good grant, because it did not concern the administration of justice in any court, but required only the skill of writing after a copy. So, the office of making and sealing *subpœnas* was granted for years, and allowed to be good; and there, several precedents are cited of offices granted for years; as, first, offices in which the safety of the realm was concerned; as, the office of warden of a haven or port by H. 6.; of gunpowder, 1 Car. 1., of making gunpowder by Car. 2. Also, offices concerning the trade of the realm have been granted for years; as, 1 H. 7. of the exchange of money; 18 H. 8. of gauger; 17 R. 2. of aulnager though a seal belongs to it, with which the officer is entrusted; of the letter-office, 13 Car. 1. Also, offices in courts of justice have been granted for years; as, the office of surveyor of the green-wax; of the 6*d.* writs in Chancery and *subpœnas*; of comptroller and customer, and making out process in C. B. All these and several others have been granted for years; but no dispute having been made of the validity of them how far some of them would hold at this day may be a question.

2 Lev. 245.

2 Jon. 126.

6 Mod. 57.

But, where one made a grant for years of the stewardship of a court-leet and court-baron, this was held void as to the court-leet, being a judicial office, but good as to the court-baron, being only ministerial, and the suitors judges thereof: but the grant appearing afterwards to be for years, determinable on the death of the lessee, it was held good for both; because there was no danger of its coming to executors or administrators.

4 Co. 53. a.

(a) Where a sheriff may grant to his under-sheriff to hold at will

The king may grant the office of sheriff* (a) *durante beneplacito*; and although he may determine the office at his pleasure, yet he cannot determine it for part, as for a vill, &c., nor can he abridge the sheriff of any thing incident or appurtenant to his office.

only, for he is his deputy, and according to the nature of a deputation must be removable, as an attorney is. Hob. 15. Noy, 55. — * See the stat. 24 G. 2. c. 48.

Dyer, 176.
pl. 28.

The king may grant the office of chirographer of the Common Pleas *quamdiu nobis placuerit*, and it is good.

9 Co. 97.

3 Mod. 149.

The office of the king's *Marshalsea* (b) may be granted at will. (b) See 24 G. 2. c. 17.

Co. Lit. 42. a.

If the king grants an office at will, and grants a rent to the patentee for his life, for the exercise of his office, this is no absolute estate for life; because the rent being granted on account of the office, and in discharge of the duty of the place, whenever his interest in the office ceases, the rent is determined; because it was first granted for the exercise of the office, which he is no further concerned in.

A (a) judicial office cannot be granted in reversion; for though the grantee be never so fit at the time of the grant, he may become unfit when it takes effect.

party judicial, cannot be granted in reversion; as the office of Auditor of the Court of Wards.

11 Co. 4. 2 Roll. Abr. 152.

Co. Lit. 3. b.
(a) So, an office partly ministerial and

The king may grant an estate in an office to commence *in futuro*, or upon a contingency, which estate shall arise out of the inheritance he hath in the office itself, for such he may have in point of interest, though not in execution.

version, and such a grant in reversion by a subject, *vide* Dyer, 80. pl. 58. 259. pl. 18. 3 Leon. 31. Hob. 150. 2 Roll. Abr. 154. Cro. Car. 279. 11 Co. 4. 8 Co. 55. b. Carth. 550. 2 Salk. 465. pl. 2. 4 Mod. 275.

But for the difference between the king's grant of an office in re-

It hath been adjudged, that the office of registrar being usually granted as well in reversion as possession, a grant to one of such office for life, when by the death or surrender of the present officer it shall become void, is good; for though there is no reversion of an office, unless it be an office of inheritance, yet it may well be granted in reversion, *habend.* after the death of the present officer; which is no more than a provision of a person to supply it when it becomes void; and if such provision has been usually made, the custom and usage (b) gives sanction to it.

Cro. Car. 279. 555. Jon. 310. 2 Roll. Abr. 153. March, 38. 3 Leon. 31. (b) But unless there have been such usage, it is not grantable in reversion. 2 Vent. 188.

By the statutes 22 Geo. 3. c. 75., and 54 Geo. 3. c. 61. (the former of which recites, that the practice of granting offices in the colonies and plantations to persons resident in *Great Britain* had been long complained of as a grievance to his majesty's subjects in those parts), it is enacted, that no office in any colony or plantation, or foreign possession belonging to the crown of *Great Britain*, shall be granted for any longer term than during such time as the grantee thereof shall reside in such colony, &c. and execute such office in person and behave well therein.

22 G. 3. c. 75. 54 G. 3. c. 61.

And by sect. 2. it is enacted, that in cases where the governor and council of any colony shall grant leave of absence to any person holding an office, the governor shall, within one week, report the same to one of his majesty's secretaries of state for confirmation; and if such leave is not confirmed within one month from the date of the report being received by the secretary of state, the officer shall return forthwith to the colony, or shall be deemed to have vacated his office.

§ 2.

Sect. 3. imposes a penalty not exceeding 100*l.* on any governor neglecting to make such report; and

§ 3.

Sect. 4. enacts, that returns shall be laid on the table of the House of Commons every session of all officers in the colonies who are not present in the execution of their duties. ||

§ 4.

(I) Offices, by whom to be executed, and who are incapable thereof.

Co. Lit. 3. b.
(a) That an infant cannot be a steward, for he cannot by intendment execute it; much less may he assign it over. Cro.

Eliz. 636, 637.
per opham.

—But a ministerial office may be granted

IF an office, either of the grant of the king or subject, which concerns the administration, proceeding, or execution of justice, or the king's revenue, or the commonwealth, or the interest, benefit, or safety of the subject, or the like; if these or any of them be granted to a man that is unexpert, and hath no skill and science to exercise or execute the same, the grant is merely void, and the party disabled by law, and incapable to take the same *pro commodo regis et populi*; for only men of skill, knowledge, and ability to exercise the same, are capable to serve the king and his people. An (a) infant therefore is not capable of an office of stewardship of the court of a manor, either in possession or reversion.

to an infant, in possession or reversion, for he may exercise it by a deputy. 11 Co. 4. a. — As, where the office of registrar to the Bishop of Rochester was granted to *J. S.* who was an infant of twelve years of age at the time of the grant, *habend.* after the death of *J. D.* (who was the registrar in possession) for his life, to be exercised by him or his deputy, and afterwards *J. D.* died, *J. S.* being of the age of thirty; this was held a good grant at the time of making of it, the office being to be exercised by him or his deputy. Cro. Car. 279. 2 Roll. Abr. 153. *Young v. Stowel.* Cro. Car. 355, 356. March, 38. S. P. adjudged. 4 Mod. 279. 2 Vent. 188. Pollexf. 156. S. P. cited, and adjudged to be law.

Dyer, 150. b.
Cro. Car. 557.
S. C. cited.
2 And. 118.
S. P. (b) If an office of learning be given to a man utterly insufficient, it is void; and

Lord *Broke* gave the office of chief prothonotary to *G.*, but he appearing unfit, he revoked it, and granted it to *W.*, and a precedent was shewn, where the office of clerk of the crown was granted by the king to one *Vintner*, who exhibited his patent, and desired to be admitted; and the justices of the King's Bench refused to admit him (b), because he never had exercised that office, nor ever was brought up in it; and recommended a fit person, whom the king *ore tenus* commanded to be admitted, and was sworn.

though it be to him and his assigns, or to be exercised by a sufficient deputy, it mends not the case, but it must radically vest in the first grantee, before it can go in procurator or deputation to any other. Hob. 148. — If the king should grant an office in *B. R.* the judges may remove such an officer for insufficiency, because they are proper persons to judge of his abilities. 4 Mod. 50.

Car. 95.
Latch. 228.
Noy, 91.
Palm. 450.

The Bishop of *Gloucester* granted the office of chancellor of his diocese to one *S.*, who, because he was unskilful in the civil and canon law, was adjudged incapable.

And in 4 Mod. 27. S. P. was argued, where the grant was to him or his deputy; in which case it was insisted, that insufficiency did not create an original incapacity so as to avoid the grant; because that he might appoint a deputy learned in those laws, and that if he appointed one who was unskilful, it would be a forfeiture of the office.

Cro. Jac. 17.
Lady Russel's case.

If the king, by his letters patent, grants the office of custody of the castle of *Dunnington* to a woman, to be exercised by her, or her sufficient deputy, the grant is good, and it shall not be intended a castle of war rather than a private house.

3 Jac. 1. c. 5.
(c) How far dissenters

By the 3 Jac. 1. c. 5. it is enacted, "that no (c) popish recusant convict shall exercise any public office or charge in the commonwealth,"

“monwealth, but shall be utterly disabled to exercise the same
 “by himself or his deputy.”

capable or excused from serving any public office, *vide* 2 Mod. 299. 2 Vent. 247. 2 Lev. 151. 184. 242. 2 Jon. 81. 137. 4 Mod. 269. Salk. 167. pl. 1. Skin. 574. Carth. 506. 5 Mod. 431. Comb. 315. 10 Mod. 101. 179. 11 Mod. 132. pl. 11. 12 Mod. 67. 2 Stra. 1193. Ld. Raym. 29. *et supra* (E).; and see the provisions of 9 G. 4. c. 17., and *ante*, p. 16.; and for the recent act for the relief of Roman Catholics, see *post*, tit. *Papists, &c.*||

from the
church are
rendered in-

|| By 22 Geo. 2. c. 46. § 14. it is enacted, that no clerk of the peace or his deputy, nor any under-sheriff or his deputy, shall act as solicitor, attorney or agent, to sue out any process at any general or quarter sessions of the peace to be held for such county, riding, &c. where he shall execute the office of clerk of the peace, &c.; but if any clerk of the peace or his deputy, or under sheriff or his deputy, shall presume to act as solicitor, attorney, or agent as aforesaid, such clerk of the peace, &c. shall be subject to a penalty of 50*l.*||

22 G. 2. c. 46.
§ 14. See
Hughes v.
Statham,
4 Barn. & C.
187. 6 Dow.
& Ry. 219.

(K) *Of the Manner of executing them: And herein of Offices that are incompatible, and where an Office may be executed by two or more Persons.*

OFFICES are said to be incompatible and inconsistent, so as to be executed by the same person, when from the multiplicity of business in them they cannot be executed with care and ability; or when their being subordinate and interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty. And this my Lord *Coke* says is of that importance, that if all offices civil, ecclesiastical, &c. were only executed each by a different person, it would be for the good of the common wealth, advancement of justice, and preferment of deserving men.

And hence it is, that the king himself, though he may grant an office, yet cannot execute it himself (*a*); nor can the Chief Justice of *B.R.* be prothonotary or clerk of the papers, though he may dispose of those places.

Inst. 100.
(a) Sid 305.

So, if a forester, by patent for his life, is made justice in *Eyre* of the same forest *pro hac vice*, the forestership is become void, for these offices are incompatible; because the forester is under the correction of the justice in *Eyre*, and he cannot judge himself. The same law of a warden of a forest, and of a justice in *Eyre* of the same forest.

4 Inst. 310.

Upon a *mandamus* to restore one to the place of town-clerk, it was returned, that he was elected mayor and sworn, and therefore they chose another town-clerk; and the court were strongly of opinion that the offices were incompatible, because of the subordination. A coroner made sheriff ceases to be coroner; so, a parson made a bishop; a judge of C. B. made a judge of *B.R.*, and the town-clerk's office is to be attendant on the mayor. In re-disseisin the sheriff is minister and judge, but that is by act of parliament; and by the (*b*) customs of some places the mayor has other offices annexed to his place of mayor, but here they are distinct

Sid. 305.
2 Keb. 92.
Rex v. Pergam
(b) Upon a writ of error upon a judgment in Northampton, the error assigned was, that the *ven facias* was

awarded to the two bailiffs, and the court was held before the mayor and the two bailiffs, so that the bailiffs being judges of the court could not be officers; but the court conceived it might be good by custom, and not error; for the judges are not bailiffs only, but the mayor and bailiffs; and it is a common course in many of the ancient corporations, where the bailiffs are judges, or the mayor or they be judges, yet in respect of executing process they be the officers also. Cro. Car. 138. *Crane v. Holland*. 4 Mod. 66. S. C. cited. [But this case, as is well observed by *Buller J.* will not assist in the determination of the point in question. For in a writ of error in a civil action, the question, Whether the judges in the court below are properly judges or not can never be decided: it is sufficient, if they be judges *de facto*. 2 Term R. 87.]

distinct; and the court recommended the case to the town for an amicable composure.

Milward v. Thatcher,
2 Term R. 81.
[See 3 Barn. & A. 63.]

[The corporation of *Hastings* consists of a mayor, twelve jurats, freemen, and a town-clerk, which latter is elected by the others, and the jurats sit as judges in a court of record, and hold pleas of the crown; and any two of them with the mayor may hold a court, but all the jurats have a right to attend as judges without being summoned. It was holden, that the acceptance of the office of town-clerk, though an inferior office, vacated that of jurat, for that these two offices were incompatible, notwithstanding there were several instances within the borough of their having been vested in the same person.]

The King v. Tizzard,
9 Barn. & C. 418.; and see *Rex v. Hughes*, 8 Dowl. & Ry. 708.

[[So also it was held that the offices of town-clerk and alderman in the borough of *Weymouth* were incompatible; for the power of removing the town-clerk being in the mayor, aldermen, and bailiffs, he would as alderman have to vote on the question as to his own amotion. And the mayor, aldermen, and bailiffs, having the power of varying or discontinuing the town-clerk's salary, he would as alderman have to vote also on that question. And *Littledale J.* said he had great doubts whether the holding of two offices by the same person was ever contemplated in the charters granted to corporations.

Rex v. Marshall, cited 2 Barn. & A. 341.

So also the offices of recorder and alderman of a borough are incompatible.]

4 Mod. 17.
4 Inst. 146.
Lev. 1. Keb. 1.
Sid. 40., *et vide* Cro. Car. 138.
259. Jon. 263.
Hob. 214.

Ministerial offices may be granted to two, and so may also some judicial offices, which are established by act of parliament; but ancient offices cannot regularly be granted to two, nor otherwise than they have been. However, it seems to be in the discretion of the judges, if they see an office in their courts comprehend too much for one man to execute it, to put in more. But this must be where it is granted to several as one office; for if divided to two or three, the prescription is interrupted, and it is not a grant of the ancient office.

2 Roll. Abr. 152. Hob. 153.
3 Mod. 145.
4 Mod. 17. cited.

Therefore, a grant of the office of chief prothonotary of the Common Pleas to two hath been held void.

2 Roll. Abr. 152. 11 Co. 3.

So a grant to two to be chief justices of any of the benches hath been held void; but a grant to two to be clerks of the crown is good.

11 Co. 2. Au-

If a grant be made to two of the office of one of the auditors of

of the Court of Wards, it is good; yet it is but one office, and partly judicial; but this is by the 32 Hen. 8. c. 46.

ditor Curl's case. 2 Roll. Abr. 152.

4 Mod. 18. S. C. cited.

The office of forester of *Waltham* forest was granted to two, Dyer, 167. a. and held good.

The clerk of the King's Bench office had granted the office of clerk of the papers to *A.* and *B.*, and the longest liver of them; *B.* makes a parol surrender and prays that *C.* should be admitted in his room, which was done accordingly; *B.* dies; *A.* commenced a suit against *C.*, supposing that he had no right; but upon the trial it appeared that the plaintiff agreed that *C.* should be admitted, which was looked upon as a surrender of the former grant, and the taking of a new one; and it was ruled accordingly.

Vent. 296.
2 Mod. 95.
||Where an office of justice or profit is in trust, the acts of a majority of the *cestui que trusts* may bind the rest.

5 Swanst. 180. note.||

The king granted the office of comptroller of the customs in the port of *Exeter*, *durante beneplacito* to two; one died; and the question was, Whether the other should have the whole by survivorship? *Et per cur.* He shall not, for there shall be no survivorship of an office of (a) trust, if it is not granted to them and the survivor.

2 Mod. 260.
Arris v. Stukeley.
(a) It is said in general, *per Cur.* that if an office be granted to

two, and one die, the office does not survive, but determines; as, if two sheriffs, and one die, the other cannot act: otherwise, if granted to two and the survivor of them.

2 Salk. 465. pl. 1.

The Bishop of *Landaff* by deed granted the office of chancellor or commissary of his diocese to Doctor *Lloyd* and Doctor *Jones*, to hold the same *conjunctim et divisim* to them and to the survivor of them: Doctor *Lloyd* died, and the successor of the bishop granted the office to another, who sued *Jones*. It was agreed by counsel on both sides, that this office had been anciently and usually granted in this manner; and on a case stated out of Chancery, and referred to the Judges of *B. R.*, the only question was, Whether this was such a judicial office as could be granted in this manner? And after several arguments it was adjudged, that this was a good grant: and the principal reason of the judgment was, because of the long and constant usage; and it was said, that the offices of most of the bishoprics in *England* are and have been constantly so granted.

Carth. 213.
Jones v. Bew Show. 289.
4 Mod. 16.
2 Salk. 465.
pl. 1. 12 Mod. 10. S. C.

||Vide 1 Mauh. & S. 482.||

(L) Of the Execution of an Office by Deputy: And herein of Superiors being answerable for their Deputies.

AS to the execution of an office by (b) deputy, we must observe, that there are some offices which in their nature and constitution imply a power or right of exercising them by deputy; some that in their nature cannot be exercised by deputy; and some, that by having such a power annexed to the grant or institution may be so exercised, though without such an express provision they could not.

(b) A deputy is said to be one who occupieth in right of another, and for whom regularly his superior shall answer. Perk.

§ 100. — The difference, says my Lord *Coke*, between a deputy and an assignee is, that an assignee

assignee is a person who has an estate or interest in the office itself, and does things in his own name, for which his grantor shall not answer, unless in some special cases; but a deputy has not any estate or interest in the office, but is as servant to the officer, and does every thing in the name of the officer, and nothing in his own name, and for whom the grantor shall answer. 9 Co. 49. But *per Holt C. J.* it is said, that a deputy cannot regularly have less power than his principal, cannot be restrained from exercising any part of the office by covenant, or otherwise, must regularly act in his own name, unless it be in case of an under-sheriff, who acts in the name of the high-sheriff, because the writs are directed to him. Salk. 95.

2 Inst. 582. Offices of inheritance for years, and those which require only
Plow. 580. a superintendency, and no particular skill, may regularly be exer-
9 Ca. 47. cised by deputy; such as that of (c) Earl Marshal of *England*,
Style, 557. forester, park-keeper, &c.
(a) The office

of High Constable of England may be exercised by deputy. Keilw. 171. a. — *John Wiltshire* held lands in *Heyden* in *Essex* by grand serjeanty, to hold a towel when the king should wash his hands before dinner the day of the coronation: but he having no dignity was allowed to make a deputy. Co. Lit. 107. b. — *Anne*, wife of the Earl of Pembroke, held lands of the king to perform the office of napery at his coronation; but because a woman could not do it in person, she was allowed to make a deputy: so the heir of the said earl was by tenure to carry the gold spurs before the king at his coronation; but because he was not of age, he was allowed to make a deputy. Co. Lit. 107. b.

Roll. R. 274. A sheriff, though he is an officer made by the king's letters
Phelpe v patent, and though it be not said that he may execute his office
Winscombe. *per se vel sufficientem deputatum suum*, yet he may make a deputy,
which is the under-sheriff, against whom actions may be brought
by the parties grieved.

9 Co. 49. And it is said in general, that when an officer hath power to
(b) A bishop make assigns, he may (b) implicitly make a deputy.
on his creation
hath power of appointing deputies. 2 Sid. 158. The office of clerk of the outlawries of the
Common Pleas belongs to the Attorney-General, who exerciseth it by deputy. 4 Inst. 101.

5 Mod. 150. A judicial officer cannot, it is said, make a deputy, unless he
cited *arguendo*. hath a clause in his patent to enable him; because his judgment
(c) Therefore is relied on in matters relating to his office, which might be the
the esquire of reason of the making of the grant to him; neither can a minis-
the king's terial officer depute one in his stead, if the office be to be per-
person cannot formed by him in (c) person; but when nothing is required but
assign his a superintendency in the office, he may make a deputy.
office; for the
law supposes
it to have been given him in consideration of his diligence, fidelity, and skill. 11 E. 4. 1. 2 Roll.
Abr. 154. — The office of carver, being a personal trust, cannot be assigned. Dyer, 7. b.

9 E. 4. 30, 51. It is clear, that the Judges of *Westminster Hall*, as well as
a. Bro. tit. all (d) others having judicial authority, must hold their courts in
Judges, 11. their proper persons, and cannot act by deputy, nor any (e) way
Perk. § 101. transfer their power to another.
(d) But the

judges of the ecclesiastical courts may act by deputy, as the ancient custom hath been. Latch.
Et vide supra letter (D). (e) And therefore where the Council of the Marches of Wales re-
ferred a suit to certain persons to hear and determine it, this was held to be illegal, and a
prohibition awarded to the court to stay their proceedings against the party for refusing to
obey the order of the referees. Roll. Abr. 582. March, 102. — So justices of the peace cannot
delegate a certain number of themselves, and invest them with a power to make rates and
orders. 6 Mod. 87.

Lill. Reg. 446. A coroner cannot make a deputy, nor an escheator; because
these are judicial offices, which they must exercise in person:
but it is said, that the king by special commission may appoint a
deputy

deputy escheator, to enquire by office of the death of a nobleman, or, as the book seems to hold, of any other person, though under that degree.

It is held, that the office of constable being wholly ministerial, and no way judicial, he may appoint a deputy to execute a warrant directed to him, when by reason of sickness, absence, or otherwise, he cannot do it himself; for the public good requires, that there should be always some officer ready at hand to execute such warrants; and the too rigorous restraint of the service of them to the proper officer could not but sometimes cause a failure of justice. But it is said, that a constable cannot make a deputy, without some such special cause.

[The high constable appointed a deputy to billet soldiers under the mutiny act. This appointment was by parol only, and the deputy was not sworn. By the court. — The high constable hath power by the act to billet soldiers, and he may appoint a deputy to this particular ministerial act. This is a ministerial, not a judicial, act; and a constable may appoint a deputy to do ministerial acts.]

It seems the better opinion that a (a) recorder of a town cannot make a deputy without a special grant or custom for that purpose, being a judicial office relating to the administration of justice.

liberty may have a deputy. Cro. Jac. 241, 242. adjudged.

And therefore, where a writ was directed to the mayor, aldermen, and recorder of *Lancaster*, and the record was certified by the mayor, aldermen, and deputy recorder, without shewing that the recorder had power to make a deputy, the return was held naught.

It is held, that the Marshal of the King's Bench, having the inheritance of the office, with power to grant the same for life, cannot notwithstanding give power to such grantee for (b) life to make a deputy.

tenant for life can make a deputy, if, in the very grant made to them, there is not an express clause for the execution of the office *per se vel sufficientem deputatum suum*. See the stat. 27 G. 2. c. 17. whereby the power of appointing the marshal is vested in the crown.

[The offices of clerk of the papers, and clerk of the day-rules in the King's Bench Prison, cannot be executed by deputy.]

The office of aulnage, or sealing of cloths, cannot be exercised by deputy, being an office of trust, unless there be a clause in the patent for that purpose.

Regularly a deputy cannot make a deputy (c), because it implies an assignment of his whole power, which he cannot assign over. But if *A.* be appointed steward of a copyhold court, to be exercised *per se vel deputatum suum*, and he appoint *B.* his deputy, who hath long exercised the said office, and *B.* authorize *C.* and *D.* jointly and severally, to take a surrender of a copyhold tenement from *J. S.*, which is done by *C.*, without reciting his

Roll. Abr. 591.
Moor, 845.
Crompt. 222.
5 Bulst. 77.
Dalt. c. 1.
Roll. R. 274.
Sid. 355. Lev.
235. March,
30. 2 Keb.
309. || Rex v.
Wood, 1 Espin.
Ca. 359. ||
Midhurst v.
Waite, 5 Burr.
1259. 1 Bl. R.
350. S. C.

Keb. 659. *per*
Windham J.;
et vide 1 Lev.
76. (a) A
bailiff of a
Roll. Abr. 752.
754. Style,
185. 191. 205.
219. 2 Keb.
385.

39 H. 6. 34.
2 Roll. Abr.
154. (b) That
neither tenant
at will nor
not an express
3 Mod 147. —
is revested in the

Bryant's case,
4 Term R. 716.
5 Term R. 511.
Cro. Eliz. 187.
Watkins v.
Johns.

Salk. 95.
Ld. Raym.
658. Parker v.
Kett. (c) For
a deputy being
only one who
is authorized
himself, he
cannot dele-

gate that authority; and if a deputy might make a deputy, so such second deputy, and his power, or any relation had to it, the surrender is good, being only a single act; for the constitution in this manner gives C. the colour and reputation of an authority to act as a steward (*a de facto*); and what he does as such is sufficient among the tenants, for they have no power to examine his authority, nor is he to render them any account of it.

so *ad infinitum*, which would be highly inconvenient. Lil. Reg. 446. (*d*) Where the deputy of a deputy of a customer, sitting in the custom-house with other officers, and acting as an officer, his acts were held good as an officer *de facto* though not *de jure*; and that it would be very hard to put those who have to do with custom-house officers, to enquire into the legality of their institution. Cro. Eliz. 534.

32 H. 8. c. 35. The Chief Justice in *Eyre* may by the statute of 32 H. 8. c. 35. 4 Inst. 291. make his deputy; yet all the writs of summons ancient and late are *coram* the *justice itinerant aut ejus deputato*.
[This office is now abolished and its duties vested in the First Commissioner of Woods, Forests, &c. See 10 G. 4. c. 50. § 95.]

Leon. 219. It is said there cannot be an officer without deed (*a*), nor can 5 Mod. 147., there be any deputation of an office without deed, being a matter (*a*) A deputation of an which lies in grant.
office is in its own nature grantable by parol; and therefore though it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol. Ca. Law & Eq. 74.

5 Mod. 150. But the high-sheriff may make an under-sheriff, or his deputy, (*b*) Cro. Eliz. without deed, for he claims no interest in the office, but as servant; and therefore (*b*) where an action on the case was brought 67. Clecott v. against the deputy of a sheriff for an escape, who pleaded that Dennys, adjudged.— the sheriff made him his deputy to take bail of prisoners, and that [That a high constable may appoint a deputy by parol, see *supra* Midhurst v. Waite, 5 Burr. 1259.] he took bond, &c. and shewed no deed of deputation, yet the plea was held good on a demurrer.

2 H. 6. c. 10. By the statute of 2 H. 6. c. 10. it is ordained, “ That all officers 4 Inst. 114, “ made by the king’s letters patent within the king’s courts, who 115. “ have power and authority, by virtue of their offices of old time 2 Lev. 121. “ accustomed, to appoint clerks and ministers within the same “ courts, shall be charged and sworn to appoint such clerks and “ ministers, for whom they will answer at their peril.”

4 Co. 35. Upon the rule of *respondeat superior*, regularly, all officers 2 Inst. 466. shall answer for their (*c*) deputies, in the same manner as if the 2 Lev. 160. act were done by themselves, unless it be in criminal cases; and Dyer, 278. therefore sheriffs shall answer for the escapes, amerciaments, (*c*) But if a clerk in an office mis-enter &c. of their deputies, &c.

any thing, he himself shall be punished, and not the master of the office, because he takes a fee for it. Leon. 146.; *et vide* Hob. 13.

Wood’s Inst. [A constable shall answer for his deputy upon any miscarriage, b. 1. c. 7. unless the deputy is allowed and sworn; for then the deputy is constable.]

2 Inst. 466. If the coroner be insufficient, the whole county who made — So, the election and choice of him shall *tanquam elector et superior* answer for him. lord of a franchise shall answer for a bailiff put in by him. 2 Lev. 160

If a person be appointed customer or collector of the customs in a certain port, who is empowered by the statute 1 Eliz. c. 12. to appoint a deputy, and a deputy so appointed by him conceal the goods of a merchant, and the customer himself, being ignorant thereof, return on oath into the Exchequer the customs of this port, according to the information of his deputy; he shall, notwithstanding his ignorance, answer for the act of his deputy, and shall forfeit treble the value of the merchandize, and be fined, &c. pursuant to the statute 3 Hen. 6. c. 3.

Dyer, 238. b. pl. 38. adjudged in the Exchequer-chamber, as *Saunders* C. B. informed the reporter.

If a deputy suffers escapes, it is a forfeiture by the principal, unless such deputation be made for life, and then the grantee for life only forfeits the office.

Dyer, 278. Cro. Eliz. 534. Poph. 119. 2 Lev. 71.

Raym. 216. 3 Mod. 146. 3 Lev. 288. like point.

It is said, that if one put in a deputy, without any allowance of salary, he has no remedy but by *quantum meruit*, and that against his principal.

6 Mod. 235.

It hath been held, that though a *mandamus* will not lie for a deputy, that yet it lies for him who deposes him, to have such his deputy either admitted or restored; for that otherwise he might be deprived of his power to make a deputy. And in this case, on a *mandamus* to restore a deputy secretary of the Courts of Marches, it was held to be no good return, that at the time of the writ delivered he was not constituted deputy, for that they might have put him out of his place before the writ came to them.

Lev. 306. 2 Keb. 738. 742. Vent. 110, 111. S. C. adjudged because returns must be certain, there being nothing to be pleaded to them.

By 5 Geo. 4. c. 82., intituled, *An Act for the better regulating the office of the clerk of the parliaments*, § 2., it is enacted, that after the expiration of the existing letters patent, the clerk of the parliaments shall be appointed by his majesty, his heirs and successors; but that such clerk shall execute the duties of the office in person, and be removable by his majesty on an address of the House of Lords. ||

5 G. 4. c. 82.

(M) Of the Forfeiture of an Office.

IT is laid down in general, that if an officer acts contrary to the nature and duty of his office, or if he refuses to act at all, that in these cases the office is forfeited.

11 E. 4. 1. b. 2 Roll. Abr. 155.

But herein it will be necessary to consider more minutely, what shall be said such acts as are contrary to the duty of his office, and how far the same, whether they be acts of omission or commission, amount to a forfeiture; wherein it hath been clearly agreed, that a (a) gaoler by suffering voluntary escapes, by abusing his prisoners, by extorting unreasonable fees from them, or by detaining them in gaol after they have been legally discharged and paid their just fees, forfeits his office; for that in the grant of every office it is implied that the grantee execute it faithfully and diligently.

Co. Lit. 233. 9 Co. 52. 3 Mod. 143. (a) If a sheriff suffer felons to escape voluntarily, it is a forfeiture of his office, though the office be for life or in fee. Dyer,

151. b. Sir John Savage's case. 2 Roll. Abr. 155. 2 Bulst. 58. 3 Mod. 146. S. P.

But

59 H. 6. 33.
2 Roll. Abr.
155. 2 Vern.
175.; *et vide*
stat. 8 & 9 W. 3.

But it is held, that one negligent escape is not a forfeiture, though one voluntary one is; but that two negligent escapes amount to a forfeiture.

c. 27. tit. *Gaol and Gaolers*, letter (D), Vol. III.

6 Co. 50.
Co. Lit. 233.
b. And where
non-attendance or non-user of an office is forfeiture, *vide* 2 Roll. Abr. 155.
Keilw. 194.
Dyer, 151.
3 Mod. 146.
4 Mod. 29.
—That non-attendance is a good cause of the forfeiture of the office of recorder.
Salk. 435.

[2 Ld. Raym. 1237. But the bare being

There are, says my Lord *Coke*, three causes of forfeiture or seizure of offices by matter in deed. 1. By abuser. 2. Non-user. 3. Refusal. 1. By abuser; as by a marshal, or other gaoler's permitting escapes. 2. By non-user; in which there is this difference, when the office concerns the administration of justice or the commonwealth, the officer *ex officio* ought to attend without any demand or request, there, by non-user or non-attendance the office is forfeited; but, where an officer is not obliged to attend, but upon demand or request made by him whose officer he is, there, without such demand or request, there can be no forfeiture. And herein also, my lord *Coke* in another place takes the following diversity, *viz.* that non-user of itself, without some special damage, is no forfeiture of private offices, but that it is otherwise of a public one, which concerns the administration of justice. 3. As to refusal, he says, that in all cases where an officer is bound upon request to exercise his office, if he does not do it upon request, he forfeits it; as, if the steward of a manor be requested by the lord to hold a court, if he does not do it, it is a forfeiture.

absent, without any particular circumstance of aggravation, will not induce a forfeiture. *Rex v. Corporation of Wells*, 4 Burr. 199.]—Where to a *scire facias* to repeal the patent of a searcher of a port for non-attendance, the officer pleaded that he was sick, and that he was confined in prison at the king's suit, *vide* Cro. Car. 491, 492.

2 Inst. 43.

The king granted to the abbot of *St. Alban* to have a gaol, and to have a gaol-delivery, and divers persons were committed to that gaol for felony; and because that the abbot would not be at the expense of making deliverance, but had detained persons in prison a long time, it was resolved, that the abbot had for that cause forfeited his franchise, and that the same might be seized into the king's hands.

Cro. Car. 491.
The King v.
Rook, adjudged. 3 Mod.
146. S. C.
cited.

If a *scire facias* be brought to repeal the patent of a searcher of the customs in a port-town for non-attendance; and upon evidence it appear, that such a ship was imported and unladen, and others also were exported beyond seas, not being searched, and that when these ships were so imported or exported, neither the searcher himself, nor any of his deputies were there, though it does not appear to be by negligence or voluntarily, yet this voluntary absence and neglect, so as neither himself nor servants were there to search, is not only *crassa negligentia*, but a voluntary permission and forfeiture.

Cro. Car. 492.
per Cur.

So if a gaoler should leave his prison doors unlocked, and the prisoners escape, it is not only a negligent but a voluntary escape.

Co. Lit. 233, b.
8 Co. 44.
Cro. Car. 556.
Hard. 11.

If conditions in law, which are annexed to offices, be not observed and fulfilled, the office is lost for ever, for these conditions are as strong and binding as express conditions; and therefore if the office of forester, &c. descend to an infant or feme covert, (where

(where by law they may so descend,) and these are not exercised by sufficient deputies, they become forfeited.

If a parker or a forester cut a tree, not for browse or reparations, this is a forfeiture in law of his office: because he breaks the condition in law annexed to his office, which is, that he will preserve the game, and not do any thing that may impair or destroy them. But other books hold, that the cutting down of trees is no forfeiture, if he leaves sufficient for browse and shade for the deer, and to cover them.

Insufficiency is an original incapacity which creates the forfeiture of an office. So if a superior puts in a deputy into an office, which may be exercised by deputy, who is ignorant and unskillful, this is a forfeiture of the office.

If the king grants an office in any of the courts at *Westminster* the judges may remove such an officer for insufficiency, and are the proper persons to judge of his abilities.

removed, but cannot be abridged of his fee.

A filazer of *C. B.* being absent two years, and having farmed out his office from year to year, without the licence of the court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by words spoken openly in court. And though there was no record made of the discharge, nor any legal summons for him to answer to any accusation, yet the discharge was held good.

An officer was turned out, because that he *spoliavit quædam recorda contra officii sui debitum*; and it was objected, 1st, That it was not certain enough, because not shewn what records; to which the court answered, that it would be prolix, and then he having spoiled the records, they are not now to be had. 2d Objection, That it may be he did it by chance, and not wilfully; to which the court said, that the conclusion *contra officii sui debitum* included that.

4 Mod. 31, 32. Show. 282. 12 Mod. 13. [On the removal of the clerk of the evidence need not be set out in the order. *Rex v. Lloyd*, 2 Stra. 996.

If *A.* hath the custody of a castle with all profits, &c. granted to him for life, of which the inheritance hath been granted to *B.*, and *A.* refuses *B.* to let him inhabit in the house, this is a forfeiture in *A.*

If tenant in tail of an office commit a forfeiture, this shall bind the issue, by force of the condition tacitly annexed by law to such estate. But, if an officer for life commit a forfeiture, this shall not affect him who hath the inheritance.

14 H. 7. 1. 2 Roll. Abr. 155. 7 Co. 34. Poph. 119. 2 Lev. 71. Raym. 216. 3 Lev. 288. 3 Mod. 146. Skin. 114. 2 Vern. 173. 2 Vent. 189. 269. Bridgm. 27.

The Archbishop of *Canterbury* granted the office of guardian and keeper of *Alyngton Park* to Sir *Edward Nevil*, and to *Henry* one of his sons, with a certain fee during their lives, and the longest liver of them, which was confirmed by the prior of *Christ Church Canterbury*, to be exercised by them, or their sufficient deputy, for whom they shall answer: Sir *Edward* was attainted; and the question

9 Co. 50. a.
Cro. Eliz. 285.
And 29. Poph.
117. Cont.
Moor, 707.
2 Mod. 121.

4 Mod. 29.
arguendo.

4 Mod. 50.
arguendo. —
Where an
officer may be
Roll. R. 82, 83.

Dyer, 114. b.
pl. 64. Roll.
Abr. 155. S. C.

Keb. 597.
Pilkington's
case. Clerk of
the peace in-
dicted and re-
moved for not
delivering the
records to the
new *custos*
rotulorum.
the peace, the

Cro. Jac.
17, 18.

11 E. 4. 1.
20 E. 4. 56.
59 H. 6. 32.
22 Ass. 34.
8 H. 4. 18.

Plow. 378.
Sir Henry
Nevil's case.

question was, if the king should have the office by the attainer? and it was resolved, that being only an office of skill and confidence, the same was not forfeited to the king, but that the survivor should hold the same with the profits incident thereto.

Plow. 180.

But if the king grants an office which concerns trust and diligence to two, and one of them is attainted, the entire office is forfeited to the king; for he cannot make one to occupy in common with another.

But for this
vide Dyer,
155. 198. 211.
9 Co. 98.
Co. Lit. 253.
Cro.Car. 60, 61.
Sid. 81. 134.

Wherever an officer who holds his office by patent commits a forfeiture, he cannot regularly be turned out without a *scire facias*, nor can he be said to be completely ousted or discharged without a writ of discharge; for his right appearing of record, the same must be defeated by matter of as high a nature.

8 Co. 44. b. Roll. Abr. 580. 3 Mod. 335. 3 Lev. 288.

49 G. 3. c. 118.

¶ By stat. 49 Geo. 3. c. 118. s. 3. any person accepting by himself, or by any person in trust for him, any office, place, or employment, on an agreement to endeavour to procure the return of any member to parliament, shall forfeit such office, &c. and be incapable of holding the same, and shall forfeit 500*l.*; and any person holding any office under his majesty, who shall give such office to any person on any such agreement shall forfeit 1000*l.*

47 G. 3. c. 20.

By 47 Geo. 3. c. 20. his majesty is empowered to appoint the chancellor of the exchequer for *Ireland* to be a lord commissioner of the treasury in *England* without a salary, and such appointment shall not vacate his election as a member of the House of Commons.

50 G. 3. c. 85.

Two acts have been passed respecting the securities to be given by persons holding public offices. The 50 Geo. 3. c. 85. intituled, *An Act to regulate the taking securities in all offices in respect of which security ought to be given, and for avoiding the grant of all such offices, in the event of such security not being given within a time to be limited after the grant of such office*, enacts, that every person who shall be appointed to any office, civil or military, in any public department in *England*, or to any such office of public trust under the crown, or wherein he shall be concerned in the receipt of public monies, and who, by reason thereof, shall be required to give security, shall within one month after notice of such appointment, if he shall be in *England* (or within extended periods if he shall be abroad), enter into a bond or security in such sum, and with such sufficient sureties as shall be approved of by the lords of the treasury, or the principal officer of the department, for the due performance of his trust, and duly accounting for all monies entrusted to him.

52 G. 3. c. 66.

The 52 Geo. 3. c. 66. repeals and amends some of the subordinate provisions of the former act, extends the act to *Scotland*, but not to *Ireland*, and provides that an officer shall be appointed in every department for keeping and registering the securities of the officers of the department, and that such securities shall be registered with such officer within the time, and under the penalties enacted by the former act, as to registering securities under that act. ||

(N) Where for Corruption and oppressive Proceedings Officers are punishable: And herein of Bribery and Extortion.

THERE can be no doubt but that all officers, whether such by the common law or made pursuant to statute, are punishable for corruption and oppressive proceedings, according to the nature and heinousness of the offence, either by indictment, attachment, action at the suit of the party injured, loss of their offices, &c. That if a man be made an officer by act of parliament, and misbehave himself in his office, he is indictable for it at common law, as is every public officer, who misbehaves himself in his office. 6 Mod. 96.

But besides the punishment by indictment, information, all courts of record have a discretionary power over their own officers, and are to see that no abuses are committed by them, which may bring disgrace on the court themselves. Also, the Court of King's Bench, by the plenitude of its power, exercises a superintendency over all inferior courts, and may grant an attachment against the judges of such courts for oppressive, unjust, or irregular practice, contrary to the obvious rules of natural justice.

As to extortion by officers it is so odious (being more heinous, as my Lord *Coke* says, than robbery, as it is usually attended with the aggravating sin of perjury,) that it is punishable at common law by fine and imprisonment, and also by a removal from the office in the execution whereof it was committed; and is defined to be the taking of money by any officer by colour of his office, either where none at all is due, or not so much is due, or where it is not yet due.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of *Westm.* 1. 3 Ed. 1., and therefore such fees may be legally demanded and insisted upon, without any danger of extortion.

Westminster to regulate the fees of the officers and clerks of the several courts.]]

Also it seems, that an officer, who takes a reward which is voluntarily given to him, and which has been usual in certain cases for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *præmium* it would be impossible in many cases to have the laws executed with vigour and success.

But it has been always held, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made.

If an indictment of extortion charges *J. S.* with the taking of 50s. as bailiff of a hundred *colore officii*, without (*a*) shewing for what he took it, this is good, at least after verdict, for perhaps he might

Dyer, 218.
Palm. 564

Co. Lit. 368.b.
2 Inst. 209.
10 Co. 102.
2 Roll. Abr.
32. 57.
Cro. Car. 438.
448. Raym.
315.

21 H. 7. 17.
Co. Lit. 368.
||See 3 G. 4.
c. 69., enabling
the judges of
the courts at

2 Inst. 210.
3 Inst. 149.
Co. Lit. 368.

Roll. Abr. 16.
Roll. R. 313.
Noy, 76. Jon.
65. Cro. Eliz.
654. Moor,
468. Cro. Jac. 105.

Sid. 91. The
King v. Cover.
(a) That an in-

formation for extortion must set forth the time when the offence was committed. 4 Mod. 101. 105.—That the Court of King's Bench will not quash an indictment for extortion or oppression, though erroneous, but will oblige the party to plead or demur to it. 5 Mod. 15.

Fortescue de
Laud. c. 51.
3 Inst. 145.
149. Hob. 9.
Cro. Jac. 65.

As to bribery, it is said, in a large sense, to be the receiving or offering of an undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity; but that, in a strict sense, it signifies the taking of any thing valuable by one in a judicial place, of any one who hath to do before him any way, for doing his office, or by colour of his office, but of the king only. Also, it signifies the taking or giving a reward for offences of a public nature, which manifestly tending to discourage men, and to introduce all kinds of corruption, is highly punishable by the common law.

3 Inst. 145.
Leon, 291.
Cro. Jac. 65.
Rushw. Col-
lections, part 1.
fol. 31.

And these several offences are so odious in the eye of the law, that they are punishable not only with the forfeiture of the offender's office of justice, but also with fine and imprisonment. It is also said, that at common law bribery in a judge, in relation to a cause depending before him, was looked upon as an offence of so heinous a nature, that it was sometimes punished as high treason, before the statute 25 Edw. 3. st. 5. c. 2.

Co. Lit. 233,
234.

Also, it is said in general, that all wilful breaches of the duty of an office are forfeitures of it, and also punishable by fine, &c.; for since every office is instituted, not for the sake of the officer, but for the good of some other, nothing can be more just than that he, who either neglects or refuses to answer the end for which his office was ordained, should give way to others who are both able and willing to take care of it, and that he should be punished for his neglect or oppressive execution. But the particular instances wherein a man may be said to act contrary to the duty of his office, though various, are yet so generally obvious, that it seems needless to endeavour to enumerate them.

OUTLAWRY.

Co. Lit. 128.
Doct. & Stud.
Dial. c. 3.
Roll. Abr. 302.

OUTLAWRY is a punishment inflicted on a person for a contempt or contumacy, in refusing to be amenable to, and abide by, the justice of that court which hath lawful authority to call him before it. And as this is a crime of the highest nature, being an act of rebellion against the state or community of which

he

he is a member, so doth it subject the party to divers forfeitures, and disabilities; for hereby he loseth *liberam legem*, is out of the king's protection, &c.

And as to forfeitures for refusing to appear, herein the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and felony, the law interprets the party's absence a sufficient evidence of his guilt, and, without requiring further proof or satisfaction, accounts him guilty of the fact, on which ensues corruption of blood, and forfeiture of his whole estate, real and personal.

But outlawry in less crimes, or in personal actions, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate: it is, however, very fatal and penal in its consequences; for hereby he is restrained of his liberty, if he can be found, forfeits his goods and chattels, and the profits of his lands while the outlawry remains in force.

It hath been said, that anciently any one might as lawfully kill a person outlawed as he might a wolf, or other noxious animal (*a*); but that the law herein was changed in *Edward III.*'s time, which provides, that a person outlawed shall be put to death by the sheriff only, having lawful authority for that purpose.

rere lupinum; yet it was never permitted any who met him to kill him with impunity, but only in case he would not surrender himself peaceably; for if he made no attempt to fly, his death would be punished as that of any other man: though it seems that in the counties of *Hereford* and *Gloucester*, in the neighbourhood of the marches of *Wales*, outlaws were treated as having *capita lupina*. Bracton, 128. b.]

Also, from the heinousness of the offence, the sheriff may, on a *capias utlagatum*, break open the house of the person outlawed; for it would be unreasonable, that this privilege or protection, allowed of in other cases, should be extended to him who is declared a contemner and violator of the law; and therefore, the seizing him as an outlaw, both imply the liberty of entering and seizing him wheresoever he lies hid.

But, as the punishment of outlawry is of a very severe nature, the law hath provided and takes great (*b*) care that no person should be outlawed without due notice, and apparent contempt to the court; as will appear under the following head: *rae*. 2 Inst. 47. That three *capiases* are required, and the party to be called in five county courts, a month between every court. Bract. Lib. 5. tract. 2. c. 11.

Co. Lit. 128.
3 Inst. 161.

Plow. 541.
9 H. 6. 20. b.
Show. Parl.
Ca. 73.

Co. Lit. 128.
b. [(a) But this is a vulgar error, for though an outlaw was said *caput ge-*

2 Hal. Hist.
P. C. 202.
9 Co. 91.
Bulst. 146.
Cro. Eliz. 908.
Moor. 606.
668. Yelv. 28.
Cro. Car. 537.
4 Leon. 41.
2 Jon. 233.

4 Burr. 2551.
(b) That no person is to be outlawed *nisi per legem ter-*

(A) In what Cases Process of Outlawry lies.

(B) By what Jurisdiction such Processes are to issue.

(C) Against whom Process of Outlawry may be awarded: And herein,

1. *Whether it may be awarded against a Peer.*

2. *Whether*

2. *Whether Process of Outlawry may be awarded against an Infant.*
3. *Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.*
4. *Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.*
5. *Of awarding Process of Outlawry against Principal and Accessory.*

(D) What Forfeitures and Disabilities an Outlawry subjects the Parties to: And herein,

1. *Where it is of the same Effect with a Sentence or Judgment.*
2. *Of the Forfeiture as to Lands, Goods, &c. and herein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had: And herein,*
 1. *Of the Difference between a Forfeiture in a Criminal and Civil Case.*
 2. *What Things are forfeited by the Outlawry.*
 3. *To what Time the Forfeiture shall relate.*
 4. *Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.*
3. *Of the Party's Disability to bring any Action.*
4. *What further Disabilities Outlawry subjects the Party to.*

(E) Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reversed: And herein,

1. *Where, for want of such Process as is required by Law, the Outlawry may be reversed.*
2. *Where, for want of Form in such Processes, the Outlawry may be reversed.*
3. *Where, for Variance in such Processes, the Outlawry may be reversed.*
4. *Where, for a defective Execution and Return, the Outlawry may be reversed: And herein,*
 1. *To whom such Process is to issue and be directed.*
 2. *To what Place the Process is to issue; and herein of the Quinto exactus, and Proclamation on an Outlawry.*
 3. *What shall be said a good Execution and Return.*

(F) Of the Manner of reversing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

(G) What

(G) What the Party must do in order to entitle him to a Reversal : And herein,

1. Of appearing in Person, or by Attorney, and giving Bail.
2. Of suing out a Scire facias.

(H) The Effects and Consequences of a Reversal : And herein,

1. Where the Proceedings on the Reversal are in the same Plight as if no Outlawry had been.
2. To what the Party shall be restored on Reversal of the Outlawry.

(A) In what Cases Process of Outlawry lies.

IT seems, that originally process of outlawry only lay in treason and felony, and was afterwards extended to trespasses of an enormous nature. And herein it is laid down by Serjeant (a) *Hawkins*, that process of outlawry at this day lies in all appeals and in all indictments of treason or felony, and in all indictments of trespass *vi et armis*; and on all returns of rescous; and, as it seems probable, in all indictments of conspiracy or deceit, or other crimes of a higher nature than trespass *vi et armis*; but that it lies not on an action, or, an indictment, on a (b) statute, unless it be given by such statute, either expressly, as in the case of *præmunire*; or impliedly, as in cases made treason or felony by statute, or where a recovery is given by an action in which such process lay before, as in the case of a (c) forcible entry.

the statutes against forestalling. 21 Edw. 4. 11. b. 2 Hal. Hist. P. C. 194. (c) On a conviction by justices on view of a forcible entry process of outlawry lies. 1 Keb. 563.—[Whether the common law gives process of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in the case of the King v. Wilkes on a libel. But Lord Mansfield, in delivering the judgment of the Court of King's Bench, spoke at large to prove that such process lies against crimes *universally*. 4 Burr. 2537. However, the reasoning on which this opinion is grounded stands opposed by a former judgment of the Common Pleas on a prior case relative to the same offender. 2 Wils. 151. But it was adopted by both Houses of Parliament, when in Wilkes's case they resolved, that privilege of parliament doth not extend to *libels*. See Ann. Reg. 1764.]

In an assize *capias pro fine* lies, and upon that, process of outlawry, if the assize be found with force; but being a mixed action, as savouring of the realty, it is out of the statute of additions, 1 H. 5. c. 5. which extends only to personal actions, appeals, and (d) indictments.

on which process of outlawry lies.

So process of outlawry lies in replevin, and is given by the statute 25 Edw. 3. c. 17. which gives the *capias* in this manner: when on the *pluries replegiari facias* the sheriff returns *averia elongata*, then a *capias in withernam* issues, and on that being returned *nulla bona*, a *capias* issues, and so to outlawry; but it

Staunf. 192.
Bro. tit. Outlawry, 26. 36.
59. Co. Litt. 128. b.
Dyer, 215.

214.
(a) 2 Hawk. P. C. c. 27, § 113, 114. and several authorities there cited.
(b) It does not lie on an indictment on

(c) On a conviction by justices on view of a forcible entry process of outlawry lies. 1 Keb. 563.—[Whether the common law gives process of outlawry against crimes, being merely *constructive* breaches of the peace, was questioned in the case of the King v. Wilkes on a libel. But Lord Mansfield, in delivering the judgment of the Court of King's Bench, spoke at large to prove that such process lies against crimes *universally*. 4 Burr. 2537. However, the reasoning on which this opinion is grounded stands opposed by a former judgment of the Common Pleas on a prior case relative to the same offender. 2 Wils. 151. But it was adopted by both Houses of Parliament, when in Wilkes's case they resolved, that privilege of parliament doth not extend to *libels*. See Ann. Reg. 1764.]

2 Inst. 665.
6 Mod. 85.
(d) But a presentment is the same with an indictment, 2 Leon. 200.

6 Mod. 84.
Salk. 5. Earl of Banbury v. Wood.
2 Ld. Raym. 987.

does not lie [on the original writ of replevin, which is *vicontiel* and determined; and therefore as no addition is required in such original writ, so neither ought there to be any in the second writ; for where a writ or process is founded on a former it must pursue the former, and cannot vary from it.

35 H. 6. 6 b. By the common law, in all actions of trespass *quare vi et armis*,
22 H. 6. 15. and in which there is a fine to the king, a *capias* was the process;
Rast. Ent. and herein process of outlawry lay by the common law.
293. 10 Co.
76. 2 Roll. Abr. 805.

Co. Litt. 128. But in account, debt (a), detinue, annuity, covenant, and such
b. 3 Co. 12. actions as are grounded upon negligence or laches merely, no
2 Bulst. 63. *capias* lay at common law, but only summons and distress infi-
2 Inst. 143. nite; and therefore, the *capias* and outlawry in these actions
Cro. Jac. 222. were introduced by divers acts of parliament. (b)
261. Yelv.

158. Raym. 128. Keb. 890. 908. Sid. 248. 258. (a) Whether process of outlawry lies in a writ of detinue of charters. Dyer, 223. a. *dubitatur*. (b) This opinion, that the writ of *capias* did not lie at common law for debt and damages, is contradicted by the history of our legal process. For in the reign of Henry III. the process in all personal actions was as follows:—If the party did not appear upon the summons, he was attached by pledges; and afterwards by better pledges: if he still did not appear, the sheriff was commanded *quod habeat corpus*: if the sheriff returned *nou inventus*, there issued a *distringas per terras et catalla*; after that, another *distringas* commanding him also to take the body; after that another *distringas, ne manum apponat*; and lastly, a writ to take the lands and chattels into the king's hands. Thus there might be one summons, two attachments, a *capias* (as it was afterwards called), and four distresses. To this, it is added by Bracton, that should the defendant not be found, nor have any lands or goods, whether the action was for money or for a trespass, he was to be demanded from county to county, and outlawed: and persons so outlawed were condemned to perpetual imprisonment, or to abjure the realm. Bract. 440, 441. Reeves' Hist. of the Law, vol. 1. 485, 484. vol. 2. 439.]

25 E. 3. c. 17. By the statute of Marlebridge, 52 Hen. 3. c. 23. the writ of
2 Inst. 145. *monstravit de compoto* was given, where before, the process in ac-
380. F.N.B. count was summons, attachment, and distress infinite; and by
259. Westm. 2. 13 Edw. 1. stat 1. c. 11. process of outlawry is given in account.

25 E. 3. c. 17. By the 25 Edw. 3. c. 17. it is accorded, that such process shall
3 Co. 12. be made in a writ of debt and detinue of chattels, and taking of
2 Roll. Rep. beasts, by writ of *capias*, and by process of exigent, by the
295. 2 Bulst. sheriff's return, as is used in a writ of account.
63.

19 H. 7. c. 9. And by the 19 Hen. 7. c. 9. reciting, "That forasmuch as
" before this time there have been great delays in actions of the
" case that have been sued as well before the king in his bench,
" as in the court of his common bench, by reason of which
" delays many persons have been put from their remedy; it is
" therefore ordained, enacted, and established, that like pro-
" cess be had hereafter in actions upon the case as well sued and
" hanging, as to be sued in any of the said courts, as in actions
" of trespass or debt."

Leon. 329. But it hath been adjudged, that process of outlawry lies in no
2 Roll. Abr. case but where a *capias* lies; and that therefore where the pro-
76. Sid. 159. ceeding is by bill and not by original, as there can be no *capias*,
Keb. 577. so there can be no process of outlawry, as in a bill of privilege by or against an attorney.

(B) By

(B) By what Jurisdiction such Processes are to issue.

IT is clear, that the courts at *Westminster* may issue process of outlawry, and that the Court of King's Bench, either upon an indictment originally taken there, or removed thither by *certiorari*, may issue process of *capias* and exigent into any county of *England*, upon a *non est inventus* returned by the sheriff of the county where the party is indicted, and a *testatum* that he is in some other county.

2 Hal. Hist.
P. C. 198.

Justices of oyer and terminer may issue a *capias* or exigent, and so proceed to the outlawry of any person indicted before them, directed to the sheriff of the same county where they held their session at common law; and by the statute of 5 Edw. 3. c. 11. they may issue process of *capias* and exigent to all the counties of *England*, against persons indicted or outlawed of felony before them.

2 Hal. Hist.
P. C. 51. 199.

But justices of gaol delivery (a), regularly, cannot issue a *capias* or exigent; because their commission is to deliver the gaol *de prisonibus in ea existentibus*, so that those whom they have to do with are always intended in custody already.

2 Hal. Hist.
P. C. 199.

(a) But now they have commissions

of oyer and terminer, and other commissions, &c. giving them full power in all cases.

Justices of the peace may make out process of outlawry upon (b) indictments taken before themselves, or upon indictments taken before the sheriff, and returned to the justices of the peace, by the statute of 1 Edw. 4. c. 1.; but the power of the sheriff, to make any process upon indictments taken before him, is taken away by that statute.

2 Hal. Hist.
199.

(b) Justices of assize, justices of nisi prius, justices of oyer and terminer, and justices of

gaol delivery, and also justices of the peace in their sessions, may proceed to outlawry in cases of indictments found before them, and that by the common law; and in cases of popular actions may proceed to outlawry by the statute of 21 Jac. 1. c. 4. But they cannot issue a *capias utlagatum*, but must return the record of the outlawry into the King's Bench, and there process of *capias utlagatum*, shall issue.

2 Hal. Hist. P. C. 52. —
Dalt. 406. 2 Hal. Hist.

It is made a *quare* by *Hale*, whether a coroner can by law make out a process of outlawry against a man indicted by inquisition before him.

2 Hal. Hist. P. C. 199. *Per* Hawkins, a coroner may

award process until the exigent on a bill of appeal before him; and that by the better opinion, such process shall be awarded by him only, and not by him and the sheriff jointly, and that he may proceed thereon to outlawry; but that since *Magna Charta*, c. 17. by which it is enacted *That no sheriff, constable, coroner, or other bailiff of the king, shall hold pleas of the crown*, he cannot proceed to the trial of the appellee.

2 Hawk. P. C. c. 9. § 41. and several authorities there cited.
Yelv. 158.
Cro. Jac. 222.
261. Raym.
Keb. 890. 908.

It hath been held, that though the process in inferior courts be a *capias*, that yet they cannot proceed to outlaw the person.

128. Sid. 248. 259.

The process to the outlawry, *viz.* the *capias* and exigent, must be in the king's name, and under the judicial seal of the king appointed to that court that issues the proofs, and with the (c) *teste* of the Chief Justice or Chief Judge of that court of sessions.

2 Hal. Hist. P. C. 199.

(c) Where the *capias* was *este* *Edmundo*

Anderson without a *T.*, for this error the outlawry was reversed; for the *teste* is the warrant of the writ, as it is of all judicial writs.

Cro. Eliz. 592. *Gronby v. Ischam.*

(C) Against whom Process of Outlawry may be awarded. And herein,

1. *Whether it may be awarded against a Peer.*

2 Inst. 49.
3 Inst. 31.
Staunf. 130.
2 Hawk. P. C.
c. 44. § 16.

IF a nobleman, or peer of the realm, be indicted and cannot be found, process of outlawry shall be awarded against him, and he shall be outlawed *per judicium coronatorum*.

2 Hal. Hist.
P. C. 199. 200.
Cro. Eliz. 170.
503. 5 Co. 54.
Roll. Abr. 220.
(a) That an
abbot or prior
ought not to
be outlawed.
3 E. 3. 2 Roll.
Abr. 805.

But in civil actions between party and party, regularly, a *capias* or exigent lies not against a lord of parliament of *England*, whether secular or (a) ecclesiastical; yet, in case of an indictment for treason or felony, yea, but for a trespass *vi et armis*, as, an assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence is a contempt against him: and therefore, if a rescue be returned against a peer, or, if a peer be convict of a disseisin with force, or deny his deed, and it be found against him, a *capias pro fine* and exigent shall issue, for the king is to have a fine: and the same reason holds upon an indictment of trespass or riot, and much more in the case of felony.

2. *Whether Process of Outlawry may be awarded against an Infant.*

3 H. 5.
Utlag. 11.
Fitz. tit. Out-
lawry, 11.

An infant above the age of fourteen may be outlawed, and the outlawry is not erroneous; but an infant under the age of fourteen cannot be outlawed, for if he be, it is erroneous.

2 Roll. Abr. 805. Dyer, 104. 2 Hal. Hist. P. C. 207, 208. ||But, according to Bracton, twelve is the age at which a person could be outlawed; for every male at that age either was, or ought to be, enrolled in some *decenna* or *manupastus*; and as he was then *infra legem*, he was then capable of being declared *ex lex*. Bracton. 125. Co. Lit. 128. a. ||

Dyer, 239. a.
2 Roll. Abr.
805.

But the outlawry of such infant is not void, it being of record, but voidable only by writ of error.

3. *Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.*

Co. Lit. 122. b.
Lit. § 186.
||Bract. 125. ||

A woman is said to be waived, and not outlawed; and the reason, says my Lord Coke, why the outlawry of a woman is legally called *waiviaria mulieris* is, because women are not sworn in leets or torns, as men are, who are above the age of twelve; and therefore, says he, men are called *utlagati*, i. e. *extra legem positi*; but women are *waiviatae*, i. e. *derelectae*, left out or not regarded, because they are not sworn to the law.

Cro. Jac. 358.
Middleton's
case. Roll.
Rep. 407. S. P.
Roll. Abr. 804.
S. P.

Therefore, where a *capias* and exigent were awarded against three men and two women, and the return was *utlagati existunt*, where, as to the women, it ought to have been *waiviatae existunt*, this was held to be error.

For this, *vide*
Dyer, 271. b.

If, in an action against husband and wife the husband is outlawed and wife waived, and she is taken upon the *capias utlagati*, though

though she is to be discharged of the imprisonment, (because the plaintiff cannot proceed against her alone,) yet she still remains waived, and when her husband is taken he must bring her in.

Cro. Jac. 445.
Cro. Eliz. 370.
Hut. 86.
Sid. 21.

In an action for a debt due by a wife before marriage the husband was returned outlawed and the wife waived; but, before the return of the exigent, an attorney procured for the wife a *supersedeas*, surmising, that the wife had appeared by him as her attorney: on motion that this appearance of the wife should be received, all the court conceived, that if upon the exigent the sheriff had returned *reddidit se*, or upon *pluries capias* had returned *cepi corpus* for the wife, then her appearance should be entered, but not by attorney, as it is here; and the exigent should only issue against the husband, *et idem dies* should be given to the wife. But, when the husband upon the exigent is returned outlawed, then it shall be entered *aler sans jour* for the wife, for the process is determined; and if he will purchase his pardon he shall not have any allowance thereupon in a *scire facias*, unless he appear for himself and his wife. But if for the husband the sheriff should return *cepi corpus* upon a *pluries capias*, and a *non est inventa* for the wife yet an exigent shall issue against both, because it must be presumed the husband might bring in his wife: but, if upon the exigent the sheriff returned *reddidit se* for the husband, and for the wife that she is waived, the husband shall go *sine die*: but in this case, because the exigent was returned against both to be outlawed, the *supersedeas* supposing the appearance of the wife is merely idle and void; whereupon it was disallowed, and the exigent appointed to be filed against both.

Cro. Car. 58,
59. Smith v.
Ash *et ux.*
Hut. 86. S. C.

4 *Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.*

If two are sued in a joint action and neither of them will appear, process of outlawry must be taken out against both.

Cro. Eliz. 648.
Beverley v.
Beverley.

If an exigent is awarded against two, and the return is *primo exacti fuerunt et non comparuerunt*, without saying *nec eorum aliquis comparuit*, it is erroneous.

2 Roll. Abr.
802. Taver-
ner's case.
2 Hal. Hist.

P. C. 204. S. C. cited, and S. P. said to be have been often adjudged. Cro. Jac. 358. S. P. adjudged, and said to be manifest error. 3 Mod. 89, 90. S. P. adjudged. Roll. R. 406. Palm. 388. S. P. adjudged.

If two in a writ of account are adjudged to account, and one is after (a) outlawed in the suit, and the other appears, he shall account alone.

41 E. 3.
3 Roll. Abr.
127. S. C.
Brownl. 25.

S. C. said. (a) But if sued by bill upon which no outlawry can be, what proceedings shall be, *quære*; *et vide* Sid. 159. Keb. 577. [In such case the plaintiff must discontinue, and take out an original, on which he will proceed to outlawry against the one, after which he may go on in the action against the other. Edwards v. Carter, 1 Stra. 473. Symonds v. Parminter, 2 Stra. 1269. 1 Wils. 78. 1 Bl. R. 20. In an action upon a contract, if the defendant plead, that the promise was made by another jointly with him, the plaintiff cannot reply that such other person is out of the kingdom, and that it is not possible to summon or attach him, but must proceed to outlawry. Sheppard v. Baillie, 6 Term R. 327.] || Goldsmith v. Levy, 4 Taunt. 299.]

41 E. 3. 13. b.
Roll. Abr. 127.;
et vide Moor,
188. 2 Leon.
76.

When two are adjudged to account, and one is outlawed and accounts, if he discharges himself upon the account, this shall be a discharge to the other when he sues a *scire facias* upon a charter of pardon; and if he be charged by the account, this shall be a charge upon the other, because they are judged to account jointly.

Dyer, 239.
pl. 203.
Hawtre v.
Anger.
N. Bendl. 148.
pl. 205.
Moor, 74.
pl. 203.; and
And. 10. S. C.
adjudged.

If in debt due upon an obligation against *B.* and *C.*, sons and heirs of the obligor, and against *D.* the daughter and heir of *A.*, who was another of the sons and heirs of the obligor in gavel-kind, process is continued till the uncles are outlawed, and the niece waived; and after, the uncles are pardoned, and bring a *scire facias* against the plaintiff, who thereupon declares against them *simul cum* the niece; and the uncles plead, their niece is but of the age of seven, *unde non intendunt quod durante minori etate sua* they ought to answer, &c. yet the parol shall not demur; for the niece is out of court, and *quoad* her the original is determined, and at her full age no re-summons could be sued against her, but the uncles only, because she never appeared in court.

Sid. 173.
Keb. 642. S. C.
Guy v. Bar-
nard. ||(a) The
same point was
determined on
demurrer in
Saunderson v.
Hudson,
3 East, 144.
but see Co.

An action of trespass was brought against two; one was outlawed; after the entry of the writ it was entered, *et sciendum est quoad prædict. J. S.* (one of the defendants) *utlagat. est.* and then counts against one of them; on motion in arrest of judgment, the court held the declaration naught, and the course of pleading in such cases, after the entry of the writ, was to say, *et quod prædict. J. S. utlagat. est in breve illo*; and that the last words are essential, because that he might be outlawed in another writ, and not in this. (a)

Lit. 128. b. 352. b. If the outlawry is alleged to be *in that suit*, it is not necessary to add a *prout patet per recordum*. Macmichael v. Johnson, 7 East, 50. But the process against each defendant must be connected with the same original, otherwise the court will set aside the declaration for irregularity. Haigh v. Conway, 15 East, 1.; *sed vide* Gent v. Abbott, 2 Moo. R. 87. The court will not set aside the declaration at the instance of the defendant, who is in court, on the ground of irregularity in the outlawry of the other defendant, who is not before the court. Solly v. Forbes, 2 Moo. 90. In an action on a joint contract against three defendants, two of whom are outlawed, the third, who pleads the general issue, may take advantage of a misnomer of his companions in stating the contract; for the contract remains joint, notwithstanding the outlawry, and it is a variance in description, Gordon v. Austin, 4 Term R. 611. Where one defendant is outlawed, and the other dies before final judgment, the action survives against the outlaw, and the plaintiff cannot have a *scire facias* against the representative of the deceased defendant. Fort v. Oliver, 1 Maul. & S. 217. ||

5. Of awarding Process of Outlawry against Principal and Accessory.

5 E. 1. c. 14.

Herein we must first take notice, that by the statute of *West. 1.* 3 Ed. 1. c. 14. it is recited, "That it had been used in some counties to outlaw persons being appealed of commandment, force, aid, or receipt, within the same time that he which is appealed for the deed is outlawed; and thereupon it is provided, that none be outlawed upon appeal of commandment, force, aid, or receipt, unless he that is appealed of the deed be attainted, so that one like law be used therein through the realm; nevertheless, he that will so appeal, shall not by reason of this intermit or leave off to commence his appeal at the next county against

“against them, no more than against their principals which he
 “appealed of the deed, but their exigent shall remain until such
 “as be appealed of the deed be attainted of outlawry, or other-
 “wise.”

In the construction of this statute, the following particulars are laid down by Serjeant *Hawkins* as most remarkable.

1st, That it seems agreed that it extends as well to indictments as to appeals, not only because the word *appeal* in the statute may in a large sense be taken for an accusation in general; but because indictments are certainly as much within the reason of the statute as appeals; and the common law, for the settling whereof this statute was made, did not make any distinction in this respect between appeals and indictments.

2 Inst. 185.
 2 Hawk. P. C.
 c. 27. § 129.

2dly, That it seems to be agreed, that wherever some of the defendants are expressly charged as principals, and others as accessories, before the award of this exigent, the outlawry thereon of those charged as accessories cannot but be reversible, because it appears upon the record that the exigent issued contrary to the direction of the statute. But if several be outlawed on a writ of appeal, which chargeth them all alike without any distinction, there can be no advantage taken of the appellant's not having pursued the statute, since it appears not but that he might have charged them all as principals.

2 Hawk. P. C.
 c. 27. § 130.
 2 Hal. Hist.
 P. C. 200.

3dly, That it is strongly holden, that if an appellant take out the exigent at the same time against all the defendants, he must, when they appear, count against them all as principals; and shall be concluded from charging any of them as accessories, because he has taken out such process as is erroneous where all are not principals. But he makes a doubt, whether this be law at this day, since all errors, as the law seems now to be holden, are salved by appearance.

2 Hawk. P. C.
 c. 27. § 131.;
et vide 2 Hal.
 Hist. P. C. 200.

4thly. That it seems the better opinion, that where there are more than one principal the exigent shall not issue till all of them are arraigned: And herein it is said by *Hale*, that if *A.* and *B.* be indicted as principals in felony, and *C.* as accessory to them both, the exigent against the accessory shall stay till both be attainted by outlawry or plea; for that it is said, if one be acquitted, the accessory is discharged, because indicted as accessory to both, and therefore shall not be put to answer till both be attaint. But hereof he adds a *dubitatur*, because, though *C.* be accessory to both, he might have been indicted as accessory to one, because the felonies are in law several; but if he be indicted as accessory to both, he must be proved so.

2 Hawk.
 P. C. c. 27.
 § 132.
 2 Hal. Hist.
 P. C. 200,
 201.

In treason all are principals; and therefore process of outlawry may go against him that receives, at the same time as against him that did the fact.

Hal. Hist.
 P. C. 238.

(D) What Forfeitures and Disabilities an Outlawry subjects the Parties to : And herein,

1. *Where it is of the same Effect with a Sentence or Judgment.*

2 Hal. Hist.

P. C. 599.

(a) Whether the outlawry appear by the sheriff's return

of the exigent, or by the coroner's return of a *certiorari* to them directed, to certify whether the party were outlawed or not, the party is as much attainted, and shall forfeit and lose as much, as if sentence had been given against him upon verdict or confession. 2 Hawk. P. C. c. 48. § 22. *sed vide* 2 Hal. Hist. P. C. 205, 6. — That those malefactors who wilfully fly from justice add a new crime to their former offence, and therefore ought to have no benefit of the law. 3 Mod. 72.

2 Hawk.

P. C. c. 28.

§ 23.

IF a man be outlawed of treason or felony, though there be no other judgment (a) but *utlagatus est per judicium coronatorum*, yet it is of itself an attainder, and subjects the party to such an award thereupon, to be made by the court where he is brought, as is suitable to the offence for which he is indicted and outlawed.

But if such outlawry appear to the court to be erroneous, thereof any one as *amicus curiæ* may inform them, the party shall have counsel assigned him to take advantage of the error. But if he will neither bring a writ of error, nor plead in convenient time, and the outlawry be voidable only, and not void, the proper execution shall be awarded against him, but no sentence pronounced ; because the outlawry is a judgment, and no man shall have two judgments for one offence.

2 Hal. Hist.

P. C. 408.

And herein it is said by *Hale*, that though the court *ex officio* is to prefix the party a day to purchase a writ of error, and in the mean time to respite execution ; yet that must be on his alleging error in fact, or error in law upon the outlawry ; for if the court be satisfied that it is merely a pretence, they may choose whether they will allow him a day to sue forth a writ of error, but may award execution presently.

2 Hawk. P. C.

c. 33. § 27.

Hal. Hist.

P. C. 521.

2 Hal. Hist.

P. C. 350.

But though an outlawry be an attainder, and equal to a conviction or sentence by verdict or confession, yet it does not subject the party to any severer punishment than the crime does for which the outlawry was pronounced ; and therefore, if it be in such a crime for which clergy is allowable, the party outlawed shall be allowed his clergy in the same manner as he who is convicted by verdict or confession.

2 Salk. 494.

pl. 1. The King

v. Tippin.

One was outlawed upon an information for seducing a young gentleman to marry a young woman of a lewd character, and fined 5000*l*. It was moved in behalf of the defendant, that he could not be fined upon the outlawry ; because in misdemeanors the outlawry does not enure as a conviction for the offence, as it does in cases of treason and felony, but as a conviction for the contempt in not answering, which contempt is punished by the forfeiture of his goods and chattels ; and if he might be fined now, he must be fined again upon the principal judgment. And the first was held to be irregular ; and that the outlawry in these cases is not a conviction, as appears by *Fleta, quamvis quis pro contumaciâ et fugâ utlagatur, non propter hoc convictus est de facto principali*.

2. *Of the Forfeiture as to Lands, Goods, &c.; and herein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose suit the Outlawry was had: And herein,*

1. *Of the Difference between a Forfeiture in a Criminal and Civil Case.*

Herein we must observe, that an outlawry of treason or felony is a conviction and attainder of the offence wherewith the party is charged; and such outlawry corrupts the blood, and causes an absolute forfeiture of the party's estate both real and personal, *viz.* in case of outlawry of treason, his lands are forfeited to the king of whomsoever they are holden; and in case of outlawry of felony, to the lord by escheat of whom they are immediately holden.

9 H. 6. 20.
2 Roll. Abr.
85. Staunf.
Pre. 47. Co.
Lit. 128.
2 Hal. Hist.
P. C. 205.

Also in civil cases, the retiring from the enquiries of justice is held so criminal in the eye of the law, that it is punished with the loss of the offender's goods and chattels, and the issues and profits of his real estate; but by outlawries in civil cases the king has no estate, but only a pernanity of the profits; nor can he manure or sow the ground; and his interest continues no longer than the party hath an estate, and determines with the party's death; and being originally introduced to compel the defendant to come in the sooner and answer the plaintiff's demand, may more easily be superseded or reversed, and thereby the king's pernanity of the profits discharged, than an outlawry in a capital case.

Plow. 541.
5 Co. 110.
Show. Par.
Ca. 75.; *et vide*
the authorities
suprà.

Also if a person make default till the award of an exigent either upon an appeal or indictment of a capital offence, he forfeits his goods, unless he was pardoned before the exigent was awarded. And it is holden, that the law is the same, as to such a default upon an indictment of petit larceny, and that wherever goods are so forfeited, they are not saved by an acquittal at the trial; but by a reversal of the award of the exigent they are saved, whether such reversal be for an error either in fact or in law; as for the imprisonment of the defendant at the time when the exigent was awarded, or for a defect in the indictment, appeal, or process.

Staunf. Pre.
47. 185. Roll.
Abr. 793.
Cro. Eliz. 472.
5 Co. 110. Co.
Lit. 259. Cro.
Jac. 464.

2. *What Things are forfeited by the Outlawry.*

Outlawry in a capital case being, as hath been said, an attainder and conviction, it is clear that all lands of inheritance, as all other the real and personal estate whereof the party outlawed is seized or possessed in his own right, are forfeited absolutely.

For which
vide tit. For-
feiture.

Also, the king hath by the common law such a power to require his subjects to answer all demands of law and justice, that the non-appearance on process in a civil action, is such a contempt that the party guilty is put out of the law, forfeits his goods and chattels, his leases for years (*a*), and his trust in such leases, and the profits of his lands of freehold.

Salk. 109.
5 Mod. 114.
[(a) If the
outlaw die be-
fore his term
is sold by a
venditioni ex-
ponas, the

Court of Exchequer w let the widow in to plead this matter against a purchaser. *Watts v. Robinson*, Bunb. 220

But

Bro. tit. Outl.
82. Perk.
§ 388. Co.
Lit. 31. a. [(a)
But of copy-
hold lands be-
longing to the
outlaw the
king is not en-
titled, even to
the profits, by reason of the prejudice which would accrue thereby to the lord, who hath not committed any offence, and therefore shall not lose his customs or services. *Rex v. Budd, Parker, 190. Seliard v. Everard, Owen, 57.*]

But outlawry in trespass, or any civil action, works no corruption of blood; and therefore, if the husband be outlawed in any such action, the wife shall notwithstanding have dower, and the issue shall inherit; for it is a forfeiture of the issues and profits of the lands (a) only during the life of the party outlawed, and so long as the outlawry remains unreversed. Also, it seems, that if the wife herself be outlawed or waived in any such action, yet her dower is not forfeited.

Hetl. 164.
(b) For this
vide tit. Rents.

It is said to have been agreed by the whole court that arrearages of rent reserved upon an estate for life are not forfeited by outlawry, because they are real, and no (b) remedy for them but by distress: otherwise, if upon a lease for years.

Cro. Eliz. 851.
Hut. 53.; and
vide 4 Co. 93.
a. 2 Roll. Abr.
806. Cro. Eliz.
205. (c) That
debtors may
pay debts to
the executor
or administrator
of a person outlawed, and their release shall be a good discharge to them, though the executors shall be accountable to the king for them. *Hut. 54.*

Also it is held that there are other things of the party outlawed which are forfeited to the king; and that therefore an executor or administrator cannot plead in excuse of assets that his testator or intestate was outlawed, because he might have debts (c) due upon contract: so goods taken for trespass before the outlawry, for which he may have trespass, and recover the value of the goods, which shall be assets in his hands.

Hut. 53.

So if the testator had mortgaged his lands upon condition that if the mortgagee pay not at such a day to him, his executors or his heirs, 100*l.*, that then it shall be lawful for him or his heirs to re-enter; and after, but before the day, the testator is outlawed, and makes his executor, and dies, and at the day the mortgagee pays the money to the executors; this is assets, and not forfeited to the king.

9 H. 6. 21.
2 Roll. Abr.
806.

If tenant for term of years be outlawed, the term is forfeited to the king, and he may seize it and use it at his pleasure.

2 Roll. Abr.
807.

So if *A.* being possessed of a lease for years grant it over to *B.* in trust for himself, and afterwards is outlawed in a personal action, this trust shall be forfeited to the king.

9 H. 6. 21.
2 Roll. Abr.
806.

If tenant at (d) will sows the land, and afterwards is outlawed, the king shall have the corn.

(d) If a man leases at will, and the lessee sows the land, and the lessor is outlawed, the king shall not have the corn, and can have only the rent; for he is entitled to no more than the lessor himself. *5 Co. 116.*

2 Roll. Abr.
807. North
v. Fines.

If the conusee of a statute-staple takes the conusor in execution upon the statute, and afterwards is outlawed in a personal action, the debt shall be forfeited to the king, and the king may discharge the conusor out of execution.

2 Roll. Abr.
808.

So if there are two conusees of a statute, and they take the body of the conusor in execution, and one of the conusees is outlawed in a personal action, it is said to be a forfeiture of the debt against both.

22 Ass. 55.

If a man be outlawed on a personal action, the king shall present

present to his churches, although he hath a freehold or inheritance in them.

2 Roll. Abr.
708. S. C.

So if a person outlawed hath an advowson, that happens to become void (*a*) during the time the outlawry is in force, such avoidance is forfeited to the king, whether the outlawry were in a capital case, an action of trespass, or other personal action.

2 Roll. Abr.
807. (*a*) If
after the out-
lawry the party
purchaseth

any more goods, the property is immediately vested in the king.

Carth. 442.

If pending *quare impedit* brought by *A.*, he is outlawed, and judgment is given for him in the *quare impedit*, and thereupon the incumbent resigns, and takes a new presentation from the queen by virtue of the outlawry, and accordingly he is instituted and inducted, and afterwards *A.* reverseth the outlawry, and brings a *scire facias* to have execution of the judgment; though the presentation was vested in the queen, and executed before the outlawry reversed, yet *A.* shall have execution of his judgment; for upon a recovery in a *quare impedit*, any incumbent that cometh in *pendente placito* shall be removed.

Beverley v.
Cornwall,
Cro. Eliz. 44.
And. 148.
Moor, 569.
Savil, 89.
Goulds. 103.
Owen, 3. S. C.
Vide post,
(H. 2.)

Things personal, settled by way of trust on the offender, are as much forfeited as if he had the legal interest, or were in possession of them; as if a bond be taken in another's name, in trust for a person who is afterwards outlawed, this is forfeited in the same (*b*) manner as if taken in his own name.

Hob. 214.
Cro. Jac. 512.
(*b*) And shall
be executed by
an information
in the Exche-
quer-chamber, or in Chancery. Hal.

So the trust of a term granted by a man for the use of himself, his wife and children, &c. is liable in like manner to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture: but it shall be forfeited so far only as is reserved for the benefit of the party himself, if made *bonâ fide*, whether before or after marriage for good consideration, without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the court, where it is not expressly found.

Hist. P. C. 248.

Lane, 54. 113.
Mod. 16. 38.
2 Keb. 564.
608. 644. 763.
772. Lev. 279.
Hard. 496.
And. 294.
Raym. 120.
2 Roll. Abr. 34.
Roll. Abr. 345.
March, 45. 88. Sid. 260. Keb. 909.

So where upon an indictment of recusancy, the party, intending to go beyond sea, made a deed of gift of all his goods and chattels upon some feigned consideration, and then he went out of the realm, and was afterwards outlawed on the same indictment; it was adjudged, that the deed of gift was void to defeat the queen of the forfeiture of the goods, and this by the statute of 13 Eliz. c. 5. and that the queen was entitled to his leases and goods by the forfeiture.

3 Co. 82.
Pauncefoot v.
Blunt, cited in
Twine's case;
et vide Dyer,
295. a.

13 Eliz. c. 5.

The forfeiture, as hath been said, must be of goods which the party has in his (*c*) own right, and not the right of another; and therefore an executor or administrator outlawed forfeit nothing which they have in right of their testator or intestate.

11 H. 6. 17. 37.
Cro. Eliz. 575.
851. 2 Roll.
Abr. 806.
Cro. Car. 556.

(*c*) So, a term limited to executors, and not vested in the party himself, is not forfeitable.

So if an executor recovers in account against the receiver of the testator, and afterwards is outlawed, yet he shall not forfeit this debt; for it continues the debt of the testator, and is only put in certainty by the judgment.

20 H. 6. 8. b.
2 Roll. Abr.
806.

4 Co. 95.
Slade's case.

Debts and duties upon simple contract are forfeited to the king by the outlawry of the party, though the debtor might have waged his law on such contract on an action brought by the creditor; of which privilege he is deprived by the outlawry.

Britton v.
Cole, Carth.
441. Salk.
395. 408. S. C.
Ld. Raym.
305. S. C.
Skin. 617.
S. C. 5 Mod.
112. S. C. Comb. R. 51. S. C.
and couchant. Carth. 442.

It hath been adjudged, that the cattle of a stranger (*a*) *levant* and *couchant* on lands extended on an outlawry, may be taken for the king upon a *levari facias* as the issues and profits of the lands; for that otherwise there might be no issues at all, or the person outlawed may take in other men's cattle to agist, and so defeat the outlawry.

Carth. 442.
per cur.
(*b*) But if
tenant for
life is outlawed,
and dies, *qu.* Whether the issues can be extended on the reversioner? Carth. 442.

So if the person outlawed should after the inquisition make a feoffment of his lands, the cattle of the feoffee may be taken for the issues of those lands, for the land is (*b*) debtor the king.

Carth. 442.

But if the owner of the soil is outlawed, the cattle of a commoner cannot be taken as issues: however, if they should be taken, he must plead his title in the Exchequer, unless his right of common is found by inquisition on the outlawry.

8 Ann. c. 14.
Graves v.
d'Acastro,
Bunb. 194.

[Upon a seizure of goods of an outlaw in a civil suit, the landlord is entitled, under the statute 8 Ann. c. 14., to be satisfied one year's rent out of the money in the sheriff's hands.] ¶ Because a *capias utlagatum* at the suit of the party is considered only as a private execution.

St. John's
Coll. v. Mur-
cott, 7 Term
R. 259.

And where a sheriff's officer was in possession of a tenant's goods, under a *capias utlagatum* in a civil suit, and the landlord employed the same officer to make a distress for the rent, which the officer did, and sold the goods, and received the produce; and the outlawry was afterwards reversed: it was held, that the landlord might recover the produce as money had and received by the officer. ||

3. To what Time the Forfeiture shall relate.

Co. Lit. 13, 14.
(*c*) But, if the
defendant had
appeared, and
the plaintiff
had declared
upon his writ,
and the de-
fendant had
been convicted
and attainted
by verdict or
confession; or
if the appeal

If a man be outlawed upon an indictment of felony and treason, and pending the process he alien the land, yet the king or lord shall have the land which he held at the time of the treason or felony committed; for the indictment contains the year and day when it was done, unto which the attainder by outlawry relates. But if a man sue an appeal by writ of felony or murder, and pending it the party alien, and then is outlawed before appearance, the lord's escheat is lost, because it relates only to the time of the outlawry pronounced; inasmuch as the writ of appeal is general, and contains no (*c*) certain time of the offence committed.

had been by bill, and thereupon the party had been outlawed, though, before appearance, the escheat had related to the time of the fact committed to avoid mesne incumbrances; for in the declaration in the one case, and in the bill in the other, the year and day of the felony is set forth. Hal. Hist. P. C. 261, 262.

As to goods and chattels, the very issuing of the writ of exigent in case of treason or felony gives to the king, or the lord of a franchise to whom that liberty is granted, the forfeiture of all the goods of the party so put in exigent, from the time of the *teste* of the writ of exigent. Co. Lit. 288. b. 41 Ass. 15.

And as the award of the *exigent* gives the forfeiture, so, if that be well awarded, the forfeiture shall continue, though the outlawry be reversed for error in law or in fact, subsequent to the award of the exigent; for the king's title being by the exigent, and that being of record, must be awarded by matter of as high a nature; therefore it is necessary for a party outlawed in treason to bring his writ of error specially, *tam in adjudicatione brevis de exigi facias quam in promulgatione utlagariæ*. Also a writ of error lies to reverse the very award of the exigent; and though no error subsequent to the award of the exigent will avoid it, yet, if there be error in the exigent, or in the appeal or indictment upon which it issues, both outlawry and exigent shall be reversed. Staunf. P. C. 184. 41 Ass. 15. 4 E. 3. 17. 5 Co. 111. a.

And as the award of the exigent gives the forfeiture of the goods, so the outlawry gives the forfeiture or loss of the lands of the party outlawed; but the bare judgment of outlawry by the coroners, without the return thereof of record, is no attainder, nor gives any escheat, but it must be returned by the sheriff with the writ of *exigi facias*, and the return indorsed. Co. Lit. 197.

And therefore, if there be a *quinto exactus*, and thereupon *utlagatus est per judicium coronatorum*, but no return thereof be made, there lies a writ of *certiorari* to the coroners, or to the sheriff and coroners, to certify the outlawry into the King's Bench; but this is only either to ground a charter of pardon on it, or to amerce the sheriff where he returned only a *quarto exactus*. And as to the effect it has otherwise, my Lord Chief Justice *Hale* thinks as follows: Reg. 284. Dyer, 223. a. 317. a.

1st, That it doth not disable the party to bring an action, because in relation to party and party it stands as nothing, till returned by the sheriff. Dyer, 317. a. 2 Hal. Hist. P. C. 206.

2dly, That, consequently, barely upon such a return of an outlawry upon a *certiorari*, without the writ of exigent indorsed and returned together with the *certiorari*, it seems no escheat lies for the lord. But this he makes a *quære*. 2 Hal. Hist. P. C. 206.

3dly, But, if the writ of *certiorari* be directed to the sheriff and coroners, and the writ of exigent be extant in court, and they return this outlawry, possibly this may be a sufficient warrant to enter it of record, as a return upon the *exigent* for the king's advantage, and to issue upon it a *capias utlagatum* to have the forfeiture of his goods. 2 Hal. Hist. P. C. 206, 207.

4thly, But unless the writ is some way returned or extant, it gives the king no title to land or goods, for the writ of *exigi facias* is the warrant of the outlawry, and that which gives the coroners their authority in such a case to give judgment of outlawry; and it is not like the case where there was once a writ and return of outlawry, and the record since lost; for that, upon circumstances, a jury, upon the general issue, may find a record, though not shewn 2 Hal. Hist. P. C. 207.

shewn in evidence ; but, here, the writ was never in truth indorsed or returned.

2 Hal. Hist.
P. C. 207.

5thly. But if the writ of *certiorari* were directed to the coroners alone, though it may be a ground to cause the sheriff to mend his return, and make it according to the truth ; yet the certificate of the coroners will not make a record to entitle the king or lord to any thing without the writ of exigent extant, and the return upon it amended by the sheriff ; for without the *exigi facias*, and the return of the outlawry upon it, there is neither disability, forfeiture, nor escheat ; and therefore, a *certiorari* shall not be so much as granted to the coroners to remove an outlawry after the party's death.

Hard. 101.
Attorney-Gen-
eral v. Sir
Ralph Free-
man.

A. was outlawed, and afterwards made a lease of his lands, and afterwards these lands amongst others were found by inquisition ; and this lease was pleaded in bar, to bind the king, being before the inquisition ; the court held, that a lease or other estate, made by the party after outlawry, and before an inquisition taken, will prevent the king's title, if it be made *bona fide* and upon good consideration, but if it be in trust for the party only, it will not be a bar ; but that no conveyance whatsoever made after the inquisition will take away or discharge the king's title.

Hard. 176.
Hammond's
case.
(a) Any one
that has an
estate or a
right, may
grant the same
over, if his title
be precedent
to the out-
lawry. Hard.
422.—*A.* owes

A. was outlawed at the suit of *B.*, and his lands extended ; afterwards *C.* claiming title to them brought his ejectment, and pleaded to the inquisition ; and upon a bill in the Exchequer, an injunction was prayed for the king to stay the proceedings at law, but denied ; for though a person outlawed cannot after an extent prevent the king's title by any alienation whatsoever ; yet such outlawry gives no (a) privilege to the possession of a disseisor, but that the disseisee may enter and bring his ejectment ; for by the outlawry the king had no interest in the land itself, but only a title to recover the profits.

money to *B.* on a judgment, and to *C.* on a bond ; *A.* is outlawed at the suit of the obligee, and his lands seized on the outlawry ; the question was, Whether the conusee of a judgment could extend those lands ? it was held the outlawry should be preferred, and that the king's hands should not be moved, unless the conusor could shew covin and practice between the obligor and obligee. 2 Salk. 495. pl. 2. Attorney-General v. Baden.

Raym. 17.
Lev. 33. Keb.
57. 74. 76.
Windsor v.
Seywell.

It was found by special verdict in ejectment, that *A.*, being outlawed in a personal action, levied a fine, and the king seized the lands in the hands of the conusee ; and it was resolved that if the seizure was before the fine levied the king may well retain against the conusee, but if the fine was levied before the seizure the conusee may well take.

Salk. 395.
Carth. 442.
S. C. And that
if a person
outlawed do
alien his lands
before any in-
quisition taken
for the king,
which he may
lawfully do, yet
precedent.

From these cases the law seems to be now settled, as laid down in *Salk. viz.* That by a bare outlawry the party immediately forfeits his personal goods, and they are vested in the king, but that he does not forfeit the profits of his lands, nor chattels real, till inquisition taken ; and that therefore an alienation after outlawry, and before inquisition, is good to bar the king of the pernancy ; but if he makes a feoffment after inquisition, the feoffee has the estate, and the king shall have the profits.

the alienee must plead off the extent in the Exchequer, by shewing his title

[As to the preference upon outlawries, the following differences were stated by *Parker C. B.*, as settled in *Easter term*, 11 W. 3. 1699. First, Where there are two outlawries at different times, the first inquisition shall prevail; this was *Bradnell's case*, *Mich.* 36 Car. 2. Secondly, Where there are two outlawries on one day, the first inquisition shall be preferred: this was *Pain and Dew's case*, *East.* 21 Car. 2. Thirdly, Where there are two inquisitions on one day, the first outlawry shall be preferred. And, fourthly, Where there are two outlawries on one day, and both inquisitions on one day, there the first lease shall be preferred.]

4. Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.

When the outlawry is returned on the *exigi facias* by the sheriff, and recorded in court, execution may be taken out against the party outlawed, either general, to arrest the body, or special, to arrest the body and extend the goods and lands, as also debts and *choses in action* belonging to the party outlawed; and when such inquisition is returned by the sheriff, transcript of the outlawry and inquisition is transmitted into the Exchequer: and thereupon, if any debt be returned due from any one to the outlawed, on application to the *Exchequer*, a *scire facias* issues to such person, to shew cause why the king should not have such sum so found due on the inquisition to the outlawed. And the reason of returning the transcript of the record into the Exchequer is, *ad ulterior. execution. predicto domino reg. per eand. Cur. de Scacc. superinde fiend.*: for when the inquisition has returned the outlawed to be possessed of any goods or lands, the property of those goods belongs to the king, since the outlaw, being out of the king's protection, cannot enjoy any thing, and the profits of the land are to be seized into the king's hands; but the lands themselves are not forfeited, unless it be in capital cases: in other cases, the profits are seized whilst the party continues outlawed; and therefore the transcript of this record is sent into the Exchequer, that the court of ordinary revenue may have it in charge. But the Court of Exchequer (a) usually grants a *custodiam* to such person as sued out the outlawry.

Hard. 422.
Carth. 441.

(a) That the king is to satisfy the party at whose suit the outlawry was taken out; but this, *per Popham, C. J.* is *de gratiâ*, and not *de jure*, *Yelv.* 19.

[1 P. Wms. 690. S. C. cited in argument. 2 P. Wms. 269. S. P. And the court will not subject the property to the debt of the party, unless he obtain a grant of it under the Exchequer seal, and make the attorney-general a party. *Balch v. Wastall*, 1 P. Wms. 445. *Rex v. Fowler*, *Bunb.* 38. ——— *v. Broomley*, 2 P. Wms. 269.]

The king by his prerogative is to have *bona felonum et fugitivorum*; and (b) though the lord of a manor or other private person may claim them, yet that cannot be by prescription, but must be way of grant; for every prescription must be immemorial; and the goods of felons and fugitives cannot be forfeited without matter of record, which presupposes the memory of that continuance. (c)

Durham, he having a grant of *bona fugit.* in *Durham*, should have the goods, *vide Lane*, 90, 91. 2 Roll. Abr. 808. [(c) Although they may not be claimed immediately by prescription, yet may

4 E. 3. 16.
5 Co. 102.
(b) Outlawry in *Northumberland* for a debt in *Durham*, whether the king, or Bishop of

may they be had obliquely, or by a mean by prescription; for a county palatine may be claimed by prescription, and by reason thereof to have *bona et catalla preditorum, felonum, &c.* Co. Litt. 114. b. *Durham* is a county palatine by prescription. 4 Inst. 216.]

Co. Litt. 288. There is a difference said to be between an outlawry of mesne
b. Cro. Eliz. process and after judgment; that, as to the first, the party hath
707. But in no interest, but that the whole benefit of the forfeiture accrues to
2 Lev. 50. it is the king.
held, that
there is no difference between outlawries before and after judgment.

Cro. Jac. 619. If a *capias ad satisfaciendum* issues upon a judgment in an
Moor and Sir action of debt, and the sheriff returns *non est inventus*, and after
George Rey- a *capias utlagatum* issues, upon which the party is taken and im-
nolds, S. P. prisoned, and he is let to go at large, the party that recovered
But by Bridg. may have an action of debt for this escape against the sheriff,
67. it appears because of the prejudice to him (*a*), he being in execution as well
to have been for his benefit as for the king's.
an action
upon the case.

[Throgmorton v. Church; 1 P. Wms. 693. S. P. Leighton v. Walwin, 1 Roll. Abr. 800. 895.
Cro. Eliz. 706. S. C. by the name of Leighton v. Garnous, 5 Co. 88. S. C. Moor, 566.
S. C. Yelv. 20. S. C. cited. 5 Mod. 201. S. C. cited.] (*a*) Although the *capias utlagatum*
issue after the year, so that the defendant could not be in execution without prayer, yet case
lies; for the plaintiff was prejudiced by the escape; for he ought not to be discharged, till he
found sureties to satisfy the plaintiff by the stat. 5 Edw. 3. c. 13. 5 Co. 89.

Cro. Eliz. 652. So if a *capias utlagatum* issues upon an outlawry upon mesne
Bonner v. process, and the defendant is taken and suffered to escape, an
Stokeley, action upon the case lies; because the plaintiff is thereby de-
adjudged. layed of his debt.
Moor, 641.
pl. 882. S. P. adjudged. [Cooke v. Champness, Fitz. 265. S. P. Stanton v. James, 1 Lutw.
110. S. P.]

Wolf v.] If within the year a *capias ad satisfaciendum* issues on a judg-
Davidson, ment, and the defendant is thereupon outlawed, and two years
1 Salk. 381. after taken upon a *capias utlagatum*, and the sheriff suffers him
5 Mod. 200. to escape, debt will lie against him; for the defendant was in
S. C. ad- execution at the suit of the plaintiff, without prayer, inasmuch as
judged. the plaintiff was at the end of his process, and no continuance
Comb. 373. nor *scire facias* lay after the *capias utlagatum*, which, being sued
S. C. adjud- at the charge of the plaintiff, imported an election of the body.
ed. Comb. 373. *at the charge of the plaintiff, imported an election of the body.*
S. C. ad-
journd; and Holt C. J. said, he never understood the diversity taken in the case where within
the year and where after. 1 Sid. 380. S. P. adjourned.]

Yelv. 19. If *A.* hath judgment in debt against *B.* for 50*l.*, and thereupon
Jennings v. he takes out a special *capias utlagatum* against him, and *J. S.*
Hatley, ad- promises that, in consideration of his staying any further pro-
judged by ceeding on that writ, he the said *J. S.* will satisfy him the debt,
three judges unless *B.* do it before such a day; an *assumpsit* lies on this pro-
cont. Popham. mise; for the plaintiff is at the charge of suing out the writ, and
hath the carriage of it; and the party shall be in execution at
his suit, and the king is to satisfy him out of the goods of the
party outlawed; although it was objected, that the consideration
was against law, being in delay of justice, and that the whole
benefit accrued to the king.

2 Vent. 89, 90. But it hath been adjudged, that an action on the case will not
Dawson v. lie against the sheriff for neglecting to extend or seize the goods
and

and lands of a person outlawed upon a *capias utlagatum*, because it is the king's loss; and though it was urged, the sheriff's extending and seizing would be a means to enforce the defendant to appear to the plaintiff's action, this, the court said, was so remote, as not to be considered as a ground to support an action: but if it had been shewn that the sheriff might have taken his body, and had neglected to do it, there might have been more reason to support the action.

The Sheriffs of London.

When after the extent the lands are leased out, or a *custodiam* granted to him at whose suit the outlawry was had, the lessee shall account only according to the extended value; and if they happen to be extended too low, the party hath no remedy but by taking out a *melius inquirend.*, and thereby having them extended at a greater value.

Hard. 106.
Marters v.
Whitefield.

If by the inquisition the lands of the person outlawed are found in the particular occupation of such and such persons, but the value of every particular parcel is not found, but by the lump that *in toto* the lands are of such a value, this is a good finding. inquisition ought to be as certain as an indictment

Hard. 6, 7.
Crosse's case;
et vide Hardw.
58. where it
said, that such
or declaration.

It was found by inquisition upon an outlawry, that the party outlawed was seised in fee *de sex clausis prati et pasturæ*; and it was objected, that the inquisition was void for uncertainty; *per Hale C. B.*, an inquisition found *de uno messuagio sive tenemento* has been held good; because it is not an office of entitling but of instruction or information, which does not require such precise certainty as an office of entitling does: so in an inquisition upon an extent upon a statute or judgment, or in dower, such certainties suffice, else all such inquisitions were liable to be quashed, which would annul all such proceedings; which would be mischievous; and such inquisitions have not used to be quashed for want of such precise certainty.

Hardw. 191.
Wilford v.
Greaves.
[2 Salk. 469.
Bunb. 103.]

A bill was exhibited by the attorney-general against a person outlawed, to discover his real and personal estate, and what secret and fraudulent gifts and conveyances he had made, because by the outlawry his goods and the profits of his land were forfeited; to which the defendant demurred; *quia nemo tenetur prodere seipsum*, and to discover his estate upon a forfeiture; but the court held, that he ought to answer the bill; because the king is entitled to his estate by course of law, and the outlawry is in the nature of a gift to the king, or a judgment for him; and a common person may have a bill of discovery in the like case to entitle him to take out execution.

Hard. 22.
The Protector
v. Lord
Lumley.

Also, in case of outlawry it is said to be the course of the Exchequer to prefer an information in nature of trover and conversion against him who hath the goods of a person outlawed.

Mod. 90.

3. *Of the Party's Disability to bring any Action.*

A person outlawed cannot regularly maintain any action, for by his contumacy he is out of the king's protection, and shall

Lit. § 197.
Co. Lit. 128.

(a) But a person outlawed may be sued, being to his prejudice. Noy, 1. Sid. 60. *Utlagatus legem terræ amittit*. Glanvil, lib. 2. c. 3. *Respondra a tous, mes nul respondra a luy*. Cro. Jac. 426. cited from Britton and Bracton.

28 E. 3. 92. This disability may be taken advantage of by pleading the
22 Ass. pl. 47. same in bar or abatement, with this diversity, that it may be
63. pleaded in abatement in all cases, but it cannot be pleaded in
5 Co. 109. bar, unless the ground or (b) cause of the action be forfeited; as,
Co. Lit. 29. in felony, where it may be pleaded in bar to all actions concern-
2 Ld. Raym. ing lands and tenements, as well as goods and chattels, because
1006. all are forfeited by the felony.

(b) If the demandant in a *cessavit* be outlawed in a personal action, this outlawry may be pleaded in bar of the action, because the arrearages are due to the king. 2 Inst. 298.

Dyer, 227. But, though it cannot be pleaded in bar, unless the ground or
in margin. cause of action be forfeited, nor in actions where the damages
3 Leon. 197. are uncertain; yet, it is now held, that in actions on the case,
Owen, 22. where the debt to avoid the law-wager is turned into damages,
Cro. Eliz. 203. there outlawry may be pleaded in bar; for it was vested in the
2 Vent. 282. king by the forfeiture, as a debt certain due to the outlaw; and
3 Lev. 29. the turning it into damages, whereby it becomes uncertain, shall
not divest the king of what he was once lawfully possessed.

Jon. 239. It hath also been held, that outlawry may be pleaded in bar
Lutw. 1604. after it is pleaded in abatement (c), because the thing is forfeited,
[(c) It is stated in Lutw. as and the plaintiff has no right to recover.
having been so said in 11 H. 7. pl. 27. But no such dictum is to be met with in the place referred to. The decision in Jon. 239. was, that the defendant may plead outlawry in bar to a *scire facias* by the plaintiff after imparlance.

And. 36. The disability cannot be taken advantage of until the exigent
Co. Lit. 128. be returned; for the enquiry after the party in the county is, in
Dyer, 317. order that he may appear; and therefore, if he does appear at
a. pl. 6. the return of the exigent, the law is satisfied, and the outlawry
2 Roll. Abr. must not be recorded against him.
305.

Co. Lit. 128. a. Also this disability is only pleadable when the plaintiff sues
Doct. Pl. 390. in his own right; for if he sues *en auter droit*, as executor, administrator, or as mayor with his commonalty, outlawry shall not disable him, because the person whom he represents has the privilege of the law, and outlawry being no objection to his representation, it is no objection but he should be answered.

2 Mod. 267.; But it hath been held, that to an information against a justice
et vide of peace, for refusing to grant his warrant to suppress a conventicle, outlawry in the informer is a good plea, though objected that he sues in right of the king; for as to a moiety he recovered to his own use, which he cannot do by reason of this disability.

Preced. Chan. Again, a relator in his information set forth, that he and the
13. defendants were part-owners of several coal mines in *Derbyshire*,
Attorney-General of the Duchy at the relation of Mr. Vermuden v. Sir John that the king had a duty of lot and cope out of all the lead-mines there; that by the custom, if one owner were at the expense of improving and working a mine, all the owners ought to contribute and bear their part of the charge; that the relator had
been

been at great charges in making soughs and other things for working and improving the mines, without which they could not be wrought, and so the king would lose his duty; and that the defendant would not contribute nor pay any part of the charge; therefore to make him account with the relator, and pay his part of the charge, was (amongst other things) the scope of the information. To this the defendant pleaded an outlawry in the relator; and after much debate the plea was held good; for though the Attorney-General be plaintiff, yet the relator is to have the whole benefit or loss of the suit, and is himself party to it, for it would abate by his death, &c.; and the king's name is only made use of by the form of the court, and he is not directly concerned at all, and very little by consequence, and the suit is not for the king's duty, but the relator's interest.

well as relator; for outlawry cannot be alleged in disability of a *mere* relator. Mitf. Eq. pl. 186.]

Heath *et al.*
in the Duchy-
chamber
coram Ch. B.
Atkins and
Ventris J.;
et vide
2 Bulstr. 134.
which seems
cont., et vide
And. 30.
[The relator
in this case
seems to
have
sustained the
character of
plaintiff, as
Mitf. Eq.

If there be two tenants in common of a rectory for years, and one of them be outlawed, yet the other, on setting forth this latter, may have an action of debt for a moiety.

Sid. 49.

If the party outlawed bring a writ of error to reverse the outlawry, the outlawry in that suit, or any stranger's, shall not disable him; for if he were outlawed at several men's suits, and one should be a bar to another, he could never reverse any of them: and if it be for error in the same outlawry, the outlawry itself is no objection, for that would be *exceptio ejusdem rei cuius petitur dissolutio*: nor is another outlawry pleadable in bar to such writ of error, for then two erroneous outlawries would be irreversible; which would amount to *exceptio ejusdem, rei, &c.* So if there be an attaint brought on a verdict, outlawry grounded on that verdict shall not be pleadable in bar, for the above reasons.

Co. Lit. 128.
Raym. 46.

As this is a dilatory plea, when it is pleaded in another court than where the outlawry issued the defendant must bring it in immediately; for this being in delay, if the court should give time, and it should not be brought in, delay of justice would be from the court; and since there is a way of having it immediately, by producing it under the great seal, no time shall be given to bring it (a) *sub pede sigilli*. But otherwise, when it is in the same court, for then the record is already in court.

10 Ass. 10.
Doct. Pl. 396.
6 Co. 53.
5 Co. 88.
8 Co. 142.
(a) That out-
lawry must be
pleaded *sub*
pede sigilli,
otherwise the

plaintiff may refuse it, but he shall not afterwards demur for that cause. Salk. 217.

In pleading outlawry in disability in another court, the ancient way was to have the record of the outlawry itself *sub pede sigilli* by *certiorari* and *mittimus*: but this being very expensive, it is now held to be sufficient to plead the *capias utlagatum* under the seal of the court from whence it issues; for as the issuing of the execution could not be without the judgment, the execution is a proof to the court that there is such a judgment; which again is a proof by matter of record of the defendant's plea of a matter of record, whereby it appears to the court not to be merely dilatory; and therefore on shewing such execution, if the plaintiff will

Co. Lit. 128.
Doct. Pl. 392.
394.

plead *nul tiel record*, the court will give the defendant a day to bring it in.

Fitz. Coron.
233. a.
12 E. 4. 16.
Doct. Pl. 396.
Co. Lit. 128.
2 Roll. R. 38.
Cro. Car. 566.

Outlawry in a county palatine cannot be pleaded in any of the courts at *Westminster*, for the party is only ousted of his law within that jurisdiction; and it shall not extend to disable a man in another county where they have no power; for the county palatine being a royal jurisdiction within bounds, the losing of the privileges of the law within that jurisdiction can be no disadvantage to him in another county; and if he does not live within the palatine jurisdiction, he is not obliged to attend there. But it seems, that outlawry in the county palatine of *Lancaster* may be pleaded in the courts of *Westminster*; because that county was erected by act of parliament in *Edward III.*'s time; but *Durham* and *Chester* are by prescription.

Doct. Pl. 397.
5 Co. 90.
Moor, 73.
Dyer, 228.
Cro. Jac. 484.
Salk. 329.
2 Roll. R. 58.
Yelv. 36.
8 Co. 142.
Brownl. 83.

If outlawry be pleaded either in bar or abatement, and the plaintiff reply *nul tiel record*, and the defendant have a day given him to bring in the record, and in the interim the plaintiff remove the record by writ of error, and reverse it; though the defendant fail in bringing in the record, yet this shall not be fatal and peremptory on him; for, in the first case, he shall have liberty to plead a new bar; and in the second, the judgment shall only be a *respondeas ouster*; because his plea was a true plea at the time of pleading it, and the plaintiff was actually disabled from suing, not having then his *liberam legem*.

Co. Lit. 128.
Doct. Pl. 397.

So, that outlawry does not abate the writ, but is only a temporary impediment that disables a plaintiff from proceeding; for, upon obtaining a charter of pardon, or reversing the outlawry, he is restored to his law, and shall oblige the defendant to plead to the same writ.

Cro. Jac. 425.
Piers Griffith
v. Hugh Mid-
dleton.

Audita querela to avoid a statute upon the statute of usury; to which the defendant pleaded outlawry in the plaintiff at the suit of *J. S.*; on demurrer it was insisted that outlawry could not be pleaded in this case, the suit being only by way of discharge, and not to recover any thing; but it was held, that a person outlawed is not receivable to sue in any court, unless it be to reverse his own outlawry; and the Chief Justice said, that where the action is *ad lucrandum*, there ought to be ability in the person, and that it is all one to gain by way of discharge, as by way of perquisition.

Cro. Jac. 616.
Bythal v.
Harris, ad-
judged by
three Judges
v. Houghton.
(a) But it was
agreed, that if
two plaintiffs
in debt be

But where error was brought by six to reverse a judgment in ejectment, and the defendant in error pleaded outlawry in one of the plaintiffs, the plea was held ill on demurrer; because this was only a commission which went in (a) discharge, and in which all the plaintiffs were obliged to join: it was also said in this case, that it would be very mischievous upon an outlawry in case of (b) error, attain, or *audita querela* which are only by way of discharge, if this should be any bar.

barred, and bring error, the outlawry against one is a good bar against the other, because they are to recover. Cro. Jac. 616. (b) But for this, *vide* Cro. Eliz. 648. 6 Co. 25. Cro. Jac. 171.

A person

A person is outlawed in debt, and taken upon a *capias* and committed to the *Fleet*; the keeper of the *Fleet* lets him escape voluntarily; and afterwards the executor of the plaintiff in debt takes him in execution again upon a new writ; and upon this second taking he brings an *audita querela*: to this outlawry in the plaintiff in the *audita querela* was pleaded; upon which plea he demurred; and it was resolved, that outlawry was a good plea in this case in disability of the plaintiff; because that this writ is not directly to reverse the outlawry (as a writ of error is), but is founded upon a wrong, *viz.* upon the escape, and not upon the record only.

Sid. 43.
Jason v. Kete.

In debt upon a judgment brought in *Trinity* term, the defendant imparled till *Michaelmas* term, and then pleaded in bar, that the plaintiff *die hunc prox. post test. Sanct. Martini* was outlawed; to which the plaintiff demurred. It was urged, that the outlawry was mesne between the action brought and the plea pleaded, and that all matters in discharge of the action, which happen after the action brought, ought to be pleaded *puis darrein continuance*. But the court compared this to the common case of a judgment confessed by an executor after an action brought, which is never pleaded *puis darrein continuance*, but as this case is; and in these cases, the time of the outlawry, and the time of the judgment, and when it was, appear in themselves.

Salk. 178. pl. 3.
Moorv. Green.
5 Mod. 11.
S. C.

In pleading outlawry it hath been adjudged that the defendant must conclude his plea with a *prout patet per recordum*, and not *hoc paratus est verificare*.

3 Lev. 29.

If the defendant after imparlance pleads outlawry in bar, and the plaintiff replies *nul tiel record*, and the defendant hath a day to bring in the record, and fails therein, judgment shall be given absolutely against him, and not a *respondeas ouster*.

Cro. Car. 566.
Dawson v.
Lee.

If ten outlawries on mesne process be pleaded in disability of the plaintiff, this is naught for duplicity; for though there be a difference as to pleading double between pleas in bar and abatement, there is likewise a difference between a plea of an outlawry in disability and other pleas in abatement; and the court held this plea ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required.

Carth. 8, 9.
Trevelian v.
Seccomb.
Show. 80.
S. C.

Outlawry may be pleaded to a bill in equity, as well as to an action at common law; and in this case the defendant need not set down the plea, as he must other pleas and demurrers, in eight days, or they must stand over-ruled; but the plaintiff must set it down, if there be any insufficiency in point of form in pleading; for being *sub pede sigilli* it appears, upon the shewing of it, to be a good plea, and therefore not presumed to be necessary to be argued before the court. If an outlawry be not pleaded yet it may be shewed at the hearing as a peremptory matter against the plaintiff's demand, if it be personal; because it shews the right of the thing in demand to be in the king. If a plea of outlawry stand allowed, whereby the suit is put *sine die*, and after the outlawry be reversed, the plaintiff must bring his bill of revivor;

This plea must
be on oath.
2 Vern. 37.
[But plea of
an outlawry
with the com-
mon averment
of the identity
of the person
need not be on
oath. *id.* 198.]

vivor; because that suit being abated, the defendant has no day in court, and therefore must be brought into court by a new process.

(a) That to avoid pleas of outlawry, the plaintiff may make all that have outlawries against him defendants. 2 Vern. 109. *per Hutchings* Ld. Commissioner.

But, if the bill be for relief against an action at law, and an outlawry be pleaded by the defendant in the same action, it will not be allowed (a); because the outlawry is part of the grievance, and it is *exceptio ejusdem rei cuius petitur dissolutio*. Also, as at law, an outlawry in an executor, administrator, or guardian, is no good plea, because they do not claim in their own right; and the real actor being the testator or infant, the outlawry in any third person is no exception against him why he should not share *in judicio*.

Loukes v. Holbeach, 4 Bing. 419.

|| A person outlawed cannot be heard to make a motion for his benefit in court—*e. g.* a motion to set aside an annuity.||

4. What further Disabilities Outlawry subjects the Party to.

Co. Lit. 6. b. *et vide tit.*

Persons outlawed are under several other disabilities, besides that of bringing an action; such a one cannot be a juror, because he is not *liber et legalis homo*, as the law requires. (b)

Juries. ||(b) Persons under outlawry are now expressly excluded from being jurors by 6 G. 4. c. 50. § 3.||

Vide tit. Evidence.

But one outlawed in a personal action may be a witness though he cannot be a juror.

Co. Lit. 6. b.

A person outlawed cannot be an (c) auditor to take accounts.

(c) But a person outlawed may be a private attorney. Co. Lit. 52. a. — May be executor or administrator, *vide tit. Executors and Administrators*. — Incapable of executing an office in a corporation. Carth. 199. Show. 288. ||The outlawry in this case was on an indictment for treason; and see Cro. Car. 147.||

2 Hawk. P. C. c. 24. § 4.

One outlawed in a personal action cannot be an approver; because by his outlawry he is out of the law, and his accusation shall not be of such credit as to put any person on his trial.

Bulst. 29.

If a man pledge goods and then is outlawed, he cannot redeem them; because then the absolute property of them is in the king: but if the outlawry be reversed, then the outlawed person is reinstated in his property as if there had been no outlawry, and therefore may redeem.

Co. Lit. 8. b.

Persons outlawed in debt, trespass, or other civil action, may be heirs.

Brook, 82.

If a husband be outlawed in trespass, or any civil action, the wife shall have dower, for this works no corruption of blood, or forfeiture of lands: so likewise, it seems, if the wife be outlawed or waived in such actions, yet her (d) dower is not forfeited.

(d) So, a husband shall be tenant by the courtesy though he be outlawed in a civil action. 5 Co. 110. Co. Lit. 92. b. 591. a.

Owen, 116.

A. being outlawed, the queen granted him a lease for years, rendering rent; he was again outlawed after the grant, but before any seizure there was a pardon of all goods and chattels forfeited; and it was adjudged, that a person outlawed was capable of receiving a lease, and that by the pardon the term, which was forfeited, revived, and was restored again.

Knowles v. Powel. Moor, 237. S. C.

It is held that where clergy is allowable, it shall be as much allowed to one who is outlawed by common law for felony, as to one who is convicted by verdict or confession. Also, a statute taking away the benefit of clergy from those who shall be found guilty, doth not thereby take it from persons who are outlawed; neither doth the statute of 25 H. 8. c. 1. § 3. which takes away clergy from those who are found guilty after the laws of this realm, extend to persons outlawed. (a)

By the statute of *Westm.* 1 Edw. 1. c. 15. it is enacted, that if a person be attaint by outlawry of any felony he is not bailable: but it is held, that the Court of King's Bench may in their discretion, in some special cases, bail a person upon an outlawry of felony; as where he pleads that he is not of the same name with the person that was outlawed, or alleges any other error in the proceedings.

|| Whether a person outlawed in a civil action can vote at elections of members of parliament does not appear expressly settled, though the objection has sometimes been made. Where the vote is in right of a freehold estate he would seem disqualified, at least after inquisition found, since the king then becomes entitled to the rents and profits. Where the franchise is of a personal nature, it seems that the vote is unobjectionable.

It has been held, that outlawry in a civil suit does not render a candidate ineligible; but this was before the statute 9 Ann. c. 5. ||

11 Co. 29. 31.
2 Hawk. P. C. c. 33. § 28. 62.
Fost. 358.
[(a) For this point see Hawk. P. C. *ubi supra*, 4 Term R. 543.]

1 Ed. 1. c. 15.
2 Inst. 187.
2 Hawk. P. C. c. 15. § 40.

Dodd's Doubtful Questions in Election, Law stated, &c. chap. 3.

Ibid.

(E) *Of the Regularity of Proceedings on an Outlawry, and (b) for what Errors it may be reversed:*
And herein,

1. *Where, for want of such Process as is required by Law, the Outlawry may be reversed.*

THE forfeitures and penalties in an outlawry being so severe, great care hath been taken and caution used that no person should be outlawed without sufficient notice, and great contumacy to the process of the court; and therefore the law requires that in all civil causes, and in every indictment or appeal for any crime under the degree of capital, there should be three *capiases* to the sheriff of the county where the action or prosecution is commenced, before the exigent is awarded; and if any such process is omitted, the outlawry is erroneous.

But (c), after judgment upon a *capias ad satisfaciendum*, an exigent may be awarded, with an *alias* and *pluries*, and thereupon the defendant be outlawed; because he having been already in court before judgment, and having consance of the debt, ought to pay the debt on the first suing out of the *capias*; otherwise it is a contumacy in not performing the judgment of the court, for which disobedience he is put out of the king's protection. he resided. Cro. Jac. 577.— If one is outlawed in *Middlesex*, a *capias utlagat.* may be sued out against him in any other county without a *testatum.* Vent. 33. 2 Hal. Hist. 198.

(b) By statute of recusancy the outlawry of a recusant not to be reversed for want of form. 5 Mod. 141. 5 H. 6. 9. Roll. Abr. 793. Finch of Law, 351. 355. Rast. Ent. 188. pl. 18. Co. Lit. 259.

40 E. 3. 25. pl. 28. Finch, 476.

(c) So, after judgment, there need not be any proclamations to the county where

2 Hawk. P.C.
c. 27. § 116.

(a) But *vide*
2 Hal. Hist.
P. C. 194, 195.

It is said to be agreed, that one *capias* before the award of the exigent hath always been sufficient in an indictment or appeal of death, or high treason, but that it seems doubtful whether two *capiases* were not required by the common law in all indictments and appeals of any other felony. However, says *Hawkins*, it is (a) certain that they are required in all indictments of any other felony by 25 E. 3. c. 14. by which it is enacted, "That if after any man be indicted of felony before the justices in their sessions, to hear and determine, it shall be commanded to the sheriff to attach his body by writ or precept, which is called a *capias*; and if the sheriff return that the body is not found, another shall be incontinently made, returnable at three weeks after, wherein it shall be comprised, that the sheriff shall cause to be seized his chattels, and safely to keep them till the day of the writ or precept returned; and if the sheriff return, that the body is not found, and the indietee cometh not, the exigent shall be awarded, and the chattels shall be forfeit, as the law of the crown ordaineth; but if he come and yield himself or be taken by the sheriff or by other minister, before the return of the second *capias*, then the goods and chattels shall be saved."

2 Hawk. P.C.
c. 27. § 116.

It is said to have been the general opinion, that this statute extends to appeals, as well as to indictments, though it mention only the latter; but that it extends not to any indictment or appeal of death, though it speak of felony in general.

2 Hawk. P.C.
c. 27. § 115.

It is left a *quære*, if three *capiases* be still necessary in an appeal of rape, as they were at the common law, notwithstanding it be made felony by statute.

Rex v. Yandell, 5 Term R. 521.

[This statute doth not apply to a court of oyer and terminer, and gaol-delivery, but is confined to the sessions of the justices of the peace.]

2. *Where, for want of Form in such Processes, the Outlawry may be reversed.*

3 H. 7, 8. b. 9.
a. Sid. 100.
Dyer, 206.

(a) Where, for want of form in a writ of proclamation, and for

If any process required in an outlawry be erroneous, the outlawry for this may be reversed; for a person shall not be subject to any disadvantage in respect of having such process awarded against him, nor shall he be condemned barely for not appearing, where that which should have compelled him to have appeared is (a) defective.

improper abbreviations, the outlawry was reversed. *Style*, 182. — So where in the exigent it was *utlest*. for *utlagat*., the outlawry was reversed. *Style*, 227. So where it was *utlegat*. instead of *utlagat*. *Lev*. 164. — But it is said, that a defect in process in an outlawry may be salved by the defendant's purchasing a pardon, and shewing it to the court; for that supposes that there was such an outlawry against him as needed a pardon, which, if it were erroneous, it would not do. 2 Hawk. P.C. c. 27. § 111.

Cro. Eliz. 592.
2 Hal. Hist.
P. C. 199.

As where the *capias* was *este Edmundo Anderson*, without a *T*, for this error the outlawry was reversed; for the *capias* and exigent must be in the king's name, and under the judicial seal of the king appointed to that court that issues the process, and with the

the *teste* of the Chief Justice or Chief Judge of that court of sessions.

Every *capias* ought to be returnable the ensuing term, for the mischief that might otherwise befall the prisoner in being kept always in prison.

The *capias utlagatum* can issue only in term-time, being a judicial writ; yet, in pleading an outlawry, the party need not allege that it issued in term-time; for it shall be so intended, unless the contrary appears.

[It need not indeed be stated in express terms on a record of a judgment of outlawry, that a writ of *capias* issued; for it is sufficient, if it appears, "that the sheriff was commanded to "take the defendant."

Neither is it necessary in stating every writ to repeat the day and year when each was issued: it will suffice, if it appear by reference to the preceding parts of the record; as if, after stating that the *capias* was returned on such a day, it proceed, *Whereupon* the exigent was awarded; *whereupon* referring to the day when the *capias* was returned.

It need not appear on a record of outlawry, that the *capias* and exigent were sealed by the justices of oyer and terminer, &c.]

If the process be against the feme, and the words are, *quas recuperavit versus eum*, instead of *eam*; this is (a) such an error for which the outlawry may be reversed.

a writ of error, for that in the exigent it was fourteen in figures, and not in words. So where the year of the Lord was in figures, and not in words. Style, 334. — So where it was *ex insinuatone* for *ex insinuatione*, for want of *i* the outlawry was held to be erroneous. Cro. Jac. 577.

If the writ be *præcipimus vobis* instead of *præcipimus vobis*, this is erroneous; for without a command to the sheriff the writ is not good, and here, there is none; the word *præcipimus*, being senseless, is of no greater force than if omitted.

3. *Where, for Variance in such Processes, the Outlawry may be reversed.*

If there be a variance between the original and extent or other process, for this the outlawry may be reversed.

As, a variance between the original writ and filazer's rule.

So where in error to reverse an outlawry in trespass, in the original the plaintiff was named *Barnes*, and in the exigent *Bernes*; this was held error. So where in the original it was *Blaba sua*, and the exigent was *Blada*; this was held a plain variance, and the outlawry was reversed.

So where in the original the party was named *Agnes Gargrave*, of *Kingsly in com. Ebor.*, and in the exigent she is named *nuper de Kingsly*; this was held error.

|| Where

But for this
Cro. Eliz. 467.
Dyer, 175.
Lev. 143.
Litch. 11.
Lutw. 333.

Rex v. Perry,
6 Term R. 573.

Ibid.

Rex v. Yandell,
5 Term R. 521.

Cro. Jac. 577.
(a) So, an outlawry was reversed upon

2 Keb. 128.
— So where it was erroneous.

Style, 334.

Fitz. Utlagary,
41. Bro. Variance, 90. Misnomer, 80. Error, 172.

2 Leon. 120.

Cro. Eliz. 240.
Elden v. Barnes.

Cro. Jac. 576.

Bonner v.
Wilkinson,
5 Barn. & A.
682.

|| Where in an original writ the defendant was described as *T. B. of Callerton* in the county of *Northumberland*, and the error assigned was that *T. B.* was not, before or at the time of issuing the original writ, of or conversant in *C.* aforesaid, and that there was not any town, hamlet, or place of the name of *C.* in that county; and to this it was pleaded that plaintiff prosecuted his writ with intent to declare upon a bond of defendant, in which he was described as *T. B., of C.* in the county of *N.*; it was held by the court that this estopped the defendant from pleading that he was not of *C.* in the county of *N.*, and the judgment of outlawry was affirmed.||

4. *Where, for a defective Execution and Return, the Outlawry may be reversed: And herein,*

1. To whom such Process is to issue and be directed.

The exigent and several processes, in order to an outlawry, are to be directed to the sheriff of the proper county; and such care hath been taken that there might be no surprise in the affair, that in civil cases there are three several offices concerned in the issuing of such process: the first is the Chancery, out of which the original issues; the second, the filazer, who makes out the *capias*, *alias*, and *pluries*; and the third, the exigenter, who makes out the exigents; which several processes must be legally executed before the party can be said to be outlawed: therefore, if the sheriff returns a *cepi*, if he have not the body at the day, the court will not award an exigent on the suggestion of an escape, unless the sheriff will return one.

2 Hawk. P. C.
c. 27. § 17.

Cro. Jac. 576.

If the exigent be directed to the sheriffs of the city of *Lincoln*, and the direction be, *Quod capias corpus ejus ita quod habeas corpus ejus*, where (as it was objected) it ought to have been *capiatis et habeatis*; yet this is no error, for they are both but one officer to the court, and though in the end of the writ it was, *Ita quod habeatis ibi hoc breve*, this was likewise held to be good, and no way repugnant, being good both ways.

Hetley, 93.
Lit. Rep. 150.
S. C.

But if, in the direction of process of outlawry to the sheriffs of *London*, it be *precipimus tibi* instead of *vobis*; this is such an error for which the outlawry will be reversed, because that the court will *ex officio* take notice that there are two sheriffs in *London*.

Dyer, 223.
pl. 24. Bro.
Coron. 166.
3 Inst. 212.

Judgment of outlawry is given by the coroner at the fifth county-court, upon the party's not appearing to the exigent, (which is a writ, commanding the sheriff to cause the defendant to be demanded from county-court to county-court until he be outlawed &c.) and such judgment is entered thus, *Ideo, &c. per judicium coronatoris domini regis comitatus prædicti. utlagatus est.*

Co. Lit. 288.
Dyer, 317.

If the judgment appear not by the return of the exigent to have been given by the coroner, it is erroneous, except in *London*,

London, where the mayor by custom is coroner, and the judgment is given by the recorder.

Cro. Jac. 358. 531. pl. 6. 8 Co. 126. Cro. Eliz. 648. Palm. 43. Roll. R. 266.

If there be two coroners in a county the calling upon the exigent may be by one of them, and likewise one alone may give the judgment of outlawry; but it seems the return must be by two in ministerial acts; the name of the coroner must be subscribed (a) to the judgment of outlawry at the *quinto exactus* upon an outlawry of felony; and it must be subscribed also by the name of their office, *A. B. et C. D. coronatores*, unless in London, where the mayor is coroner; the sheriff's name and the office must also be subscribed to the return of the exigent, *e. g. A. B. armiger vicecomes*.

2 Hal. Hist. P. C. 204. [(a) It is not necessary, that the names of the coroners should be subscribed to the judgment of outlawry; it is sufficient if it appear on the record, that

the judgment of outlawry was given by them. Rex v. Yandell, 5 Term R. 541.]

If after the *quinto exactus* the coroners refuse to give judgment of outlawry the court will grant an attachment against them; and it is said that the coroners of *Stafford* for such an offence were fined 10*l.*; but after the judgment of the outlawry pronounced, they may (b) stay the return of the exigent to be advised, if the case requires it.

Noy, 113. An attachment granted against the coroners of *York*. (b) That a *certiorari* lies to return the out-

lawry, which must be returned by the sheriff on the *exigi facias*, and such return recorded in the court above. Dyer, 225. a.

By the statute of 34 H. 8. c. 14. the clerks of the crown, clerks of assize, and clerks of the peace, are to certify into the King's Bench the names of all persons outlawed, attainted or convicted; and upon letter from the justices aforesaid, certificates shall be made of such persons outlawed, attain, or convict, to the justices of goal-delivery.

2 Hal. Hist. P. C. 36.

2. To what Place the Process is to issue; and herein of the *Quinto exactus*, and Proclamations on an Outlawry.

The exigent must be sued to the county where the party really resides, for there all actions were originally laid; and because that outlawries were at first only for treason, felony, or very enormous trespasses, the process was to be executed at the torn, which is the sheriff's criminal court; and this held not only before the sheriff but before the coroners, who were ancient conservators of the peace, being the best men in each county to preside with the sheriff in his court, and who pronounced the outlawry in the county-court on the party's being *quinto exactus*; and therefore anciently there was no occasion for any process to any other county than that in which the party actually resided. But this matter being since altered, and the learning thereof depending on several acts of parliament, it will be unnecessary to take notice of the statutes themselves.

Fitz. Exigent, 26. Dyer, 295-

And first, it is enacted by the 6 H. 6. c. 1. "That before any 6 H. 6. c. 1.
" exigents be awarded against persons indicted in the King's
" Bench of treason or felony, writs of *capias* shall be directed as
" well to the sheriffs or sheriff of the county wherein they be in-
" dicted

“dicted as to the sheriff or sheriffs of the county whereof they be named in the indictments ; the same *capias* having the space of six weeks at the least, or longer time, by the discretion of the said justices, if the case require it, before the return of the same ; which writs so returned, the justices shall proceed in the manner as they had done before the statute ; and if any exigent awarded, or any outlawry pronounced hereafter against any such persons before the return of the said writs, the same exigent so awarded, with the outlawry thereof pronounced, shall be void and holden for none.”

8 H. 6. c. 6.

And it is farther enacted by 8 H. 6. c. 10. “That upon every indictment or appeal by the which any subject dwelling in other counties than where such indictment or appeal shall be taken of treason, felony, and trespass, before the justices of the peace, or before any other having power to take such indictments or appeals, or other commissioners or justices in any county, franchise, or liberty of *England*, before any exigent awarded, presently after the first writ of *capias* returned, another writ of *capias* shall be awarded, directed to the sheriff of the county whereof he who is indicted is or was supposed to be conversant by the same indictment, returnable before the same justices, before whom he is indicted or appealed, at a certain day, containing the space of three months from the date of the said last writ, where the counties be holden from month to month, and where the counties be holden from six weeks to six weeks, the space of four months, until the day of the return of the said writ, by which writ of second *capias* the sheriff shall be commanded to take him which is so indicted or appealed, by his body, if he can be found within his bailiwick ; and if he cannot be found within his bailiwick, to make proclamation in two counties before the return of the same writ that he which is so indicted or appealed shall appear before the said justices, &c. at the day contained in the said writ, to answer, &c. after which writ so served and returned, if he which is so indicted or appealed come not at the day of such writ returned, the exigent shall be awarded ; and that every exigent and outlawry otherwise awarded or pronounced shall be holden for none and void.”

But it is expressly provided, “That the above recited statute concerning process to be made before the king in his bench stand in force, and that this present statute shall not extend to indictments or appeals taken within the county of *Chester* : and that if any persons shall be indicted or appealed of felony or treason, and at the time of the same felony or treason supposed were conversant within the county whereof the indictment or appeal makes mention, the like process to be made against them as was used before.”

13 H. 6. c. 6.

And it is farther enacted by 10 Hen. 6. c. 6. “That such second *capias* as is required by 8 Hen. 6. c. 10. shall be awarded upon indictments or appeals removed into the King's Bench, or elsewhere, by *certiorari* or otherwise.”

51 Eliz. c. 3.

And by the 31 Eliz. c. 3. it is enacted, “That in every action
“personal

“personal, wherein any writ of exigent shall be awarded out of any court, one writ of proclamation shall be awarded and made out of the same court having day of *teste* and return, as the said writ of exigent shall have directed and delivered of record to the sheriff of the county where the defendant, at the time of the exigent so awarded, shall be dwelling, which writ of proclamation shall contain the effect of the same action; and that the sheriff of the county, unto whom any such writ of proclamation shall be directed, shall make three proclamations in this form following, and not otherwise: that is to say, one of the same proclamations in the open county-court, and one other of the same proclamations to be made at the general quarter sessions of the peace in those parts where the party defendant at the time of the exigent awarded shall be dwelling; and one other of the same proclamations to be made one month at the least before the *quinto exactus* by virtue of the said writ of exigent, at or near the most usual door of the church or chapel of that town or parish where the defendant shall be dwelling at the time of the exigent so awarded; and if the defendant shall be dwelling out of any parish, then in such place, as aforesaid, of the parish in the same county, and next adjoining to the place of the defendant's dwelling, and upon a *Sunday* immediately after divine service and sermon, if any sermon there be, and if no sermon there be, then forthwith after divine service; and that all outlawries had and pronounced, and no writs of proclamations awarded and returned according to the form of this statute shall be utterly void and of none effect.”

[By statute 4 & 5 W. & M. c. 22. § 4. made perpetual by 7 & 8 W. 3. c. 36. § 4. it is enacted, “That upon the issuing of any exigent out of any of their majesties' courts, against any person or persons for any criminal matter, before judgment or conviction, there shall issue out a writ of proclamation, bearing the same test and return, to the sheriff or sheriffs of the county, city, or town corporate, where the person or persons in the record of the said proceedings is or are mentioned to be or inhabit, according to the form of the statute made in the one-and-thirtieth year of the reign of the late Queen *Elizabeth*, which writ of proclamation shall be delivered to the said sheriff or sheriffs three months before the return of the same.”]

In the construction of these statutes the following opinions have been holden:

That though the words are express, that any outlawry pronounced contrary to the directions of the statute shall be void; yet it is not to be taken as if such outlawries were absolutely void, but only voidable by writ of error.

If a defendant be expressly named of the same county wherein he is indicted or appealed, and be also named under an *alias dictus* of another, it hath been adjudged, that there is no need of any *capias*, with a command for proclamation according to 8 H. 6. c. 10. because that which comes under the *alias dictus* is no way traversable nor material: Also, if a defendant be named of *B.* and late

Note: This statute extends the provisions of the 31 El. only to criminal cases before judgment: in those cases after judgment, no proclamations are necessary.

Cro. Eliz.
179.
2 Co. 59.
Plow 157.
Hob. 166.
2 Hawk.
P. C. c. 27.
§ 126.
2 Hal. Hist.
P. C. 195-6.

late of *C.* there is no need of any *capias* to the sheriff of the county wherein *C.* lies; because that it appears, that the defendant is at present conversant at *B.* But if a defendant be named of no certain place at present, but only late of *B.* and late of *C.* and late of *D.* &c. being all of them in counties different from that in which the prosecution is commenced, a *capias* shall go to the sheriff of every one of these counties.

Cro. Jac. 167.
Leech's case.

On a writ of error to reverse an outlawry upon the statute of 5 Eliz. c. 9. of perjury, the first error assigned was, that the defendant was indicted by the name of *N. L. de parochia de Aldgate*, and not shewn in what county *Aldgate* is. 2dly, For that a county-court was held 23 Feb. and the next county-court was held 23 March following, so as there was not twenty-eight days between these two county-courts, as there ought to be by the law, exclusive and not inclusive. And for the first cause it was reversed, although it was objected to be well enough because *Middlesex* was in the margin, so the parish should be intended to refer thereto; but because an indictment shall not be taken by intendment, and because the county in the margin shall be referred to the place where the offence was committed, and not to the indictment of the party; and by the statute of 8 H. 6. c. 10. there ought to be the addition of the place and county where the party indicted inhabits; therefore it was held to be ill, and reversed. For the second cause also, it was held to be erroneous; but *Tanfield* said that ought to be assigned as an error *in fait*, for it might be leap-year, and then it is good, and that matter issuable.

2 Hal. Hist.
P. C. 201-2.

If an *exigi facias* be delivered to the sheriff, and there be but two county-courts before the return, and the sheriff return the first and second *exactus, et non comparuit*, and that there were no more county-days between the delivery of the writ to him and the day of the return, there may issue a special *exigi facias* with an *allocato comitatu*, if it be prayed after the return, and before any new county-day be past; but if any county-day be past between the last of the former county-days and the return, no *exigi facias* shall issue with an *allocato comitatu*, but an *exigi facias de novo*; for the demand of the party must be at five county-courts successively held one after another without any county-court intervening: so, if after the second *exactus* the offender render himself, and find mainprize, and at the days of the return make default, no *exigi facias* with an *allocato comitatu* shall issue, because three county-days intervened, but a new exigent and a *capias* against the bail.

Palm. 287.
2 Leon. 14.
2 Hal. Hist.
P. C. 202.

And therefore it hath been holden, that in *London*, where the holding of the *hustings* is uncertain, no *exigi facias* shall issue with an *allocato hustings*, because the court cannot take notice of the set times of holding it, as they may of the times of holding the county-courts. But it is now agreed, that if an exigent issues in *London*, and they begin *hustings de placito terræ* (as they may) they shall proceed along at that *hustings* to the outlawry, without mingling their *hustings de communibus placitis*; but if an *allocato husting* comes, they shall proceed without omitting any *husting*.

[If

[If upon the record of the outlawry, in a criminal case *before* judgment, it appear from the writ of proclamation and return, that the party was outlawed after he had a day given to appear in court, and before the arrival of that day, this will be error. Thus, *George Barrington* was outlawed on the 21st of *February*, and the writ of proclamation required the sheriff to proclaim him, so that he should be before the justices of the peace at the general sessions of the peace to be holden for the county aforesaid next after the first day of *February* next ensuing; and the return by the sheriff to that writ was, that he had proclaimed the said *George Barrington* that he should be before his majesty's justices of the general sessions of the peace last within mentioned. The next sessions of the peace were holden on the 25th of *February*; so that by the terms of the writ, and the proclamation too, the prisoner had a day given him to appear till the 25th of *February*; and if he had appeared on that day, he would have complied with the requisition of the writ, and have saved his default. But he was outlawed before that day came, *viz.* on the 21st of *February*; and upon that ground the court held the outlawry bad.]

Barrington v. Regem, 2 Term R. 499.

But where it appeared by the writ of proclamation, and the return to it, that the prisoners were required to render themselves to the sheriffs, so that he might have their bodies before the justices, &c. at the return of the writ; it was adjudged to be good.

Yandell v. Regem, 5 Term R. 521.

If it appear upon the record, that the writ of proclamation was delivered to the sheriff three months before the return of it, it is sufficient, though it be not expressly so alleged.

Ibid.

The sheriff need not allege in his return to the writ of proclamation, that "the persons proclaimed did not appear and render themselves;" though he must in his return to the exigent.

Ibid.

A writ of proclamation requiring the sheriff to proclaim the parties *in open court in the sheriff's county* (not saying *county court*), is good.]

Ibid.

|| Where the proclamations returned by the sheriff could not, by possibility, have been made between the day of issuing the writ and the day of the return, inasmuch as there was no county court, or general quarter sessions of the peace held, at which the defendant could have been proclaimed, while the writ was running, the court seemed to think that the proceedings were irregular.||

3 Dow. & Ry. 55.

3. What shall be said a good Execution and Return.

Before a person is pronounced outlawed he is to be *quinquies exactus*, for he hath three days for appearance, one for grace, and if he stand in contempt at all these days, at the fifth county-court he is pronounced outlawed by the coroners; and therefore (a) if a person be outlawed the day of the *quinto exactus*, this is error, because he hath all day to appear.

(a) Cro. Jac. 660. Palm. 280. S. C.

But if an exigent is awarded against *A.* and after he is *quinto exactus*, and before the return of the exigent, he dies, yet the outlawry shall stand in its force, and shall not be reversed; for judgment

Noy, 49. Hartland v. Yates.

(a) If upon an indictment of murder an exigent be ment was by the coroners upon the *quinto exactus*, and they may certify the outlawry: but otherwise (a), if A. had died before the *quinto exactus*.

awarded, but before the return the party dies, his executors may, by writ of error setting forth the special matter, reverse the proceedings. 5 Co. 111. a. Eaton's case cited in Foxley's case. — That an executor may reverse an outlawry. 2 Keb. 507. — Than an heir or executor may. 2 Hawk. P. C. 461. — But a gaoler or sheriff cannot take any advantage of an error in an outlawry. Dyer, 67. a. 5 Keb. 286.

Roll. Abr. 802. If, on an outlawry against two, it be returned that *exacti non comparuerunt*, without saying *nec aliquis eorum comparuit*, this is erroneous; for peradventure one of them did appear.

Cro. Jac. 358. So, where a *capias*, and thereupon an exigent, was awarded against five, viz. three men and two women, and the return was, *Quod ad quartum comitatum, &c. non comparuerunt*, without saying *nec eorum aliquis comparuit*; this was held to be manifest error; and it being likewise returned *utlagati existunt*, where for the women it ought to have been *waviatæ*, this likewise was held to be error.

Rex v. [If one exigent be awarded against the principal and accessory together, it is error only as to the accessory.]
Yandell,
5 Term R. 521.

2 Hal. Hist. The return must shew where the county-court was held, and
P. C. 203. in what county; and this must be shewn on every *exactus*; and
(b) Style, 451. therefore (b) an outlawry was reversed, because the place where
(c) Keb. 50. the county-court was held was not shewn on the *secund. exactus*;
so (c) where not shewn on the *tertio exactus*.

Cro. Jac. 616. Also, the party must be named of such a place (d) *in com.*
(d) An out- Midd., and not *de Midd.*
lawry in London was reversed upon a writ of error, because the hustings were set out to be held in, but not for the city. Trin. 6 G. 2. Martin v. Duckett.

11 H. 7. 10. a. If the sheriff returns, that *ad comitatum meum S. tent. apud C.*,
2 Roll. Abr. and says not *in com. præd.*, or *in com. S.*, this is erroneous.
102. 2 Hal.
Hist. P. C. 293.

2 Roll Abr. So if it be *ad comitatum meum tentum apud S. in com.* Somers.,
802. and say not *ad comitatum meum Somers.*, or *adcomitatum Somers.*,
Palm. 480. without saying *ad comitatum meum Somerset*; this is erroneous.
Latch. 210.

Vent. 108. So, an outlawry was reversed, for that the proclamations were
Show. 319. returned to be *ad comitat. meum tent. apud*, such a place *in com.*
3 Mod. 89. *prædict.*, and not said *pro com.*; for anciently one sheriff had two
2 Keb. 141. or three counties, and might hold the court in one county for
Comb. 19. another.
2 Show. 60.68.

pl. 52. Lev. 164. [From the authorities referred to in this and the two preceding paragraphs, and several others which the Court of King's Bench was furnished with, it was holden in Wilkes's case, that a technical form of words was requisite in the description of the county-court, at which an outlaw is exacted; and therefore where, in that case, the sheriff stated that "at my county-court," without adding "of Middlesex," and "held at the house known by the sign of the Three Tuns in Brook Street, near Holborn, in the County of Middlesex," without adding the words, "for the County of Middlesex," after the word "held," the outlawry was reversed. Rex v. Wilkes, 4 Burr. 2527.—In a later case, Buller J. says, "I do not know, that "it has ever been determined that in any return made by a sheriff any technical form of "words is necessary: certain requisites must be observed; but if observed in substance, and "the return be not in equivocal terms, a great deal of argument is necessary to convince me "that

"that such a return is bad." *Barrington v. Regem*, 2 Term R. 502. The inclination of the opinion of the court in this case of *Barrington* seems to have been, that a return to a *capias cum proclamatione*, that the prisoner was exacted, "*at my county-court, holden at the house known by the name of the Sheriff's Office in Took's Court, Cursitor Street, in and for the County of Middlesex*," was well enough; though objected, that the name of the county was not added after "*my county-court*," and that the county-court was not stated to have been holden in *Took's Court, Cursitor Street*, and in and for the County of *Middlesex*. However, the clearness of the other objection made to the return in that case relieved the court from the necessity of giving an opinion upon this. — In *Barrington's* case let it be observed the outlawry was before judgment; in *Wilkes's* case, it was *after* conviction.]

The sheriff must return the day and year of the king to every *exactus*; and therefore if the day and year of the king be inserted in the 1st, 2d, 3d, and 5th *exactus*, but omitted in the 4th, it is erroneous, and shall not be supplied by intendment.

2 Roll. Abr. 802. 2 Hal. Hist. P. C. 203. [Rex v. Almon, 5 Term R. 202. S. P.]

So, if it be *anno regni domine regine*, without saying *Elizabethæ*, or *domine Elizabethæ*, without saying *regine*, or *anno regni domini regis Jacobi*, without saying *regni sue Angliæ*, for the year of *England* and *Scotland* differ: so, if there be less than a month between the first and second *exactus*, in these cases the outlawry is erroneous.

2 Roll. Abr. 803. 2 Hal. Hist. P. C. 203.

So, if the return be *ad husting tent. apud Guildhall civitatis London.*, without saying *de communibus placitis*, it is erroneous; because they have two husting, one *de communibus placitis*, another *de placitis terræ*.

2 Roll. Abr. 802. 2 Hal. Hist. P. C. 203.

If an outlawry be returned, that the party was *exact.* at three several times, 10 *Jac.*, and that he was *quarto exact.* 25th day of *Feb. et non comparuit*, without mentioning any year, *et quinto exact.* such a day in *March* 10 *Jac.* although it may be intended, that he was *quarto exact.* in 10 *Jac.* yet the outlawry shall not be good by intendment; for perhaps the clerk would have made it *quarto exact.* 8 *Jac.*, which would have been clearly bad.

2 Roll. Abr. 803. Chapman's case.

(F) Of the Manner of reversing an Outlawry: And herein of the Difference between Errors in Fact and in Law.

OUTLAWRIES are, regularly, to be reversed by plea by writ of *identitate nominis*, or by writ of error, for any errors, be they errors in fact or in law.

2 Hal. Hist. P. C. 207.

As to errors in fact; as that in felony, the party was an infant under the age of fourteen, was in prison or beyond sea; these can, regularly, be only taken advantage of by writ of error. But it is agreed, that by the common law *in favorem vitæ* an outlawry of treason or felony might be avoided by plea that the defendant was in prison, or in the king's service beyond sea, &c. at the time of the outlawry pronounced against him; but that no outlawry for any other crime (against a party rightly described) can be avoided by plea of any matter of fact whatsoever.

Co. Lit. 259. 2 Hawk. P. C. c. 50. § 6.

As to avoiding an outlawry of felony because the party was beyond the sea, these differences are laid down by *Rolle* and *Hale*, as agreed to by the court: 1st, That if a man, having committed

2 Roll. Abr. 804. 2 Hal. Hist. P. C. 208.

a felony, goes beyond the sea voluntarily, or upon his own occasions, and not in the king's service, before any exigent awarded, though after the indictment, and then an exigent is awarded, and the offender beyond the sea is outlawed for the felony, he may assign it for error. 2dly, But if, after the exigent awarded upon the indictment of felony, he goes beyond the sea voluntarily, or upon his own occasions, and being so beyond sea is outlawed, he shall not avoid it by such being beyond sea; because, by the exigent awarded he has notice of the prosecution, and by such a means he may avoid his conviction, by staying till all the witnesses are dead. 3dly, But yet *primâ facie* the error in that case is well assigned, by alleging he was *ultra mare tempore promulgationis utlagariæ*; and if he were in the realm after the exigent issued, it shall come in by the plea of the king's attorney to shew it. 4thly, But if he were within the realm at the time of the exigent issued, and went beyond the sea upon the service of the king or kingdom, and then is outlawed, being beyond the sea, this outlawry shall be reversed; if the party allege generally that he was *ultra mare tempore promulgationis utlagariæ*, and the king's attorney reply that he was in *England tempore emanationis brevis de exigî facias*, it is a good replication for the plaintiff in the writ of error, to allege that he went out after the exigent, and before the outlawry pronounced, upon the king's command or service, and shew it specially, and so confess and avoid the plea.

Bryan v.
Wagstaff,
5 Barn. & C.
314. 8 Dow. &
Ry. 208. S. C.
Ry. & Moo.
327. S. C.

|| Where, in error to reverse an outlawry, the error assigned was, that before and at the time of awarding and issuing the *exigî facias*, the plaintiff in error was beyond seas, and defendant pleaded, that before the awarding and issuing of the *exigî facias*, plaintiff in error of his fraud and covin, and in order to defeat defendant of the means of recovering his just debt, and for the purpose of avoiding the said outlawry, voluntarily left the realm of *England*, and of his fraud and covin voluntarily remained in parts beyond the seas until after the outlawry, whereupon issue was joined, and found for the defendant; the court held, that the plea was not an answer to the assignment of error, and that judgment of reversal of the outlawry should be entered for the plaintiff in error, *non obstante veredicto*.

Hesse v.
Wood,
4 Taunt. 691.;
but see 2 Car.
& P. 125. 129. 132.

So also, the Court of Common Pleas reversed the outlawry, though it was sworn the defendant went beyond sea in order to avoid the process.

Richardson v.
Robinson,
5 Taunt. 309.;
and see Tidd's
Pract. 139.
(9th edit.)

And on a writ of error to reverse an outlawry, issue being joined on an assignment that the outlaw was beyond sea at the time of suing out the writ of *exigent*, and thence until the time of pronouncing the outlawry; and the plaintiff in error having proved the previous proceedings, and that the outlaw was abroad at the time of suing out the *exigent*, the Court of Common Pleas held this to be sufficient, without proving the time when the judgment of outlawry was pronounced, or that the defendant was then

then abroad; for the substantial question was, whether the defendant was abroad at the time of the *exigent* issued.||

As to the avoiding an outlawry in treason, on the party's being beyond sea, it is enacted by the 26 H. 8. c. 13. and 5 & 6 E. 6. c. 11. "That all process of outlawry to be had or made within this realm against any offenders in treason, being resident or inhabiting out of the limits of this realm, or in any of the parts beyond the seas, at the time of the outlawry pronounced against them, shall be as good and effectual in law, to all intents and purposes, as if such offenders had been resident and dwelling within this realm at the time of such process awarded, and outlawry pronounced (a); provided that the party so to be outlawed shall, within one year next after the said outlawry pronounced, yield himself to the Chief Justice of *England* for the time being, and offer to traverse the indictment or appeal whereon the said outlawry shall be pronounced, as is aforesaid, that then he shall be received to the same traverse; and being thereupon found not guilty by the verdict of twelve men, he shall be clearly acquitted and discharged of the said outlawry," &c.

It is the allowed practice of the Court of Common Pleas to suffer a defendant, coming in by *capias utlagatum* the same term on which an *exigent* is returnable, to avoid the outlawry without writ of error, by shewing that he purchased a *supersedeas* out of the same court, and delivered it to the sheriff before the *quinto exactus*, &c., or by shewing any other matter apparent on record which makes the outlawry erroneous; as, the want of an original, or the omission of process, or want of form in a writ of proclamation, &c., or a return by a person appearing not to be sheriff, or the want of such addition as required by 1 H. 5. c. 5.: yet it is said in many books to be the constant course of the Court of King's Bench never to reverse an outlawry on the crown side, either in the same or a different term, for these or other errors of a like nature, without a writ of error. (b)

According to the merits of each particular case. And of late years they have gone further than formerly on motion more effectually to expedite justice, save expence, and preserve the credit and character of the defendant. Tidd's Prac. 159. (9th ed.)||

It is agreed, that any outlawry whatsoever may be avoided by a defendant's coming in upon the *capias utlagatum*, and pleading a misnomer either of the name or addition in the writ, &c. as by shewing that whereas he is called by such a name of baptism or surname, he hath been always known by a different one, and not by that in the writ, &c. Also it is said in many books that he may plead, that there is no such town as that whereof he is named; and it seems clearly agreed that he may plead, that at the time of the writ purchased, and ever since, he hath made his abode at some other town, and not at that in the writ, &c. And it is said, that by such plea the outlawry shall only be avoided as to the person who pleads it, (who shall not be intended to be the person meant,) and shall stand in force against the person of

26 H. 8. c. 13.
5 & 6 E. 6.
c. 11.

(a) For this *vide* Dyer, 287. pl. 48. 2 Jon. 180. 4 Mod. 566. || *Vide* Armstrong's ca. 10 Sta. Tri. 106. (8vo. ed.); and Post. C. L. 46.; and *tit. Treason*, vol. vii. p. 639. ||

2 Hawk. P. C. c. 50. and several authorities there cited. || Beauchamp v. Tomkins, 3 Taunt. 139. (b) It appears now however to be held discretionary in the courts to relieve the party on motion, or put him to a writ of error according to the merits of each particular case.

2 Hawk. P. C. c. 50. § 9.

the name and addition in the record. But it is said, that a person of the same name and addition as are mentioned in a record of outlawry cannot avoid it by averring that there are two persons of such name and addition, and that the person intended is the elder, and he himself is the younger, but shall be put to his writ *de identitate nominis*; which is said by some to be the only remedy in such case, after an outlawry returned. And it seems, that notwithstanding in civil cases, before an outlawry is returned, one of the same name may come into court, and shew that he is not the person intended; whereupon, if the plaintiff confess it, the diversity of the names shall be entered on the roll, and a new exigent shall issue, with a fuller description of the person intended; yet this cannot be done upon an indictment without a writ of *identitate nominis*, because it would make the process variant from the indictment, which cannot be altered without the consent of the jurors.

3 Co. 141, 142.

Doctor

Drury's case.

Vaugh. 158.

S. C. cited.

(a) For this
vide Co. Ent.

157. 3 Keb.

291. Mod.

111. Hern.

Ent. 49. Ast.

Ent. 143.

If *A.* brings an *audita querela* against *B.*, and declares that whereas *B.* had recovered against *A.* 200*l.* debt, &c. and thereupon the said *A.* was outlawed, and upon a *capias utlagatum* taken, and in execution at the suit of the said *B.*, and after from the said execution was delivered, and suffered to go at large, &c. and yet *B.* hath taken out execution upon the said judgment, and endeavours, &c. the defendant may plead and shew, that after the said enlargement, and before the purchase of the *audita querela*, the outlawry was set aside and made void; and so conclude *quod (a) non habetur tale recordum.*

2 Vent. 46.

2 Jon. 211.

Comb. 19.

2 Salk. 495.

pl. 3. S. P.

where an outlawry was reversed, on motion, at the charge of him who procured it, on affidavit, that the de-

If a person procures another to be outlawed clandestinely, who appears openly and in public, the court will, on motion, oblige such person who procures the outlawry to reverse the same at his own costs. But if it appears that the party outlawed had lurked backward and forward between two counties, and that the person procuring the outlawry had dealt openly, and had been regular in sending down the proclamations to the sheriff of the county where he sometimes resided, the court will not interpose in this summary manner, but will leave the party to his ordinary remedies by plea or writ of error.

fendant was actually in the Fleet in execution for the plaintiff in another suit, and that he knew it. — But in the same page in Salk. it is said, that though such motions are frequently granted in *B. R.* because it is a great charge to reverse an outlawry there, yet that it is otherwise in *C. B.*, the charge there being but 16*s.* 8*d.*

Biscoe v.

Kennedy,

2 Wils. 127.

[In debt upon bond entered into by the wife *dum sola*, the husband was abroad and outlawed; and the wife, though she appeared publicly, *waived*. On motion to set aside the outlawry against the wife, and to restore her the goods taken on a special *capias utlagatum*, on affidavit that they were her separate goods the court held, that the goods must be taken to be her husband's goods in point of law; and that if she had any equitable right to them she must resort to a court of equity, but, as she appeared publicly, she had been wrongfully waived; and therefore the rule was made absolute for setting aside the outlawry as to the wife, but discharged as to restoring the goods.

The

The defendant was taken on a *capias utlagatum*, on a Sunday, and therefore he moved to be discharged, the taking being contrary to the 29 Car. 2. But, notwithstanding the court held the taking bad, they refused to grant an attachment, and put the defendant to take the remedy given by the statute.

Osborne v. Carter, Barnes, 319.

The defendant was waived specially on mesne process, as a single woman, by the name of *Dunster*; and after the exigent, and before the outlawry, she married one *Priseley*; and on being taken by a *capias utlagatum* after the outlawry, on motion a rule was obtained to shew cause why the outlawry should not be reversed at her husband's expense, on his entering a common appearance for himself and his wife. But the rule was discharged, the court refusing to interpose in a summary way, as the marriage was after the exigent.]

White v. Dunster, Barnes, 321.

(G) What the Party must do in order to entitle him to a Reversal : And herein,

1. *Of appearing in Person, or by Attorney, and of giving Bail.*

REGULARLY, in all outlawries, as well personal as criminal, the party in order to reverse the same was to appear in person, and could not appear by attorney.

2 Leon. 22. —Where the husband and wife being outlawed, and the wife refusing to appear, the outlawry could not be reversed. Cro. Eliz. 611.— One outlawed prayed to appear by attorney, and upon an affidavit made of his sickness, the court *ex speciali gratia* allowed him to appear by attorney; but the clerk was commanded to enter it, *quod venit in propria personâ*, the law being clear, that upon an outlawry he ought to appear in person. Cro. Jac. 462. Having once appeared in person, the residue of the proceedings may be by attorney. 2 Keb. 507.— Said that there was a difference where the error appeared on the face of the record; that in such case error may be assigned *per attorn.*, without a special rule of court for that purpose. Carth. 7. ||It is now decided that the defendant need not appear before he moves to reverse the outlawry. Graham v. Henry, 1 Barn. & A. 132; (although the contrary had been adjudged in French v. Moore, Tidd's Prac. 159. n., 7th ed., and Summervill v. Watkins, 14 East, 536;) for until the outlawry be reversed, no writ exists to which the defendant can appear; *sed vide* Solly v. Forbes, 2 Moo. 567.]]

But now by the 4 & 5 W. & M. c. 18. for the more easy and speedy reversing of outlawries in the Court of King's Bench, it is enacted, "That, from and after the first day of *Easter* term thence ensuing, no person or persons whatsoever, who is, are, or shall be outlawed in the said court for any cause, matter, or thing whatsoever, (treason and felony only excepted,) shall be compelled to come in person into or appear in person in the said court to reverse such outlawry, but shall or may appear by attorney (a), and reverse the same without bail in all cases, (except where special bail shall be ordered by the said court.)"

4 & 5 W. & M. c. 18.

|| (a) It must appear by the affidavit that the attorney

acts at the instance of the outlaw. Plunkett v. Buchanan, 3 Barn. & C. 736. 5 Dow. & Ry. 625. S. C.; and see 3 Dow. & Ry. 55.]]

And it is further enacted by the said statute, "That if any person or persons outlawed, or hereafter to be outlawed, in the said court, (other than for treason or felony,) shall from and after the said first day of *Easter* term be taken and arrested

4 & 5 W. & M. c. 18.

[(a) That is to put in bail to a new action, plead within the limited time, put the plaintiff in the same condition, and such like matters. 4 Burr. 2540.] 4 & 5 W.&M. c. 18.

“ upon any *capias utlagatum* out of the said court, it shall and
 “ may be lawful to and for the sheriff or sheriffs, who hath or
 “ shall have taken and arrested such person and persons, (in all
 “ cases where special bail is not required by the said court,) to
 “ take an attorney’s engagement under his hand to appear for
 “ the said defendant or defendants, and to reverse the said out-
 “ lawries, and thereupon to discharge the said defendant and de-
 “ fendants from such arrest; and in those cases, where special
 “ bail is required by the said court, the said sheriff and sheriffs
 “ shall and may take security of the said defendant or defendants
 “ by bond, with one or more sufficient surety or sureties, in the
 “ penalty of double the sum for which special bail is required,
 “ and no more, for his, her, or their appearance by attorney in
 “ the said court at the return of the said writ, and to do and
 “ perform such things as shall be required by the said court (a);
 “ and after such bond taken to discharge the said defendant and
 “ defendants from the said arrest.”

And it is further enacted by the said statute, “ That if any
 “ person or persons outlawed as aforesaid, and taken and arrested
 “ upon a *capius utlagatum*, shall not be able within the return of
 “ the said writ to give security, as aforesaid, in cases where special
 “ bail is required, so as he or they is or are committed to gaol for
 “ default thereof, that whensoever the said prisoner or prisoners
 “ shall find sufficient security to the sheriff or sheriffs, in whose
 “ custody he or they shall be, for his or their appearance by at-
 “ torney in the said court at some return in the term then next
 “ following, to reverse the said outlawry or outlawries, and to do
 “ and perform such other thing and things as shall be required
 “ by the said court, it shall and may be lawful to and for the said
 “ sheriff and sheriffs, after such security taken, to discharge and
 “ set at liberty the said prisoner and prisoners for the same; any
 “ law or usage to the contrary notwithstanding.”

2 Salk. 496.

It hath been held, that if the party outlawed comes in by *cepi corpus*, he shall not be admitted to reverse the outlawry without appearing in person, as in such case he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of the *cepi corpus*, and for doing what the court shall order.

3 Ed. 1. c. 9.
 2 Hawk. P. C.
 c. 15. § 40.
*Vide tit. Bail
 in Criminal
 Causes, letter
 (D).*

By *Westm.* 1. 3 Ed. 1. c. 9. it is expressly provided, that those who are outlawed, or have abjured the realm, &c. should be excluded the benefit of replevin; yet it hath been always held, that the Court of King’s Bench may in their discretion, in special cases, bail a person upon an outlawry of felony; as, where he pleads, that he is not of the same name, and therefore not the same person with him that was outlawed, or alleges any other error in the proceedings.

31 Eliz. c. 3.
 § 3.

By the 31 Eliz. c. 3. § 3. it is enacted, “ That before any al-
 “ lowance of any writ of error, or reversing of any outlawry be
 “ had by plea, or otherwise, through or by *want of any procla-*
 “ *mation* to be had or made according to the form of this statute,
 “ the defendant and defendants in the original action shall put
 “ in

"in bail, not only to appear and answer to the plaintiff in the former suit in a new action to be commenced by the said plaintiff for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry." (a)

(a) *Vide* the stat. 4 & 5 W. & M. c. 18. *antè*.

A., who was a foreign merchant, and never in *England*, was outlawed at the suit of *B.*, in an action on several promises for goods sold and delivered; and upon a special *capias utlagatum* a ship and other effects belonging to *A.* were seized, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and restitution awarded, upon affidavits produced and read, that the defendant was never *infra legem*, i. e. that he never was in *England*, and therefore could not be outlawed, because that was putting him *extra legem*. *Sed per cur.*—This outlawry shall not be vacated upon such affidavits, but the defendant may bring a writ of error, which he was compelled to do, and thereupon to put in bail to the action in which he was outlawed according to the new statute of 4 & 5 W. & M. c. 18. *antè*; and then the plaintiff consented to the reversal of the outlawry.

Carth. 459.
Ld. Raym. 349.
Matthews v. Erbo, Tidd's Prac. 141. ||(9th ed.)||

H. was outlawed in two actions; one was for 10*l.*, the other for 40*s.*; and upon reversing the outlawry the court took special bail for the first, and an appearance for the other, upon the statute 4 & 5 W. & M. c. 18., and the recognizance was taken pursuant to 31 Eliz. c. 3. § 3.

2 Salk. 496.

[The defendant was outlawed in a personal action, without any affidavit made of the plaintiff's demand; and having brought error, he assigned his being beyond sea at the time of the outlawry, for which the court made no difficulty to reverse it. (b) But then the question was, upon what terms they should do it, the plaintiff insisting upon special bail, and having now made a proper affidavit; and the defendant insisting to file common bail only. The court, upon considering the words of 4 & 5 W. & M. c. 18. § 3., which empowers the outlaw to appear by attorney (as he did here), and says, "It shall be reversed without bail in all cases, but where special bail shall be ordered by the court," declared, they were of opinion, they had a discretionary power to require it or not; and that the want of an affidavit before, was no objection; because that is only necessary to warrant an arrest; and here was one in time for the new action that must be brought. And although the 31 Eliz. c. 3. § 3. is the only act that expressly requires bail, it is not to be inferred from thence that in other cases it is not to be insisted upon; for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. And it is now settled, that on reversing an outlawry for any other error in law besides the want of proclamations, the bail is *common* or *special*, in like manner as upon the arrest.

Serocold v. Hamson, 2 Stra. 1178.
1 Wils. 3. S. C. ||more fully reported 12 East, 624. n.
Tidd's Prac. 134. (9th ed.)
Ibid. 141. (9th ed.)

(b) And such error is not answered by shewing that defendant went beyond sea to avoid the plaintiff's process. Hesse v. Wood, 4 Taunt. 691.; and although this appeared, still the court reversed the outlawry on the usual

terms, taking a recognizance of bail in the *alternative*, either to pay the condemnation money or render. But in *Graham v. Henry*, 1 Barn. & A. 133., the Court of King's Bench, in reversing the outlawry on these terms, seem to have relied on the circumstance of the defendant *not* having gone abroad to avoid process; and see p. 88. ||

1 Ld. Raym.
605. 2 Stra. 951.
2 Barnardist.
298. S. C.
Impey, 456.

Where special bail is required, it need not be put in before the allowance of the writ of error; but it is well enough, if put in at any time before the reversal.

The bail may render the defendant, and are not, at all events, answerable for the debt.

¶ Where the outlawry is reversed, on the stat. 31 Eliz. c. 3., for want of proclamations, the recognizance of bail is, according to the words of the statute, absolute to satisfy the condemnation.

Rayer v.
Cooke, 3 Barn.
& C. 529.
5 Dowl. & Ry.
302. S. C.

Thus where the third proclamation was made at the door of the church of the parish of which the defendant was described in the writ and in the bond on which the action was brought, but where he did not reside at the time when the proclamation was made, the court reversed the outlawry as for want of proclamations, and ordered bail to be taken to pay the condemnation money, according to the 31 Eliz. c. 3. § 3.

Taylor v.
Waters,
2 Barn. & C.
353.
3 Dow. & Ry.
575. S. C.

But where the third proclamation was made less than one month before the *quinto exactus*, and on that ground the outlawry was reversed, the court ordered special bail in the *alternative* in the common form; apparently considering it as a reversal for irregularity, and not under the statute of *Elizabeth*.

Matthews v.
Gibson, 8 East,
527.
Havelock v.
Geddes,
12 East, 622.,
confirming Se-
rocold v.
Hampson,
12 East,
624.; and see
4 Taunt. 691.
Graham v.
Grill, 1 Maul.
& S. 408.;
and see Gra-
ham v. Henry,
1 Barn. & A.
131. *acc.*, and
Tidd, 142. (9th
ed.)

And so in one case, where the reversal was on motion, and for a common law error, but on appearance by attorney under the stat. 4 & 5 W. & M. c. 18., it was held that the recognizance should be absolute. But upon *error brought* by the defendant *in person* to reverse an outlawry for a *common law* error, the court have held that the recognizance should be in the ordinary *alterna-tive* form, giving the bail the power of rendering; for they considered *such* a reversal to be in general a matter of *right*, and different from a case where the party asked the court by *motion* to interfere. In a subsequent case, however, the court *on motion* reversed an outlawry, on the defendant's paying all costs, and putting in bail in the *alternative*, it appearing that there had been no real delay. It seems, therefore, that where the reversal is *on motion*, and the case is not within the 31 Eliz., the court will exercise their discretion as to the terms of the recognizance, according to the merits of the particular case. ||

Cracraft v.
Gledowe,
3 Burr. 1482.

Defendant being arrested on a *capias utlagatum*, the sheriff took an attorney's engagement, under his hand, to appear for the defendant, and reverse the outlawry, without taking security by bond in double the sum for which bail was required, pursuant to the above statute of 4 & 5 W. & M. On shewing cause why an attachment should not issue against the sheriff for discharging the defendant out of his custody, it was urged, that he neither did, nor could know, that it was a case requiring bail, as the *capias utlagatum* was not marked for bail; and that the 12 G. 1. c. 29. required an affidavit; and that the sum, for which bail is to be taken is to be marked on the process, &c. For the plaintiff, it was urged, that process of outlawry is not within the statute of 12 G. 1.; that this was by *special original*, and the cause of action is expressed in the original process, in which it appears the plaintiff

plaintiff was entitled to bail. The court were clear, that this was not a case within the 12 G. 1., and thought the sheriff had acted improperly; but, as there was an affidavit of the under-sheriff, that he had acted to the best of his understanding without any ill intention, they enlarged the rule, in order to give the sheriff an opportunity to put in bail. After which the sheriff undertook to pay the debt and costs.

The statute of 4 & 5 W. & M. hath been construed not to extend to *criminal* cases; at least, not to misdemeanors after conviction. And even in *civil* cases, the defendant cannot be bailed where he was not bailable on the process to outlawry; for it was the design of the statute to put him in the same condition as if he had not been outlawed; and therefore he is not bailable when taken upon an outlawry *after* judgment.

Two persons were outlawed in a joint action against them, and one moved, that on filing common bail he might have liberty to reverse the outlawry. *Sed per cur.*—The writ of error to reverse the outlawry must be brought in the names of both the parties that are outlawed; and if one only appears, the other may be summoned and severed, and then the outlawry may be reversed for the benefit of the party appearing.]

||In general an outlawry can only be reversed on payment of costs. But if the process has been abused and made subservient to purposes of oppression, as where a man has been outlawed, who was already in prison at the plaintiff's suit, or being at large did not abscond, but appeared publicly and might have been arrested, or served with process, the court on motion will order the plaintiff to reverse the outlawry at his own expense. So where the plaintiff had proceeded to outlaw a female, and obtained judgment of waiver, the court set it aside on motion with costs, it appearing that she was in prison during the time the several processes were sued out, and that the plaintiff was aware of that fact, and knew where to find her.||

Rex v. Wilkes,
4 Burr. 2539-
40.

Symmons v.
Bing, 2 Salk.
496.

Tidd's Prac.
143. (9th ed.)
and cases there-
cited.

2. *Of suing out a Scire Facias.*

It is clearly agreed, that an attainder of felony of a person who had any lands shall never be reversed by writ of error, without a *scire facias* against all the ter-tenants and lords mediate and immediate. But it is (a) settled, that such *scire facias* is not necessary in the case of high treason.

3 Mod. 42. 47. 4 Mod. 366. 2 Hal. Hist. P. C. 209. S. P., and that such writ is to issue returnable at fifteen days; and if any lords do appear, they may plead to the errors; and if the sheriff return there are no lands, &c. then the court proceeds to examine the errors. (a) So ruled, Mich. 12 Annæ, the Queen v. Strafford, upon examination of all the precedents. 2 Hawk. P. C. c. 50. § 13. Ca. Law and Eq. 188.

Dyer, 34.
pl. 20. Cro.
Eliz. 235.
Keb. 141. pl. 11.
Sid. 316.
3 Keb. 29.

Also it is said, that it is not necessary in the case of felony, when it is suggested on the roll that the party had no lands, and the Attorney-General confesses it.

2 Salk. 495.
pl. 5. Ld.
Raym. 154.

[Where the defendant has obtained a charter of pardon, he must sue out a *scire facias*, to give notice thereof to the plaintiff, in order that he may further prosecute his action, if he think proper.]

Trye, 131. 154.

(H) The Effects and Consequences of a Reversal:
And herein,

1. *Where the Proceedings on the Reversal are in the same Plight as if no Outlawry had been.*

Cro. Jac. 464.
Cro. Car. 365.
3 Mod. 42.
6 Mod. 115.
(a) 2 Hal. Hist.
P. C. 209.

IT is agreed that after an outlawry of treason or felony is reversed the party shall be put to plead to the indictment, for that still remains good, and (a) he may be tried at the King's Bench bar; or the record may be remitted into the country, if it were removed into the King's Bench by *certiorari*, with a command to the justices below to proceed by the statute of 6 Hen. 6. c. 6.

Salk. 371.
pl. 10. Rex v.
Hill, 5 Mod.
141. S. P.

So if a man be outlawed by process in an information, and come in and reverse the outlawry, he must plead *instanter* to the information.

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The law is the same in civil cases; and therefore if an outlawry in a personal action be reversed, the original remains.

3 Lev. 145.
Whitwick v.
Hovenden.

Trespass for taking and detaining his beasts till he made a fine: the action was laid in *Sussex*. The defendant pleads, that the cause of action did not accrue within six years before suing of the writ. The plaintiff replies, that at another time he brought an original in battery in *London*, intending when the defendant had appeared to have declared for this trespass; and that the defendant was outlawed in *London*; and that within such a time after the reversal of the outlawry he declared here. The defendant demurred; and for the defendant it was insisted, that the original being laid in *London*, he could not in this action declare in another county, though the cause of action be transitory. But, upon information by the prothonotaries, that the course of the court is, that although the original be laid in *London* for expediting the outlawry, yet, when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory; and the statute 21 Jac. 1. c. 16. gives to plaintiffs generally a power to commence a new suit within the year after the outlawry reversed; it was ruled, that so he might do in this case to warrant his declaration within the course of the court, and judgment was given for the plaintiff.

2. *To what the Party shall be restored on Reversal of the Outlawry.*

And. 188.
(b) Shall, after
outlawry re-
versed, be re-
stored to his
law and be of
ability to sue.

It hath been adjudged, that if the king grant over the lands of a person outlawed for treason or felony, and afterwards the outlawry be (b) reversed, the party may enter on the patentee, and needs neither to sue a petition to the king, nor a *scire facias* against the patentee.

5 Co. 90.
Hoe's case,
Roll. Abr. 778.
S. C. cited.

Co. Lit. 238. b.

If the goods of a person outlawed are sold by the sheriff upon a *capias ullaatum*, and after the outlawry is reversed by writ of error, he shall be restored to the goods themselves; because the sheriff

sheriff was not compelled to sell those goods, but only to keep them to the use of the king. Cro. Eliz. 278. S. P. adjudged; where a

termor being outlawed upon the statute of recusancy, the Lord Treasurer and Barons of the Exchequer sold the term; *et vide* 2 Jon. 101. 2 Show. 68. pl. 52. and 3 Keb. 871. that there shall be restitution of the profits actually paid into the Exchequer. *Vide etiam* Bunb. 104.220.

If an advowson comes to the king by forfeiture upon an outlawry, and, the church becoming void, the king presents, and then the outlawry is reversed; yet the king shall enjoy that presentment, because the presentment there came to the king as the profit of the advowson. Moor, 269. Beverley v. Cornwall.

But, if the church is void at the time of the outlawry, and the presentation is thereby forfeited as a chattel principally and distinct of itself, there, upon the reversal of the outlawry, the party shall be restored to the presentation. Moor, 269. agreed *per curiam*.

If a termor being outlawed for felony grants over his term, and after the outlawry is reversed, the grantee may have trespass, for the profits taken between the reversal of the outlawry and the assignment; for by the reversal it is as if no outlawry had been, and there is no record of it. Cro. Eliz. 170. Ognal's case, and 15 Co. 20. 22.

It is said, that if a man be outlawed in the King's Bench, and the party's goods seized into the king's hands, and then the outlawry be reversed, there can be no restitution; the reason whereof is, for that the court of King's Bench cannot send a writ to the treasurer; and the Court of Exchequer have no record before them to issue out a warrant for restitution. (a) 5 Mod. 61. (a) *Sed qu.* If restitution would not be made on petition to the king?

It hath been adjudged in Chancery, that if *A.* being possessed of several houses for a long term of years, mortgages the same, and is outlawed for high treason, upon which those houses are seized into the king's hands, and the same granted for valuable consideration to *J. S.*, who likewise gets an assignment of the mortgage, that yet the representative of *A.* may redeem the mortgage upon reversal of the outlawry; and herein the Lord Keeper said, that the judgment upon the reversal is, that the party shall be restored to all that has not been answered to the king; which in all cases has been understood of the mesne profits answered to the king, and not as to the principal thing itself, though seized into the king's hands; and that it was undoubtedly so as to a freehold or inheritance, and he saw no substantial difference in the case of a leasehold. 5 Vern. 312. Peyton v. Ayliffe; and 2 Lev. 49. the case of Pinfold v. Northey.

PAPISTS AND POPISH RECUSANTS.

(a) *i.e.* Those who refuse to come to church, and being persons professing the popish religion, and convicted of such refusal or recusancy, are

THE laws for restraining the growth of popery, by which papists are subjected to divers penalties, forfeitures, disabilities, and inconveniences, may be considered in general, as relating to popish (a) recusants, such as refuse to make the declaration against popery, and such as promote, encourage, or profess the popish religion. And these laws, though made for the advancement of religion and the public good, yet, being considered as penal laws, have, like all other penal laws, been construed strictly.

termed popish recusants convict. By the 23 Eliz. c. 1. extends to all recusants; and the courts cannot take notice of the grounds of the recusancy, but must punish them for not coming to church, without examining into the cause why they did not. Skin. 99. pl. 14. *per Sanders* Ch. J. but for this, *vide tit. Heresy, and Offences against Religion.* — And what shall be evidence to prove a person a popish recusant convict, *vide* Keb. 7.

Hawk, P.C.
c. 12, 13, 14.

For the better understanding of these penalties, &c. the laws herein are ranked under the following heads: —

(A) The Disabilities, Restraints, Forfeitures, and Inconveniences which Popish Recusants are subject to: And herein,

1. Of their Disability to bring any Action.
2. Of bearing any public Office or Charge.
3. Of claiming any Part of a Husband's personal Estate.
4. Of claiming an Estate by Curtesy, or by Way of Dower, after a Marriage against Law.
2. *Of the Restraints they are put under. And herein,*
 1. From going five Miles from Home.
 2. From coming to Court.
 3. From keeping Arms.
 4. From coming within ten Miles of London.
3. *Of the Forfeitures they are liable to. And herein,*
 1. That of two Parts of a Jointure or Dower.
 2. That of 20*l.* for not receiving the Sacrament yearly after conformity.
 3. That of 100*l.* for an unlawful Marriage.
 4. That of 100*l.* for an Omission of lawful Baptism.
 5. That of 20*l.* for an unlawful Burial.

4. *Of*

(A) *The Disabilities, Restraints, Forfeitures, &c.*4. *Of the Inconveniences they are subject to: And herein,*

1. That their Houses may be searched for Reliques, whether they be Men or Women.
2. If they be Women, and married, that they may be committed.

(B) *Of the Offence of not making a Declaration against Popery, and the Restraints it subjects the Parties to: And herein,*

1. *From sitting in Parliament.*
2. *Holding a Place at Court.*
- || 3. *Holding Offices, civil and military.*||
4. *From living within ten Miles of London.*
5. *From keeping Arms.*

(C) *Of the Offence in promoting or professing the Popish Religion: And herein,*

1. *Of the offence of saying or hearing Mass or other Popish Service.*
2. *Of giving or receiving Popish Education.*
3. *Of buying or selling Popish Books.*
4. *Of keeping School.*
5. *Of withholding a competent Maintenance from a Protestant Child.*
6. *Of the Disability of those professing the Popish Religion to present to a Church.*
7. *Of their Disability to purchase.*

(A) *The Disabilities, Restraints, Forfeitures, and Inconveniences which Popish Recusants are subject to: And herein,*1. *Of their Disability to bring any Action.*

BY the 3 Jac. 1. c. 5. § 11. it is enacted, “ That every Popish recusant convict shall stand to all intents and purposes disabled as a person lawfully excommunicated, and as if such person had been so denounced and excommunicated according to the laws of this realm, until he or she shall conform, &c. and that every person sued by such person so disabled, may plead the same in disabling of such plaintiff as if he or she were excommunicated by sentence in the ecclesiastical court, except the action of such recusant do concern some hereditament or lease, which is not to be seized into the king’s hands by force of some law concerning recusancy.”

3 Jac. 1. c. 5.
§ 11.

In the construction of this branch of the statute, it hath been holden,

Noy, 89. That the plea of such a conviction, like all other pleas in disability, ought to be pleaded before (a) imparlance, and also concluded with a (b) demand if the plaintiff shall be answered.

Latch. 176. c. 12. § 2. (a) Cannot be pleaded after a general imparlance, but may be pleaded *puis darrein continuance*, because being in disability of the person, may accrue after a continuance. Mod. Ca. in Law and Eq. 43. 381. (b) In debt for rent by the plaintiffs as executors of J. S., defendant pleads in abatement by *pet. judicium de brevi*, &c. for that one of the plaintiffs is a popish recusant convict, and *quasi excom.* by this statute; but it was held, that this, as here, ought not to be pleaded in abatement, because the writ is not abated thereby, but only suspended; and the pleading ought to be *responderi non debent*. 5 Lev. 208. — So, where judgment was demanded generally. Mod. Ca. in Law and Eq. 43. 381.

Noy, 89. That such plea ought also to shew before what justices the conviction was, that the court may know where to send for a certificate thereof, if it be denied; and also that the record itself, or at least a certificate thereof, ought to be immediately produced, according to the general rule of law, as to all dilatory pleas grounded on records.

Latch. 176. That, if after such a plea it be certified, that the plaintiff hath conformed, and thereupon the defendant be ordered to plead in chief, and then the plaintiff relapse, and be convict again, the defendant cannot plead the same in disability a second time.

3 Lev. 11, 12. That it must appear, either from the conviction itself, or by proper averments, that the plaintiff is convicted of popish recusancy, because no recusants, except popish ones, are within the said clause. But this is sufficiently set forth, by alleging, that the plaintiff being *papalis recusans* was indicted and convicted *secundum formam statuti*, &c.

2 Bulst. 155. It seems to be the better opinion, that this being a penal law, and therefore to be construed strictly, the words *as persons lawfully excommunicate*, &c. mean no more than disabling the party, in the same manner as an excommunicated person, to bring an action, but do not subject the party to the other consequences of an excommunication.

2. Of bearing any public Office or Charge.

By the 3 Jac. 1. c. 5. § 8. it is enacted, “ That no recusant convict shall at any time practise the common law of this realm as a counsellor, clerk, attorney, or solicitor in the same; nor shall practise the civil law as advocate or proctor; nor practise physic, nor use or exercise the trade or art of an apothecary; nor shall be judge, minister, clerk, or steward of or in any court, or keep any court; nor shall be register or town-clerk, or other minister or officer in any court; nor shall bear any office or charge as captain, lieutenant, corporal, serjeant, ancient-bearer, or other office in camp, troop, band, or company of soldiers; nor shall be captain, master, governor, or bear any office or charge of or in any ship, castle, or fortress of the king’s majesty’s, his heirs and successors, but be utterly disabled for the same; and every person offending herein shall also forfeit for every such offence 100*l.* the one moiety whereof shall be to the

“ the king’s majesty, his heirs and successors, and the other moiety
 “ to him that will sue for the same by action of debt, bill, plaint,
 “ or information, in any of the king’s majesty’s courts of record;
 “ wherein no essoin, protection, or wager of law shall be admitted
 “ or allowed.”

And by § 9. of the said statute it is further enacted, “ That no
 “ popish recusant convict, or any having a wife being a popish
 “ recusant convict, shall exercise any public office or charge in
 “ the commonwealth, but shall be utterly disabled to exercise the
 “ same by himself or by his deputy, except such husband him-
 “ self, and his children which shall be above the age of nine years
 “ abiding with him, and his servants in household, shall once
 “ every month at the least, not having any reasonable excuse to
 “ the contrary, repair to some church or chapel usual for divine
 “ service, and there hear divine service; and the said husband,
 “ and such his children and servants as are of meet age, receive
 “ the sacrament of the Lord’s Supper at such times as are limited
 “ by the laws of this realm, and to bring up his said children in
 “ the true religion.”

§ 9.

On these sections it hath been observed, 1st, That the latter Hawk. P. C. c. 12. § 9.
 extends to all public offices and charges in general, whereas the
 former extends only to those which are particularly enumerated.
 2dly, That this latter expressly disables a popish recusant to ex-
 ercise such an office by himself or his deputy, but the other says
 nothing at all of the exercise of an office by a deputy.

3. Of claiming any Part of a Husband’s personal Estate.

By the 3 Jac. 1. c. 5. § 10. it is enacted, “ That every woman
 “ being a popish recusant convict, (her husband not standing con- 3 Jac. 1. c. 5. § 10.
 “ victed of popish recusancy,) which shall not conform herself
 “ and remain conformed, but shall forbear to repair to some
 “ church or usual place of common prayer, and there hear divine
 “ service and sermon, if any then be, and receive the sacrament
 “ of the Lord’s Supper, according to the laws of this realm, by
 “ the space of one whole year next before the death of her said
 “ husband, shall not only be disabled to be executrix or admi-
 “ nistratrix of her said husband, but also to have or demand any
 “ part of her said husband’s goods or chattels by any law, custom,
 “ or usage whatsoever;” and by 3 Jac. 1. c. 5. § 13. every wo-
 man is put under the like disability, being a popish recusant,
 who shall be married otherwise than according to the church of
England.

4. Of claiming an Estate by Curtesy, or by Way of Dower, after a Marriage against Law.

By the 3 Jac. 1. c. 5. § 13. it is enacted, “ That every man, 3 Jac. 1. c. 5. § 13.
 “ who, being a popish recusant convict, shall be married other-
 “ wise than in some open church or chapel, and otherwise
 “ than according to the orders of the church of *England*, by
 “ a minister

“ a minister lawfully authorized, shall be disable to have any
 “ estate as tenant by the courtesy; and that every woman, being
 “ a popish recusant convict, who shall be married in other form
 “ than as aforesaid, shall be disabled to hold her dower, or
 “ jointure, or widow’s estate.”

2. *Of the Restraints they are put under : And herein,*

1. From going five Miles from Home.

35 Eliz. c. 2.
 3 J. 1. c. 5.
 § 6, 7.

To this purpose it is enacted by 35 Eliz. c. 2. and 3 Jac. 1. c. 5. § 6, 7. “ That every popish recusant convict shall repair to his place of dwelling, &c. and not remove above five miles from thence, unless he be urged by process, &c. or have a licence from the privy council, &c. or under the hands and seals of four justices of the peace, with the assent in writing of the lieutenant of the county, or of the bishop, &c. (every licence of which kind by justices of peace must express both the particular cause and the time for which it was given, and ought not to be granted without a previous oath of some reasonable cause,) under pain of forfeiting all his goods and hereditaments, (whether freehold or copyhold,) for his life, or of abjuring the realm, if he be not worth twenty marks a year, or forty pounds in goods, unless he recant before conviction, and also continue conformable.”

Hawk. P. C.
 c. 12. § 13.

Cro. Jac. 352.
 Roll. R. 108.
 Moor, 836.

Hawk. P. C.
 c. 12. § 4.

In the construction hereof it hath been holden, that the privy council may grant such licence without any such special cause or oath, &c. but that justices of peace cannot. Also it hath been holden, that in pleading a licence of justices of the peace, it must be expressly shewn, that it was made under their hands and seals; the cause in particular for which it was granted must be set forth and the time for which it was limited, and that the party was sworn to the truth of such cause.

It is said, that if the same person be both a justice of peace and a lieutenant, he cannot both join in a licence as justice of peace, and also give his assent as lieutenant, but can only act in one capacity.

Cawley, 130.
 Cro. Eliz. 212.

It seems, that the miles shall be computed according to the English manner, allowing 5280 feet, or 1760 yards, to each mile; and that the same shall be reckoned not by straight lines, as a bird or arrow may fly, but according to the nearest and most usual way.

2. From coming to Court.

3 Jac. 1. c. 5.
 § 2.

By the 3 Jac. 1. c. 5. § 2. it is enacted, “ That no popish recusant convict shall come into the court or house where the king or his heir apparent shall be, unless he be commanded so to do by the king, upon pain of 100*l*. “ And it is further enacted by 3 Car. 2. stat. 2. § 5 & 6. “ That every popish recusant convict, who shall come advisedly into or remain in the presence of the king or queen, or shall come into the court or
 “ house

3 Car. 2. st. 2.
 § 5, 6.

“ house where they or any of them reside, shall be disabled to
 “ hold or execute any office or place of trust civil or military, or
 “ to sue in law or equity, or to be an executor, &c. or capable
 “ of any legacy or deed of gift, and shall forfeit for every offence
 “ 500*l.*, unless such person do, within the term next after such
 “ his coming or remaining, take the oaths of allegiance and
 “ supremacy, and make the declaration against transubstantiation
 “ and the invocation of saints, &c. in the Court of Chancery.”

3. From keeping Arms.

By the 3 Jac. 1. c. 5. § 27, 28, 29. it is enacted, “ That all 3 Jac. 1. c. 5.
 “ such armour, gunpowder, and munition of whatsoever kind, as § 27, 28, 29.
 “ any popish recusant convict shall have in his own house, or
 “ elsewhere, or in the possession of any other, at his disposition,
 “ shall be taken from him by warrant of four justices of peace at
 “ their general or quartersessions, (except such necessary weapons
 “ as shall be allowed him by the said four justices for the defence
 “ of his person or house,) and that the said armour, &c. so taken,
 “ shall be kept at the costs of such recusants in such place as the
 “ said four justices at their said sessions shall appoint; and that
 “ if any such recusant, having such armour, &c. or if any other
 “ person who shall have any such armour, &c. to the use of such
 “ recusant, shall refuse to discover to the said justices, or any of
 “ them, what armour he hath, or shall let or hinder the delivery
 “ thereof to any of the said justices, or to any other person
 “ authorized by their warrant to take the same; that then every
 “ person so offending shall forfeit his said armour, &c. and also
 “ be imprisoned for three months without bail, by warrant from
 “ any justice of peace of such county. And it is further enacted,
 “ that notwithstanding the taking away such armour, &c. yet such
 “ recusant shall be charged with the maintaining of the same,
 “ and with the providing of a horse, &c. in such sort as others of
 “ his majesty’s subjects.”

4. From coming within ten Miles of *London*.

By the 3 Jac. 1. c. 5. § 4, 5. it is enacted, “ That no popish 3 Jac. 1. c. 5.
 “ recusant, &c. shall remain within the compass of ten miles of
 “ *London*, under pain of 100*l.* except such persons as at the time
 “ of the said act did use some trade, mystery, or manual occupa-
 “ tion in *London*, &c. and such as shall have their only dwelling
 “ in *London*,” &c.

3. *Of the Forfeitures they are liable to: And herein,*

1. That of two Parts of a Jointure or Dower.

By the 3 Jac. 1. c. 5. § 10. it is enacted, “ That every mar- 3 Jac. 1. c. 5.
 “ ried woman, being a popish recusant convict, (her husband § 10.
 “ not standing convicted of popish recusancy,) who shall not
 “ conform herself and remain conformed, but shall forbear to re-
 “ pair to some church or usual place of common prayer, and
 “ there to hear divine service and sermon, if any then be, and
 “ receive

“ receive the sacrament of the Lord’s Supper, according to the laws of this realm, within one year next before the death of her said husband, shall forfeit to the king the profits of two parts of her jointure, and dower of any hereditaments of her said husband,” &c.

2. That of 20*l.* for not receiving the Sacrament yearly after Conformity.

3 Jac. 1. c. 5.
§ 1, 2.

By the 3 Jac. 1. c. 5. § 1, 2, 3, it is enacted, “ That if any popish recusant convict who hath conformed himself to the church, &c. shall not receive the sacrament in his own parish-church, &c. within one year after his conformity, he shall forfeit 20*l.* and for the second year, 40*l.* and for every year, after 60*l.*” &c.

3. That of 100*l.* for an unlawful Marriage.

3 Jac. 1. c. 5.
§ 13.

By the 3 Jac. 1. c. 5. § 13. it is enacted, “ That every popish recusant convict who shall be married to a woman who is no inheritrix, otherwise than according to the church of *England*, shall forfeit 100*l.*”

4. That of 100*l.* for an Omission of lawful Baptism.

3 Jac. 1. c. 5.
§ 14.

By the 3 Jac. 1. c. 5. § 14. it is enacted, “ That every popish recusant shall, within one month after the birth of his child, cause the same to be baptized by a lawful minister according to the laws of this realm, in the open church of the same parish where the child shall be born, or in some other church near adjoining, or chapel where baptism is usually administered; or if, by infirmity of the child it cannot be brought to such place, then the same shall within the time aforesaid be baptized by the lawful minister of the said parishes or places aforesaid; upon pain that the father of such child, if he be living, by the space of one month next after the birth of such child, or if he be dead within the said month, then the mother of such child shall for every such offence forfeit 100*l.*” &c.

5. That of 20*l.* for an unlawful Burial.

5 Jac. 1. c. 5.
§ 15.

By the 5 Jac. 1. c. 5. § 15. it is enacted, “ That if any popish recusant, not being excommunicate, shall be buried in any other place than in the church or churchyard, or not according to the laws of this realm, the executors, &c. of such recusant knowing the same, or the party that causeth him to be so buried, shall forfeit 20*l.*” &c.

4. *Of the Inconveniences they are subject to : And herein,*

1. That their Houses may be searched for Reliques, whether they be Men or Women.

3 Jac. 1. c. 5.
§ 26.
[Repealed by
31 G. 3. c. 32.]

To this purpose it is enacted by the 3 Jac. 1. c. 5. § 26. “ That any two justices of peace, and all mayors, bailiffs, and chief officers of cities and towns corporate in their respective jurisdictions, may search the house and lodgings of every popish recusant

“ recusant convict for popish books and reliques ; and that if any
“ altar, pix, beads, pictures, or such like popish relique, or any
“ popish book be found in the custody of such person, as in the
“ opinion of the said justices, &c. shall be unmeet for him or her
“ to have or use, it shall be defaced or burnt, if it be meet to be
“ burnt ; and if it be a crucifix, or other relique of any price,
“ the same shall be defaced at the general quarter sessions in the
“ county where it shall be found, and then restored to the owner.”

2. If they be Women, and married, that they may be committed.

To this purpose it is enacted by the 7 Jac 1. c. 6. § 28. “ That
“ if any married woman, being a popish recusant convict, shall
“ not within three months after her conviction conform herself,
“ and repair to church and receive the sacrament, &c. she may be
“ committed to prison by one of the privy council, or by the
“ bishop, if she be a baroness ; or if under that degree, by justices
“ of peace, whereof one to be of the *quorum*, there to remain till
“ she perform, &c. unless the husband will pay to the king ten
“ pounds a month for her offence, or else the third part of all his
“ lands, &c. at the choice of the husband,” &c.

7 Jac. 1. c. 6.
§ 28.

[Repealed by
stat. 31 G. 3.
c. 32. § 3. in
favour of per-
sons taking
the oath
therein re-
quired.]

(B) Of the Offence of not making a Declaration
against Popery, and the Restraints it subjects
the Parties to : And herein,

1. *From sitting in Parliament.*

BY the 30 Car. 2. stat. 2. c. 1. it is enacted, “ That no peer
“ shall vote or make his proxy in the House of Peers, or sit
“ there during any debate ; and that no member of the House of
“ Commons shall vote or sit there during any debate after the
“ Speaker is chosen, until such peer or member shall take the
“ oaths of allegiance and supremacy, and make a declaration of
“ his belief that there is no transubstantiation in the sacrament of
“ the Lord’s Supper, and that the invocation or adoration of the
“ Virgin *Mary*, or any other saint, and the sacrifice of the mass,
“ as they are now used in the church of *Rome*, are superstitious
“ and idolatrous, &c., on pain that every such offender shall be
“ adjudged a popish recusant convict, and disabled to hold or
“ execute any office, &c., or from thenceforth to sit or vote in
“ either house of parliament, to sue in law or equity, or to be
“ guardian, executor, or administrator, or capable of any legacy
“ or deed of gift, and shall forfeit for every offence 500*l*.”

30 Car. 2.
st. 2. c. 1.

[[Repealed by
10 G. 4. c. 7.
which gives a
substituted
oath in lieu of
the oaths of
allegiance, su-
premacy, and
abjuration :
see the act,
post.]]

|| By 10 Geo. 4. c. 7. intituled *An Act for the relief of his
majesty’s Roman Catholic subjects*, reciting that by various acts
of parliament certain restraints and disabilities are imposed
on the Roman Catholic subjects of his majesty, to which other
subjects of his majesty are not liable ; and that it is expedient
that such restraints and disabilities shall be from henceforth
discontinued ; and that by various acts certain oaths and declar-
ations, commonly called the declaration against transubstantiation,

10 G. 4. c. 7.
§ 1.

and the declaration against transubstantiation and the invocation of saints, and the sacrifice of the mass, as practised in the Church of Rome, are or may be required to be taken, made, and subscribed by the subjects of his majesty, as qualifications for sitting and voting in parliament, and for the enjoyment of certain offices, franchises, and civil rights, it is enacted "That from and after the commencement of this act, all such parts of the said acts as require the said declarations, or either of them, to be made or subscribed by any of his majesty's subjects as a qualification for sitting and voting in parliament, or for the exercise and enjoyment of any office, franchise, or civil right, be and the same are (save as hereinafter provided and excepted) hereby repealed."

§ 2.

And by § 2. it is enacted, "That after the commencement of this act, it shall be lawful for any person professing the Roman Catholic religion, being a peer, or who shall be returned as a member of the House of Commons, to sit and vote in either house of parliament respectively, being in all other respects qualified to sit and vote therein, upon taking and subscribing the following oath, instead of the oaths of allegiance, supremacy, and abjuration:—

"I, *A. B.* do sincerely promise and swear, that I will be faithful and bear true allegiance to his majesty King *George* the Fourth, and will defend him to the utmost of my power against all conspiracies and attempts whatever, which shall be made against his person, crown, or dignity; and I will do my utmost endeavour to disclose and make known to his majesty, his heirs and successors, all treasons and traitorous conspiracies which may be formed against him or them: And I do faithfully promise to maintain, support, and defend, to the utmost of my power, the succession of the crown; which succession, by an act intituled *An Act for the further limitation of the crown, and better securing the rights and liberties of the subject*, is and stands limited to the Princess *Sophia*, Electress of *Hanover*, and the heirs of her body, being protestants; hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm: And I do further declare, That it is not an article of my faith, and that I do renounce, reject, and abjure the opinion, that princes excommunicated or deprived by the pope, or any other authority of the see of *Rome*, may be deposed or murdered by their subjects, or by any person whatsoever: And I do declare, that I do not believe that the pope of *Rome*, or any other foreign prince, prelate, person, state, or potentate, hath or ought to have any temporal or civil jurisdiction, power, superiority, or preeminence, directly or indirectly, within this realm: I do swear that I will defend to the utmost of my power the settlement of property within this realm as established by the laws; and I do hereby disclaim, disavow, and solemnly abjure any intention to subvert the present church establishment, as settled by law within this realm:

“ realm : and I do solemnly swear, that I never will exercise
“ any privilege, to which I am or may become entitled, to disturb
“ or weaken the protestant religion or protestant government in
“ the United Kingdom : And I do solemnly, in the presence of
“ God, profess, testify, and declare, that I do make this declar-
“ ation, and every part thereof, in the plain and ordinary sense
“ of the words of this oath, without any evasion, equivocation, or
“ mental reservation whatsoever. So help me God.”

And by § 3. it is further enacted, “ That wherever in the oath,
“ hereby appointed and set forth, the name of his present
“ majesty is expressed or referred to, the name of the sovereign
“ of this kingdom for the time being, by virtue of the act for the
“ further limitation of the crown and better securing the rights
“ and liberties of the subject, shall be substituted from time to
“ time with proper words of reference thereto.”

Provided always and be it further enacted, “ That no peer
“ professing the Roman Catholic religion, and no person pro-
“ fessing the Roman Catholic religion who shall be returned a
“ member of the House of Commons after the commencement of
“ this act, shall be capable of sitting or voting in either house of
“ parliament respectively, unless he shall take and subscribe the
“ oath hereinbefore appointed and set forth, before the same
“ persons, at the same times and places, and in the same manner
“ as the oaths and the declaration now required by law are
“ respectively directed to be taken, made, and subscribed ; and
“ that any such person professing the Roman Catholic religion
“ who shall sit or vote in either house of parliament without
“ having first taken and subscribed, in the manner aforesaid,
“ the oath in this act appointed and set forth, shall be subject
“ to the penalties, forfeitures, disabilities, and the offence of so
“ sitting or voting shall be followed and attended by and with
“ the same consequences, as are by law enacted and provided
“ in the case of persons sitting or voting in either house of
“ parliament respectively without the taking, making, and sub-
“ scribing the oaths and the declaration now required by law.”

And be it further enacted, “ That it shall be lawful for persons
“ professing the Roman Catholic religion to vote at elections
“ of members to serve in parliament for *England* and for
“ *Ireland*, and also to vote at the elections of representative
“ peers of *Scotland* and *Ireland*, and to be elected such repre-
“ sentative, being in all other respects duly qualified, upon
“ taking and subscribing the oath hereinbefore appointed and
“ set forth instead of the oaths of allegiance, supremacy, and
“ abjuration, and instead of the declaration now by law required,
“ and instead also of such other oath or oaths as are now by
“ law required to be taken by any of his majesty’s subjects
“ professing the Roman Catholic religion, and upon taking also
“ such other oath or oaths as may now be lawfully tendered to
“ any person offering to vote at such elections.”

And be it further enacted, “ That the oath hereinbefore
“ appointed and set forth shall be administered to his majesty’s

§ 3.

§ 4.

§ 5.

§ 6.

“ subjects professing the Roman Catholic religion, for the purpose of enabling them to vote in any of the cases aforesaid, in the same manner, at the same time, and by the same officers or other persons as the oaths for which it is hereby substituted are or may be now by law administered ; and that in all cases in which a certificate of the taking, making, or subscribing of any of the oaths or of the declaration now required by law is directed to be given, a like certificate of the taking or subscribing of the oath hereby appointed and set forth shall be given by the same officer or other person, and in the same manner as the certificate now required by law is directed to be given, and shall be of the like force and effect.”

§ 7.

And be it further enacted, “ That in all cases where the persons now authorized by law to administer the oaths of allegiance, supremacy, and abjuration, to persons voting at elections, are themselves required to take an oath previous to their administering such oaths, they shall, in addition to the oath now by them taken, take an oath for the duly administering the oath hereby appointed and set forth, and for duly granting certificates of the same.”

§ 8.

“ And whereas in an act of parliament of *Scotland* made in the eighth and ninth session of the first parliament of King *William the Third*, intituled *An Act for preventing the growth of popery*, a certain declaration or formula is therein contained, which it is expedient should no longer be required to be taken and subscribed ; be it therefore enacted, That such parts of any acts as authorized the said declaration or formula to be tendered, or require the same to be taken, sworn, and subscribed, shall be and the same are hereby repealed, except as to such offices, places, and rights as are hereinafter excepted ; and that from and after the commencement of this act it shall be lawful for persons professing the Roman Catholic religion to elect and be elected members to serve in parliament for *Scotland*, and to be enrolled as freeholders in any shire or stewartry of *Scotland*, and to be chosen commissioners or delegates for choosing burgesses to serve in parliament for any districts or burghs in *Scotland*, being in all other respects duly qualified, such person always taking and subscribing the oath hereinbefore appointed and set forth, instead of the oaths of allegiance and abjuration as now required by law, at such time as the said last-mentioned oaths or either of them are now required by law to be taken.”

§ 9.

“ And be it enacted, That no person in holy orders in the church of *Rome* shall be capable of being elected to serve in parliament as a member of the House of Commons ; and if any such person shall be elected to serve in parliament as aforesaid, such election shall be void ; and if any person, being elected to serve in parliament as a member of the House of Commons, shall, after his election, take or receive holy orders in the church of *Rome*, the seat of such person shall immediately become void ; and if any such person shall, in any of the cases aforesaid, “ presume

“presume to sit or vote as a member of the House of Commons,
“he shall be subject to the same penalties, forfeitures, and dis-
“abilities as are enacted by an act passed in the forty-first year
“of the reign of King George the Third, intituled *An Act to*
“*remove doubts respecting the eligibility of persons in holy orders*
“*to sit in the House of Commons*; and proof of the celebration of
“any religious service by such person, according to the rites of
“the church of *Rome*, shall be deemed and taken to be *primâ*
“*facie* evidence of the fact of such person being in holy orders
“within the intent and meaning of this act.”

2. *Holding a Place at Court.*

By the 30 Car. 2. stat. 2. § 9. 12, 13. it is enacted, “That
“every person who shall be a sworn servant to the king shall
“take the said oaths, and subscribe the said declaration in
“Chancery, the next term after he shall be so sworn a servant,
“&c.; and that if any such person neglecting so to do shall
“advisedly come into or remain in the presence of the king or
“queen, or shall come into the court or house where they are,
“or either of them reside, he shall suffer all the penalties
“expressed in the foregoing section; unless such person coming
“into the king’s presence, &c. shall first have licence so to do
“by warrant under the hands and seals of six privy councillors,
“by order of the privy council, upon some urgent occasion
“therein to be expressed; which licence shall not exceed ten
“days, and shall be first filed, &c. in the petty-bag office for any
“body to view without fee, &c.; and no person to be licenced
“for above thirty days in one year.”

the like penalties. But this clause is repealed as to peers of *Great Britain*
stat. 31 G. 3. c. 32. § 20. who shall take the oaths therein appointed.]

[The fifth section sub-
jects peers of
Great Britain
and *Ireland*,
and members
of the House
of Commons,
not conform-
ing as
mentioned in
the text, and
all recusants
convict, who
shall come
unadvisedly
into or remain
in the king or
queen’s
presence, to
and *Ireland* by

|| 3. *Holding Offices civil and military.* ||

|| By 25 Car. 2. c. 2. intituled, *An Act for preventing dangers*
which may happen from popish recusants, it is enacted, (§ 2.)
“That every person that shall be admitted into any office, civil
“or military, or shall receive any pay, salary, fee or wages, by
“reason of any patent or grant of his majesty, or shall have
“command, place, or trust from or under his majesty, his heirs
“or successors, or by his or their authority, or by authority
“derived from him or them within *England, Wales, or Berwick-*
“*upon-Tweed*, or in his majesty’s navy, or in *Jersey* and *Guernsey*,
“or that shall be admitted into any employment in his majesty’s
“or royal highness’s household or family, after the first day of
“*Easter* term 1673, and shall inhabit in *London* or *Westminster*,
“or within thirty miles thereof, shall take the oaths of supremacy
“and allegiance by law established, (the latter contained in the
“statute of 3 Jac.) in the *next term* after his admittance, or
“in case of omission to do so at the next quarter sessions for the
“county or place where he shall reside, and shall receive the
“sacrament *within three months* after his admittance.”

25 Car. 2.
c. 2. § 2.

§ 9.

And by § 9, the persons taking the aforesaid oaths are likewise to make and subscribe the declaration against transubstantiation at the same time.

1 W. & M.
c. 8.

By statute 1 W. & M. c. 8. intituled *An Act for the abrogating of the oaths of supremacy and allegiance, and appointing other oaths*, the oaths of supremacy and allegiance appointed by the 1 Eliz. c. 1., and the 3 Jac. 1. c. 4., and also by 13 & 14 Car. 2. c. 3., are abrogated and repealed, and other forms of oath are substituted for them.

§ 5.

And by § 5. it is enacted, that all persons that shall thereafter be admitted into any office or employment, ecclesiastical or civil, or come into any capacity in respect whereof they should have been obliged by any statute to take the abrogated oaths, shall take the oaths thereby appointed, in such manner, at *such times*, before such persons and in such places, as they should or ought to have taken the abrogated oaths if they had not been abrogated; and shall incur the same penalties for neglecting to do so.

1 Eliz. c. 1.

With respect to this time and manner of taking the oaths, the statute of 1 Eliz. c. 1., enacts that any person that shall be preferred to any spiritual benefice, or temporal or lay office, service or ministry, shall take the oath of supremacy appointed by that statute *before* taking upon him such promotion, ministry, &c. and before such person as shall have authority to admit any such person to any such office, ministry, or service, or else before such person as shall be appointed by her majesty's commission to minister the said oath.

But as we have seen that the same oaths are required by the statute 25 Car. 2. c. 2. to be taken in the next term, or at the next quarter sessions, after admittance into any office, it would seem as if this statute virtually repealed the provision of the 1 Eliz. requiring them to be taken *before* entering into office, as the legislature could hardly intend that the same oaths should be taken by the same individuals, both before entering into office, and also in a very few weeks afterwards. According to this construction, the time therefore for taking the new oaths under the 5th section of the 1 W. & M. c. 8. would seem to be the time appointed by the act of Charles 2. viz. in the next term, or at the next quarter sessions, after admittance to office.

1 W. & M.

§ 10.

(a) This is the greater declaration, not only against transubstantiation, but likewise

And this seems the more probable, because the 10th section of the statute 1 W. & M. expressly provides with respect to commissioned and non-commissioned, or warrant-officers in the army and navy, that *they* shall take the said oaths, and make and subscribe the declaration (a) mentioned in the 30 Car. 2. stat. 2. *before* the delivery to them of their commissions or warrants.

against the invocation of saints and the mass.

1 G. 1. st. 2.
c. 13.

The stat. 1 Geo. 1. stat. 2. c. 13. intituled *An Act for the further security of his majesty's person and government, and the succession of the crown in the heirs of the late Princess Sophia, being Protestants, and for extinguishing the hopes of the pretended Prince*

Prince of Wales, and his open and secret abettors, after enacting that all persons bearing offices civil or military, &c. on the first day of *Michaelmas* term then next, or at any time during the said term, shall take the oaths of allegiance, supremacy, and abjuration of the Pretender, therein set forth, at the time and in manner therein prescribed, further enacts, "That every person that shall be admitted into any office civil or military, or shall receive any pay, salary, &c. by reason of any patent or grant from his majesty, or that shall have any command or place of trust from or under his majesty, or by his authority, or by authority derived from him within *England* (a), or in his majesty's navy, or in *Jersey* and *Guernsey*, or that shall be admitted into any employment in his majesty's household or family, or of his royal highness *George Prince of Wales*, or of her royal highness the Princess of *Wales*, or their issue, and all ecclesiastical persons, heads and governors of what denomination soever, and all other members of colleges and halls in any university that are or shall be of the foundation, or that do or shall enjoy any exhibition, being of, or as soon as they shall attain the age of eighteen years, and all persons teaching or reading to pupils in any university or elsewhere, and all schoolmasters and ushers, and all preachers and teachers of separate congregations, high or chief constables, and every person who shall act as serjeant at law, counsellor at law, barrister, advocate, attorney, solicitor, proctor, clerk or notary, by practising in any manner as such in any court or courts whatsoever within *England*, who shall after the 10th of *August* 1715, be admitted into any of the before-mentioned preferments, &c. or shall come into any such capacity, or take upon him any such practice, &c. as aforesaid, shall within three months after admittance, take and subscribe the said oaths in one of the courts at *Westminster*, or at the general quarter sessions of the county or place where he shall reside."

(a) *Berwick-upon-Tweed* is here omitted.

By stat. 2 Geo. 2. c. 31., the provision of the last statute, as to taking the oaths within three months after admittance to office, is repealed; and the oaths are required to be taken at any time before the end of the next term, or before the next quarter sessions after the admittance to any office. Stat. 2 G. 2. c. 31.

And by the 9 Geo. 2. c. 26. the time is further extended to six months after admittance to office; and all persons required by the stat. 25 Car. 2. to subscribe the declaration against transubstantiation shall subscribe the same at the time and place of taking the oaths. 9 G. 2. c. 26.

These are the statutes under which the oaths of qualification for civil and military offices were required to be taken, and which have had the effect of excluding Roman Catholics from all offices within the operation of the acts.

By a late act passed in the 57th of Geo. 3. c. 92. intituled, *An Act to regulate the administration of oaths in certain cases to officers in his majesty's land and sea forces*, after reciting that by certain 57 G. 3. c. 92.

certain acts passed in previous reigns, it was provided that officers in the navy and army should take certain oaths, and make certain declarations, before entering on their offices or places of trust, and that doubts had been entertained whether such provisions were still in force; and that the practice of taking the oaths and declarations by officers previous to their receiving commissions in the army had been long disused, and that it was expedient to remove the doubts and assimilate the practice of the two services; it is enacted, that after the passing of the act, it shall be lawful for the secretaries of state, lords of the admiralty, commander in chief, and secretary at war, to deliver commissions or warrants to any officers in the navy, land forces, or marines, without *previously* requiring such officers to take the said oaths or declarations: Provided that nothing therein contained shall extend to any oaths or declaration required by any acts then in force, to be taken by such officers *after* they shall have received their commissions or warrants.

10 G. 4. c. 7.
§ 10.

And by 10 Geo. 4. c. 7. § 10. (the Act for relief of the Roman Catholics), it is enacted, "That it shall be lawful for any of his majesty's subjects professing the Roman Catholic religion to hold, exercise, and enjoy all civil and military offices, and places of trust or profit under his majesty, his heirs or successors, and to exercise any other franchise or civil right, except as hereinafter excepted, upon taking and subscribing, at the times and in the manner hereinafter mentioned, the oath hereinbefore appointed and set forth (a), instead of the oaths of allegiance, supremacy, and abjuration, and instead of such other oath or oaths as are or may be now by law required to be taken for the purpose aforesaid by any of his majesty's subjects professing the Roman Catholic religion.

(a) See the
oath, *ante*,
p. 100.

§ 11.

"Provided always, and be it enacted, That nothing herein contained shall be construed to exempt any person professing the Roman Catholic religion from the necessity of taking any oath or oaths, or making any declaration not hereinbefore mentioned, which are or may be by law required to be taken or subscribed by any person on his admission into any such office or place of trust, or profit as aforesaid.

§ 12.

"Provided always and be it further enacted, That nothing herein contained shall extend, or be construed to extend, to enable any person or persons professing the Roman Catholic religion to hold or exercise the office of guardians and justices of the United Kingdom, or of regent of the United Kingdom, under whatever name, style, or title such office may be constituted; nor to enable any person, otherwise than he is now by law enabled, to hold or enjoy the office of lord high chancellor, lord keeper, or lord commissioner of the great seal of Great Britain or Ireland; or the office of lord lieutenant, or lord deputy, or other chief governor or governors of Ireland; or his majesty's high commissioner to the general assembly of the church of Scotland.

"Provided

“ Provided always, and be it further enacted, That nothing
“ herein contained shall be construed to affect or alter any of
“ the provisions of an act passed in the seventh year of his pre-
“ sent majesty’s reign, intituled, *An Act to consolidate and amend*
“ *the laws which regulate the levy and application of church rates*
“ *and parish cesses, and the election of churchwardens, and the*
“ *maintenance of parish clerks in Ireland.* § 13.

“ And be it enacted, That it shall be lawful for any of his
“ majesty’s subjects professing the Roman Catholic religion to
“ be a member of any lay body corporate, and to hold any civil
“ office or place of trust, or profit therein, and to do any cor-
“ porate act, or vote in any corporate election or other proceed-
“ ing, upon taking and subscribing the oath hereby appointed
“ and set forth, instead of the oaths of allegiance, supremacy, and
“ abjuration; and upon taking also such other oath or oaths as
“ may now by law be required to be taken by any persons be-
“ coming members of such lay body corporate, or being ad-
“ mitted to hold any office or place of trust, or profit within
“ the same. § 14.

“ Provided nevertheless, and be it further enacted, That no-
“ thing herein contained shall extend to authorize or empower
“ any of his majesty’s subjects professing the Roman Catholic
“ religion, and being a member of any lay body corporate, to
“ give any vote at, or in any manner to join in the election,
“ presentation, or appointment of any person to any ecclesiastical
“ benefice whatsoever, or any office or place belonging to or
“ or connected with the united church of *England and Ireland*,
“ or the church of *Scotland*, being in the gift, patronage, or dis-
“ posal of such lay corporate body. § 15.

“ Provided also, and be it enacted, That nothing in this act
“ contained shall be construed to enable any persons, otherwise
“ than as they now are by law enabled, to hold, enjoy, or exercise
“ any office, place, or dignity of, in, or belonging to the united
“ church of *England and Ireland*, or the church of *Scotland*, or
“ any place or office whatever of, in, or belonging to any of the
“ ecclesiastical courts of judicature of *England and Ireland* re-
“ spectively, or any court of appeal from or review of the sentences
“ of such courts, or of, in, or belonging to the commissary court
“ of *Edinburgh*, or of, in, or belonging to any cathedral or col-
“ legiate or ecclesiastical establishment or foundation, or any
“ office or place whatever of, in, or belonging to any of the
“ universities of this realm, or any office or place whatever, and
“ by whatever name the same may be called, of, in, or belonging
“ to any of the colleges or halls of the said universities, or the
“ colleges of *Eton, Westminster, or Winchester*, or any college or
“ school within this realm; or to repeal, abrogate, or in any
“ manner to interfere with any local statute, ordinance, or
“ rule, which is or shall be established by competent authority
“ within any university, college, hall, or school, by which Roman
“ Catholics shall be prevented from being admitted thereto, or
“ from residing or taking degrees therein: Provided also, that
“ nothing § 16.

“ nothing herein contained shall extend, or be construed to extend, to enable any person, otherwise than he is now by law enabled, to exercise any right of presentation to any ecclesiastical benefice whatsoever; or to repeal, vary, or alter in any manner the laws now in force in respect to the right of presentation to any ecclesiastical benefice.

§ 19.

“ And be it enacted, That every person professing the Roman Catholic religion, who shall, after the commencement of this act, be placed, elected, or chosen, in or to the office of mayor, provost, alderman, recorder, bailiff, town clerk, magistrate, councillor, common councilman, or in or to any office of magistracy, or place of trust or employment relating to the government of any city, corporation, borough, burgh, or district within the United Kingdom of *Great Britain* and *Ireland*, shall, within one calendar month next before or upon his admission into any of the same respectively, take and subscribe the oath hereinbefore appointed and set forth, in the presence of such person or persons respectively, as by the charters or usages of of the said respective cities, corporations, burghs, boroughs, or districts ought to administer the oath for due execution of the said offices or places respectively; and in default of such, in the presence of two justices of the peace, councillors, or magistrates of the said cities, corporations, burghs, boroughs, or districts, if such there be; or otherwise, in the presence of two justices of the peace of the respective counties, ridings, divisions, or franchises wherein the said cities, corporations, burghs, boroughs, or districts are; which said oath shall either be entered in a book, roll, or other record to be kept for that purpose, or shall be filed amongst the records of the city, corporation, burgh, borough or district.

§ 20.

“ And be it enacted, That every person professing the Roman Catholic religion, who shall, after the commencement of this act, be appointed to any office or place of trust or profit under his majesty, his heirs or successors, shall within three calendar months next before such appointment, or otherwise shall, before he presumes to exercise or enjoy or in any manner to act in such office or place, take and subscribe the oath hereinbefore appointed and set forth, either in his majesty's high Court of Chancery, or in any of his majesty's Courts of King's Bench, Common Pleas, or Exchequer, at *Westminster* or *Dublin*; or before any judge of assize, or in any court of general or quarter sessions of the peace in *Great Britain* and *Ireland*, for the county or place where the person so taking and subscribing the oath shall reside; or in any of his majesty's courts of session, judiciary, exchequer, or jury court, or in any sheriff or steward court, or in any burgh court, or before the magistrates and councillors of any royal burgh in *Scotland*, between the hours of nine in the morning and four in the afternoon; and the proper officer of the court in which such oath shall be so taken and subscribed, shall cause the same to be preserved amongst the records of the court; and such officer shall make,

“ sign,

“ sign, and deliver a certificate of such oath having been duly
“ taken and subscribed, as often as the same shall be demanded
“ of him, upon payment of two shillings and sixpence for the
“ same; and such certificate shall be sufficient evidence of the
“ person therein named having duly taken and subscribed such
“ oath.

“ And be it enacted, That if any person professing the Roman
“ Catholic religion, shall enter upon the exercise or enjoyment
“ of any office or place of trust or profit under his majesty, or
“ of any other office or franchise, not having in the manner and
“ at the times aforesaid taken and subscribed the oath herein-
“ before appointed and set forth, then and in every such case
“ such person shall forfeit to his majesty the sum of two hundred
“ pounds; and the appointment of such person to the office,
“ place, or franchise so by him held shall become altogether void,
“ and the office, place, or franchise shall be deemed and taken
“ to be vacant to all intents and purposes whatsoever.

§ 21.

“ Provided always, That for and notwithstanding any thing
“ in this act contained, the oath hereinbefore appointed and set
“ forth, shall be taken by the officers in his majesty's land and
“ sea service, professing the Roman Catholic religion, at the same
“ times and in the same manner as the oaths and declarations
“ now required by law are directed to be taken, and not other-
“ wise.

§ 22.

“ And be it further enacted, That from and after the passing
“ of this act, no oath or oaths shall be tendered to, or required
“ to be taken by his majesty's subjects professing the Roman Ca-
“ tholic religion, for enabling them to hold or enjoy any real or
“ personal property, other than such as may by law be tendered
“ to and required to be taken by his majesty's other subjects; and
“ that the oath herein appointed and set forth, being taken and
“ subscribed in any of the courts, or before any of the persons
“ above mentioned, shall be of the same force and effect, to all
“ intents and purposes, as, and shall stand in the place of, all
“ oaths and declarations required or prescribed by any law now
“ in force for the relief of his majesty's Roman Catholic subjects
“ from any disabilities, incapacities, or penalties; and the proper
“ officer of any of the courts above mentioned, in which any per-
“ son professing the Roman Catholic religion shall demand to
“ take and subscribe the oath herein appointed and set forth, is
“ hereby authorized and required to administer the said oath to
“ such person; and such officer shall make, sign, and deliver a
“ certificate of such oath having been duly taken and subscribed,
“ as often as the same shall be demanded of him, upon pay-
“ ment of one shilling; and such certificate shall be sufficient
“ evidence of the person therein named having duly taken and
“ subscribed such oath.”

§ 23.

By § 24. it is enacted, “ That if any person, after the com-
“ mencement of this act, other than the person thereunto autho-
“ rized by law, shall assume, use the name, style, or title of
“ archbishop of any province, bishop of any bishoprick, or
“ dean

§ 24.

- “ dean of any deanery in *England* or *Ireland*, he shall, for every
 “ such offence, forfeit and pay the sum of one hundred pounds.
- § 25. “ And be it further enacted, That if any person holding any
 “ judicial or civil office, or any mayor, provost, jurat, bailiff or
 “ other corporate officer, shall, after the commencement of this
 “ act, resort to or be present at any place of public meeting for
 “ religious worship in *England* or in *Ireland* other than that of
 “ the united church of *England* and *Ireland*, or in *Scotland* other
 “ than that of the church of *Scotland*, as by law established, in
 “ the robe, gown, or other peculiar habit of his office, or attend
 “ with the ensign or insignia, or any part thereof, of or belong-
 “ ing to such his office, such person shall, being thereof con-
 “ victed by due course of law, forfeit such office, and pay for
 “ every such offence the sum of one hundred pounds.
- § 26. “ And be it further enacted, That if any Roman Catholic ec-
 “ clesiastic, or any member of any of the orders, communities,
 “ or societies hereinafter mentioned, shall, after the commence-
 “ ment of this act, exercise any of the rites or ceremonies of the
 “ Roman Catholic religion, or wear the habits of his order, save
 “ within the usual places of worship of the Roman Catholic reli-
 “ gion, or in private houses, such ecclesiastic or other person
 “ shall, being thereof convicted by due course of law, forfeit for
 “ every such offence the sum of fifty pounds.
- § 27. “ Provided always, and be it enacted, That nothing in this act
 “ contained shall in any manner repeal, alter, or affect any pro-
 “ vision of an act made in the fifth year of his present ma-
 “ jesty’s reign, intituled, *An Act to repeal so much of an act*
 “ *passed in the ninth year of the reign of King William the*
 “ *Third, as relates to burials in suppressed monasteries, abbeys,*
 “ *or convents in Ireland, and to make further provisions with re-*
 “ *spect to the burials in Ireland of persons dissenting from the*
 “ *established church:* And whereas Jesuits and members of
 “ other religious orders, communities, or societies of the church
 “ of *Rome*, bound by monastic or religious vows, are resident
 “ within the United Kingdom; and it is expedient to make pro-
 “ vision for the gradual suppression and final prohibition of the
 “ same therein; be it therefore enacted, That every Jesuit and
 “ every member of any other religious order, community, or
 “ society of the church of *Rome*, bound by monastic or religious
 “ vows, who at the time of the commencement of this act shall
 “ be within the United Kingdom, shall, within six calendar
 “ months after the commencement of this act, deliver to the
 “ clerk of the peace of the county or place where such person
 “ shall reside, or to his deputy, a notice or statement, in the form
 “ and containing the particulars required to be set forth in the
 “ schedule to this act annexed; which notice or statement such
 “ clerk of the peace, or his deputy, shall preserve and register
 “ amongst the records of such county or place, without any fee,
 “ and shall forthwith transmit a copy of such notice or state-
 “ ment to the chief secretary of the lord lieutenant, or other
 “ chief governor or governors of *Ireland*, if such person shall
 “ reside

“reside in *Ireland*, or if in *Great Britain* to one of his majesty’s principal secretaries of state; and in case any person shall offend in the premises, he shall forfeit and pay to his majesty, for every calendar month during which he shall remain in the United Kingdom, without having delivered such notice or statement as is hereinbefore required, the sum of fifty pounds.

“And be it further enacted, That if any Jesuit, or any member of such religious order, community, or society as aforesaid, shall, after the commencement of this act, come into this realm, he shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

“Provided always, and be it further enacted, That in case any natural born subject of this realm, being at the time of the commencement of this act a Jesuit, or other member of any such religious order, community, or society as aforesaid, shall, at the time of the commencement of this act, be out of the realm, it shall be lawful for such person to return or to come into this realm; and upon such his return or coming into this realm he is hereby required, within the space of six calendar months after his first returning or coming into the United Kingdom, to deliver such notice or statement to the clerk of the peace of the county or place where he shall reside, or his deputy, for the purpose of being so registered and transmitted, as hereinbefore directed; and in case any such person shall neglect or refuse so to do, he shall for such offence forfeit and pay to his majesty, for every calendar month during which he shall remain in the United Kingdom without having delivered such notice or statement, the sum of fifty pounds.

§ 30.

“Provided also, and be it further enacted, That notwithstanding any thing hereinbefore contained, it shall be lawful for any one of his majesty’s principal secretaries of state, being a protestant, by a licence in writing, signed by him, to grant permission to any Jesuit, or member of any such religious order, community, or society as aforesaid, to come into the United Kingdom, and remain therein, for such period as the said secretary of state shall think proper, not exceeding in any case the space of six calendar months; and it shall also be lawful for any of his majesty’s principal secretaries of state to revoke any licence so granted before the expiration of the time mentioned therein, if he shall so think fit; and if such person to whom such licence shall have been granted shall not depart from the United Kingdom within twenty days after the expiration of the time mentioned in such licence, or if such licence shall have been revoked, then within twenty days after notice of such revocation shall have been given to him, every person so offending shall be deemed guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.

§ 31.

“And

- § 32. " And be it further enacted, That there shall annually be laid before both houses of parliament an account of all such licences as shall have been granted for the purpose hereinbefore mentioned within the twelve months then next preceding.
- § 33. " And be it further enacted, That in case any Jesuit, or member of any such religious order, community, or society as aforesaid, shall, after the commencement of this act, within any part of the United Kingdom, admit any person to become a regular ecclesiastic, or brother or member of any such religious order, community, or society, or be aiding or consenting thereto, or shall administer or cause to be administered, or be aiding or assisting in the administering or taking any oath, vow, or engagement purporting or intended to bind the person taking the same to the rules, ordinances, or ceremonies of such religious order, community, or society, every person offending in the premises in *England* or *Ireland* shall be deemed guilty of a misdemeanor, and in *Scotland* shall be punished by fine and imprisonment.
- § 34. " And be it further enacted, That in case any person shall, after the commencement of this act, within any part of this United Kingdom, be admitted or become a Jesuit, or brother or member of any other such religious order, community, or society as aforesaid, such person shall be deemed and taken to be guilty of a misdemeanor, and being thereof lawfully convicted, shall be sentenced and ordered to be banished from the United Kingdom for the term of his natural life.
- § 35. " And be it further enacted, That in case any person, sentenced and ordered to be banished under the provisions of this act, shall not depart from the United Kingdom within thirty days after the pronouncing of such sentence and order, it shall be lawful for his majesty to cause such person to be conveyed to such place out of the United Kingdom as his majesty, by the advice of his privy council, shall direct.
- § 36. " And be it further enacted, That if any offender, who shall be so sentenced and ordered to be banished in manner aforesaid, shall, after the end of three calendar months from the time such sentence and order hath been pronounced, be at large within any part of the United Kingdom, without some lawful cause, every such offender being so at large as aforesaid, on being thereof lawfully convicted, shall be transported to such place as shall be appointed by his majesty, for the term of his natural life.
- § 37. " Provided always, and be it enacted, That nothing herein contained shall extend or be construed to extend in any manner to affect any religious order, community, or establishment, consisting of females bound by religious or monastic vows.
- § 38. " And be it further enacted, That all penalties imposed by this act shall and may be recovered as a debt due to his majesty, by information to be filed in the name of his majesty's attorney general for *England* or for *Ireland*, as the case may be, in the Courts of Exchequer in *England* or *Ireland* respectively, or in "the

“the name of his majesty’s Advocate General in the Court of Exchequer in *Scotland*.

“And be it further enacted, That this act or any part thereof, may be repealed, altered, or varied at any time within this present session of parliament.” § 39.

“And be it further enacted, That this act shall commence and take effect at the expiration of ten days from and after the passing thereof.” § 40.

4. *From living within ten Miles of London.*

By the 1 W. & M. c. 9. it is enacted, “That every justice of peace in *London* and *Westminster*, and within ten miles thereof, shall cause to be arrested and brought before him all reputed papists, (except foreigners, being merchants or menial servants to some ambassador or public agent, and except all such as used some trade, mystery, or some manual occupation at the time of the said act, in *London*, &c. and also except all such persons as had their dwelling in *London*, &c., within six months before the thirteenth of *February* 1688, and no dwelling elsewhere, and certified their names to the sessions before the first of *August* 1689,) and that every such justice shall tender the said declaration to every such person; and that every such person refusing the same, and afterwards remaining in *London*, &c., or within ten miles thereof, on being certified to the King’s Bench or quarter sessions at the next term or sessions, as having refused to make the said declaration, and neglecting to make the same in such court, shall suffer as a popish recusant convict,” &c.

1 W. & M. c. 9.
[Repealed by 31 G. 3. c. 32. § 19. as to persons taking the oaths therein mentioned.]

5. *From keeping Arms.*

By the 1 W. & M. c. 15., it is enacted, “That any two justices of peace may and ought to tender the said declaration to any person whom they shall know or suspect, or have information of as being a papist, or suspected to be such; and that no such person so required, and not making and subscribing the said declaration, or not appearing before the said justices upon notice to him given or left at his usual abode, by one authorized by warrant under the hands and seals of the said justices, shall keep any arms, or ammunition, or horse above the value of 5*l.* in his own possession, or in the possession of any other person to his use, (other than such necessary weapons as shall be allowed him by the quarter sessions for the defence of his house or person,) and that any two justices of peace, by warrant under their hands and seals, may authorize any persons in the day-time, with the assistance of the constable or his deputy, or tithing-man, to search for all such arms, &c. and horses, and seize them to the king’s use; and that the said justices shall deliver the said arms and ammunition at the next quarter sessions in open court, and that whoever shall conceal &c. or shall be aiding to the concealing any such arms or horses, shall be committed to the common gaol by warrant under the

1 W. & M. c. 15.

Vol. VI. I “hands

“ hands and seals of any two justices of peace, and also forfeit
 “ treble the value; and that those who discover any such arms
 “ or ammunition, so as the same may be seized, shall have the full
 “ value thereof, to be awarded to them by the sessions, &c. and that
 “ such refusers of the said declaration, &c. shall be discharged
 “ whenever they make the same.”

(C) Of the Offence in promoting or professing the
 Popish Religion: And herein,

1. *Of the Offence of saying or hearing Mass or other Popish Service.*

23 Eliz. c. 1.

§ 4.

[Repealed by
 31 G. 3. c. 32.

as to persons
 taking the
 oaths therein
 appointed.]

2 Show. 216.
 pl. 220.

11 & 12 W. 5.
 c. 4.

[Repealed by
 18 G. 3. c. 60.
 as to popish
 bishops, &c.
 taking the oath
 therein ap-
 pointed before
 they shall have
 been appre-
 hended, or any

prosecution commenced against them.]

BY the 23 Eliz. c. 1. § 4., it is enacted, “ That every person
 “ who shall say or sing mass, being thereof lawfully convict,
 “ shall forfeit two hundred marks, and be committed to prison
 “ in the next gaol, there to remain by the space of one year, and
 “ from thenceforth till he have paid the said sum of two hundred
 “ marks; and that every person who shall willingly hear mass
 “ shall forfeit the sum of one hundred marks, and suffer a year’s
 “ imprisonment.”

And it is enacted by the 11 & 12 W. 3. c. 4. “ That every
 “ person who shall apprehend any popish bishop, priest, or Je-
 “ suit, and prosecute him to conviction for saying mass, or exer-
 “ cising any other part of the function of a popish bishop or
 “ priest, shall receive 100*l.* of the sheriff; and that every such
 “ popish bishop, &c. (except, being a foreigner, he be entered
 “ in the secretary’s office, and officiate only in the house of a
 “ foreign minister,) shall be adjudged to perpetual imprison-
 “ ment.”

2. *Of giving or receiving Popish Education.*

1 Jac. 1. c. 4.

§ 6, 7

To this purpose there are several statutes, and first by the
 1 Jac. 1. c. 4. § 6, 7. it is enacted, “ That if any person or per-
 “ sons under the king’s obedience shall go or send, or cause to
 “ be sent, any child, or any other person under their or any of
 “ their government, beyond the seas out of the king’s obedience,
 “ to the intent to enter into, or reside in, or repair to, any col-
 “ lege, &c. of any popish order, profession, or calling, to be in-
 “ structed, persuaded, or strengthened in the popish religion, or
 “ in any sort to profess the same; every such person so sending
 “ such child, &c. shall forfeit 100*l.*; and every such person so
 “ passing or being sent, &c. shall in respect of him or herself
 “ only, and not in respect of any of his heirs or posterity, be
 “ disabled to inherit, purchase, take, have, or enjoy any profits,
 “ hereditaments, chattels, debts, legacies, or sums of money,
 “ &c. whatsoever; and that all estates, terms, and other interests
 “ whatsoever to be made, suffered, or done, to the use or behoof
 “ of any such person, or upon any trust or confidence, medi-
 “ ately or immediately, to or for the benefit or relief of any such
 “ person, shall be utterly void.”

And

And it is further enacted by 3 Jac. 1. c. 5. § 16. "That if the children of any subject within the realm (the said children not being soldiers, mariners, merchants, or their apprentices, or factors,) shall be sent or go beyond sea to prevent their good education in *England*, or for any other cause, without the licence of the king or six of his privy council, (whereof the principal secretary to be one,) under their hands and seals; that then every such child shall take no benefit by any gift, conveyance, descent, devise, or otherwise, of or to any hereditament, or chattel, till such child being of the age of eighteen years, or above, take the oath therein mentioned before some justice of peace of the county, liberty, limit, where the parent of such child did and shall inhabit; and that in the mean time the next of kin to such child, who shall be no popish recusant, shall have the said hereditaments, &c. so given, &c. until such child shall conform, &c. and take the said oath, and receive the sacrament; and after such conformity, &c. he who hath received the profits of the said hereditaments shall account for the same, and in reasonable time make payment thereof, and restore the value of the said goods, &c.; and that whoever shall send such child over seas shall forfeit 100*l.*, which, by 11 & 12 W. 3. c. 4. § 6., shall be to the sole use and benefit of the person who shall discover the offence."

Keb. 265.
3 Jac. 1. c. 5.
§ 16.

Also it is enacted by 3 Car. 1. c. 2. "That if any person under the obedience of the king shall go, or shall convey or send, or cause to be sent or conveyed, any person out of the king's dominions into any parts beyond the seas, out of the king's obedience, to the intent to enter into or be resident, or trained up in any priory, abbey, nunnery, popish university, college, or school, or house of Jesuits, priests, or in a private popish family, and shall be there by any popish person instructed, persuaded, or strengthened in the popish religion, in any sort to profess the same; or shall convey or send, or cause to be conveyed or sent, any thing towards the maintenance of any person so going or sent, and trained and instructed as is aforesaid, or under the colour of any charity towards the relief of any priory, &c. or religious house whatsoever; every person so sending, &c. any such person or thing, and every person passing or sent, being thereof convicted, &c. shall be disabled to prosecute any suit in law or equity, or to be executor or administrator to any person, or capable of any legacy or deed of gift, or to bear any office within the realm; and shall forfeit all his goods and chattels, and shall forfeit all his hereditaments, offices, and estates of freehold, during his life."

11 & 12 W. 3.
c. 4. § 6.
3 Car. 1. c. 2.

In the construction of the 3 Jac. 1. c. 5. it hath been holden, that if *E. T.*, being the king's ward of lands holden of the king by knight's-service in chief, die the king's ward, and it be found that *A.* and *B.* are his sisters and heirs, both of full age, and that *A.* in the lifetime of her brother departed this realm contrary to this statute, and is a nun professed, the king may retain *A.*'s moiety in his own hands till she, according to the 1 Eliz. c. 1.

Hob. 73, 74.
Ley, 59. Tredway's case.

(a) *Vide* 5 Eliz. c. 1. § 19. and 27 Eliz. c. 12. take the oath of supremacy (a) required on suing out livery; for the words of the statute 3 Jac. 1. c. 5. are, *shall take no benefit by descent*, &c. not that the party should not take by descent; and therefore the estate does not vest absolutely in *B.* the sister and next heir, but her right is to the rents and profits during the non-conformity of her sister, for which in case of common lands she might enter; but in this case the king is interested, and is not obliged to give livery to the heir, till such time as the oath of supremacy be taken.

Hob. 74. *per*
Hobart.

So if such an heir, being beyond sea, should bargain and sell his lands to a stranger, the bargain in such case will prevent the next of kin, and the bargainee may take the lands out of the hands of the next of kin, in case he had entered, for the estate never vested absolutely in such next of kin; but in such case the king may refuse to give livery sued out on such bargain in the name of the heir, except the heir himself appears and takes the oath of supremacy in his proper person.

Hill. 12 Ann.
in C. B.
and affirmed
in the House
of Lords;
Thornby v.
Fleetwood,
alias the Du-
chess of Ha-
milton's case,
Stra. 518.
Comyns, 207.
pl. 124.
Andr. 104.
10 Mod. 113.

C. Lord *Gerard* in the year 1660 settled the estate in question to the use of himself and the heirs male of his body, remainder to the heirs male of the body of *Thomas* first Lord *Gerard*, remainder to his own right heirs. *Charles* Lord *Gerard*, upon the death of *Digby* Lord *Gerard* (only son of the said *C.*) without issue male, entered, claiming the estate as heir male of the body of *Thomas* first Lord *Gerard*, by virtue of the said limitation in the settlement; and by virtue of this title enjoyed that estate above twenty-two years, and during the time of his enjoyment suffered several recoveries, and settled the estate upon his marriage in 1689, and died without issue in the year 1707, leaving *Philip* his only brother then surviving, who was heir male of the body of *Thomas* first Lord *Gerard*. Upon the death of Lord *Charles*, the Duchess of *Hamilton* claimed the estate as right heir of *C.* Lord *Gerard*, notwithstanding the estate-tail limited to the heirs male of the body of *Thomas* Lord *Gerard* subsisted in *Philip*, alleging, that Lord *Charles* and his brother *Philip*, being sent abroad and educated in a popish seminary, were made so utterly incapable of taking any estate that she had the right of entry in her. It was insisted for her, that the 1 Jac. 1. c. 4. § 6. had so far disabled Lord *Charles* to take the estate by descent, that the recovery suffered by him was void, and that the same disability being still upon *Philip*, and there being no person in being who could take the estate-tail, the duchess, as heir at law, must be entitled to take at present, as if the estate were actually spent. But it was resolved, that the words of the act being, that the offender shall be disabled as in respect of himself only, and not in respect of any of his heirs or posterity, to inherit, purchase, &c., this qualifies and restrains the disability; so that the act does not extend beyond the person offending, nor beyond the time of his non-conformity; so that the act hath preserved in the offender an ability to inherit, &c. for the benefit of posterity: and this act having made no application of the profits during the disability, and this being a penalty inflicted for a public offence, the king is entitled to the penalty. And to create
in

in the offender a total disability would be very inconvenient; for in the case of an inheritance, it would be difficult to know when or in what manner the heir should take; it could not be in the life of the ancestor, for no man can be heir of a person living; and if there be a son under no disability who cannot take it, it would be merely by construction to carry the estate over his head for the benefit of a remainder-man, who was not intended to take as long as there was any issue of a prior tenant in tail; and an heir can entitle himself only through his ancestors, and such as are inheritable; that this is not like the case of a monk, for in times of popery he was civilly dead: the 3 Jac. 1. c. 5. gives the pernaney of the profits in cases of disabilities to the next of kin, that is not a popish recusant; and *R. Ow.* was the next protestant of kin; the 3 Car. 1. c. 2. does not repeal the 1 Jac. 1. c. 4. but was made to explain, amend, and enforce it; the 1 Jac. 1. c. 4. was silent how the penalties of that act were to arise; the 3 Car. 1. c. 2. has provided that it shall be upon conviction, and expressly makes a forfeiture for life, and a restitution in case of conformity, in which the former act was silent; so that if the former act were to be put in execution, under the explanation of 3 Car. 1. c. 2., there being no conviction in the case, the duchess could have no title, but the land on conviction would be forfeited for life, which must be to the king.

3. *Of buying or selling Popish Books.*

By the 3 Jac. 1. c. 5. § 25. it is enacted, "That no person 3 Jac. 1.
"shall bring from beyond the seas, nor shall print, buy, or sell c. 5. § 25.
"any popish primers, ladies' psalters, manuals, rosaries, popish
"catechisms, missals, breviaries, portals, legends, and lives of
"saints, containing superstitious matter, printed or written in
"any language whatsoever, nor any other superstitious books
"printed or written in the *English* tongue, on pain of forfeiting
"forty shillings for every book, &c. and the books to be burnt."

4. *Of keeping School.*

By 11 & 12 W. 3. c. 4. § 3. it is enacted, "That if any 11 & 12 W. 3.
"papist, or person making profession of the popish religion, shall c. 4. § 3.
"be convict of keeping shool, or taking upon themselves the [Repealed by
"education, or government, or boarding of youth, in any place 31 G. 3. c. 32.
"within the realm or the dominions thereunto belonging, they § 13. as to per-
"shall be adjudged to perpetual imprisonment." sons taking
the oaths and
subscribing the
declaration therein appointed. Roman Catholics, however, are restrained from holding the master-
ship of any college or school of royal foundation, or of any endowed college or school, and from
keeping a school in either of the universities: neither is any catholic school-master to educate
in his school the child of any protestant father; nor is any school-master or mistress to keep a
school until his or her name shall have been registered at the quarter or general sessions of the
peace for the county, division, or place wherein such school shall be situated, by the clerk of the
peace. § 14, 15, 16.]

5. *Of withholding a competent Maintenance from a Protestant Child.*

By the 11 & 12 W. 3. c. 4. it is enacted, "That if any popish 11 & 12 W. 3.
"parent, in order to compel a protestant child to a change of c. 4.
"religion,

"religion, shall refuse to allow such child a sufficient maintenance, suitable to the degree and ability of such parent, and to the age and education of such child, the lord chancellor upon complaint may make such order therein as shall be agreeable to the intent of the said act."

6. *Of the Disability of those professing the Popish Religion to present to a Church.**

3 Jac. 1. c. 5.
§ 18, 19, 20, 21.
Precedents of
a title made
under these
statutes.
2 Lutw. 1101.;
et vide 3 Lev.
332. Lutw.
1117.

By the 3 Jac. 1. c. 5. § 18, 19, 20, 21. popish recusants convicted are disabled to present to a church; and by the 1 W. & M. c. 26. this disability is extended to persons refusing to make the declaration against popery mentioned in 30 Car. 2. stat. 2.; and by the said statute 1 W. & M. c. 26. § 4. it is enacted, "That if the trustee, mortgagee, or grantee of any avoidance, whereof the trust shall be for any popish recusant convict, shall present without giving notice in writing of the avoidance to the university, &c. within three months after the avoidance, he forfeits 500*l*."

12 Ann. c. 14.

And by the 12 Ann. c. 14. this disability is extended to all persons making profession of the popish religion; to which purpose it is enacted, "That every papist, or person making profession of the popish religion, &c., and every mortgagee, trustee, or person any ways intrusted by or for such papist, &c., with or without writing, shall be disabled to present to any benefice, school, or hospital, &c., or to grant any avoidance of any benefice, prebend, or ecclesiastical living, and that in all such cases the universities shall present."

Also, by force of the said statute, "The ordinary may tender the declaration against transubstantiation to any reputed papist making a presentation, and upon a refusal to take the same the presentation shall be void: also, the ordinary may examine every presentee upon oath, whether the person who presented him be the true patron, or only a trustee; and the court wherein a *quare impedit* shall be brought may in like manner examine

[* This disability from presenting to advowsons is not taken away by any of the acts which have been passed in favour of the catholics; and it is complained of as a hardship peculiar to them, all other non-conformists, even Jews, having the full enjoyment of the right of presentation. See Mr. Butler's note on Co. Lit. 391. a.—It is indeed remarkable, that a provision so essential to the security of the establishment, and to the integrity of the doctrines it maintains, should be confined only to one description of non-conformists. To leave the right of presentation in the hands of men who are inimical to our church, is, in truth, to create an interest in the church against the church. It has the pernicious tendency too of setting the private interests of the individual in opposition to the superior interests of the church; and of tempting the clergy to temporize with the errors of those to whom they look up for preferment. For is it probable, that a bold and honest zeal for the doctrines and discipline of our establishment will recommend to a patron who dissents from the one, or disapproves of the other? In the presence of such a person we must expect either a cold friend or a secret enemy to our church: one, who can be silent, where he ought to object; passive, when he ought to resist; or, one who can subscribe to doctrines he deems erroneous, and can pledge himself to the maintenance of a system it is his wish to subvert. By this means, the effect of those provisions which have been established for securing an orthodox clergy, and which, it is urged, render it unnecessary to lay dissenters under any restriction in this respect will, in a great measure, be done away: it is to little purpose to insist upon a profession of conformity, if we allow a temptation to schism; is to exact a vow of chastity, if we license seduction.]

“ the parties, and a bill may be brought in any court of equity
 “ to discover such secret trusts, &c., and the answer of such per-
 “ sons, upon any such examination or bill, shall be good evidence
 “ against such patron in respect of such a presentation, but not
 “ as to any other purpose.”

In the construction of the 3 Jac. 1. c. 5. the following points, Hawk. P. C.
c. 15. § 8.
 which are said to be likewise applicable to the 1 W. & M. c. 26.
 and 12 Ann. c. 14., have been holden.

That where a presentment is *pro hâc vice* vested in the univer- 10 Co. 57. b.
 sity, by reason of the patron's being a popish recusant at the time
 when the church became void, it shall not be divested again by
 his conforming himself to the church.

That such a patron is only disabled to present, and that he Cawley, 270.
 continues patron as to all other purposes, and therefore that he
 shall confirm the leases of the incumbent, &c.

That such a person, by being disabled to grant an avoidance, Jon. 19, 20.
 is no way hindered from granting the advowson itself in fee, or
 for life or years, *bonâ fide*, and for good consideration.

That if an advowson or avoidance belonging to such a person Hob. 126.
Winch. 7, 11.
Moor, 572.
Jon. 20.
 come into the king's hands by reason of an outlawry or conviction
 of recusancy, &c. the king, and not the university, shall present.

On the statute 12 Ann. c. 14. it was resolved by my Lord
 Chancellor *Talbot*, in the case of Mr. *Brett*, who was presented
 by the university of *Oxford* to a living belonging to Mr. *Fitzherbert*
 of *Swinerton* in *Staffordshire*, that a bill founded on this statute
 cannot be for relief, but only for a discovery.

[So it hath been resolved upon the same statute, that it doth Cottington v.
Fletcher,
2 Atk. 155.
 not make the whole trust void, but only the turn upon an avoid-
 ance, so that if the party conforms before any avoidance happens,
 nothing can vest in the universities.]

By the 11 Geo. 2. c. 17. reciting the 3 Jac. 1. c. 5. & 1 W. & M.
 c. 26., and that whereas for the better discovery of all secret
 trusts and fraudulent conveyances made by papists, or per-
 sons making profession of the popish religion, of their advowsons
 and right of presentation, nomination, and donation to any bene-
 fices or ecclesiastical livings, several provisions were made by the
 act 12 Ann. c. 14., which have been fraudulently evaded by per-
 sons obtaining from such papists, without a full and valuable
 consideration, grants of such advowsons, and right of presenta-
 tion, nomination, and donation, upon confidence only that such
 grantees will, at the request of such papists, present to such be-
 nefices or ecclesiastical livings clerks nominated by such papists,
 who have been presented accordingly, contrary to the true intent
 and meaning of the said act, and to the great hurt of the protestant
 interest of this kingdom; it is therefore enacted, “ That every
 “ grant to be made from and after the 6th day of *May* 1738, of
 “ any advowson or right of presentation, collation, nomination,
 “ or donation of or to any benefice, prebend, or ecclesiastical
 “ living, school, hospital, or donative, and every grant of any
 “ avoidance thereof by any papist, or person making profession
 “ of the popish religion, or any mortgagee, trustee, or person
 “ any

“ any ways intrusted directly or indirectly, mediately or immediately, by or for any such papist or person making profession of the popish religion, whether such trust be declared in writing or not, shall be null and void; unless such grant shall be made *bonâ fide*, and for a full and valuable consideration, to and for a protestant purchaser, and merely and only for the benefit of a protestant; and that every such grantee, or person claiming under any such grant, shall be deemed to be a trustee for a papist, or person professing the popish religion, as aforesaid, within the true intent and meaning of the said act; and that all such grantees, or persons claiming under such grants, and their presentees, shall be compelled to make such discovery relating to such grants and presentations made thereupon, and by such methods as in and by the said act 12 Ann. c. 14, are directed in the case of trustees of papists, or persons professing the popish religion, and that every devise to be made from and after the said sixth of *May* by any papist, or person professing the popish religion, of any such advowson or right of presentation, collation, nomination, or donation, or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such papist or person professing the popish religion, shall be null and void, and that all such devisees and their presentees shall in like manner, and by such methods, be compelled to discover whether, to the best of their knowledge and belief, such devises were made with the said intent.”

10 G. 4. c. 7.
§ 16.

¶ By the act for relief of the Roman Catholics, 10 Geo. 4. c. 7. § 16., it is provided, that nothing therein shall enable any person, otherwise than he is by law now enabled to exercise any right of presentation to any ecclesiastical benefice whatsoever, or repeal, vary, or alter in any manner the laws now in force in respect to the right of presentation to any ecclesiastical benefice; and by § 17. it is provided, that when any right of presentation to any ecclesiastical benefice shall belong to any office in the gift or appointment of his majesty, his heirs, &c., and such office shall be held by a person professing the Roman Catholic religion, the right of presentation shall devolve upon and be exercised by the Archbishop of *Canterbury* for the time being; and by § 18. it is enacted, that it shall not be lawful for any person professing the Roman Catholic religion, directly or indirectly to advise his majesty, his heirs, &c., or any persons holding the office of guardian or of regent of the United Kingdom, or the Lord Lieutenant of *Ireland*, touching the appointment to any office or preferment in the united church of *England* and *Ireland*, or in the church of *Scotland*; and if any person shall offend in the premises, he shall be deemed guilty of a high misdemeanour, and disabled for ever from holding any office civil or military under the crown.¶

7. *Of their Disability to purchase.*

The statutes relating to estates conveyed by or to papists, and the disabilities they are under to take by purchase, &c. are the 11 & 12 W. 3. c. 4., 3 G. 1. c. 18., and 11 G. 2. c. 17.

By the 11 & 12 W. 3. c. 4. it is enacted, "That from and after the 29th day of *September*, which shall be in the year of our Lord 1700, if any person educated in the popish religion, or professing the same, shall not, within six months after he or she shall attain the age of eighteen years, take the oaths of allegiance and supremacy, and also subscribe the declaration set down and expressed in an act of parliament made the 30 Car. 2. stat. 2. intituled, *An Act for the more effectual preserving the king's person and government, by disabling papists from sitting in either house of parliament*, to be by him or her made, repeated, or subscribed in the Courts of Chancery or King's Bench, or quarter sessions of the county where such person shall reside; every such person shall, in respect of him or herself only, and not for or in respect of any of his or her heirs or posterity, be disabled or made incapable to inherit or take by descent, devise, or limitation, in possession, reversion, or remainder, any lands, tenements, or hereditaments within the kingdom of *England*, dominion of *Wales*, or town of *Berwick-upon-Tweed*; and that during the life of such person, or until he or she do take the said oaths, and make, repeat, and subscribe the said declaration in manner as aforesaid, the next of his or her kindred, which shall be a protestant, shall have and enjoy the said lands, tenements, and hereditaments, without being accountable for the profits by him or her received during such enjoyment thereof as aforesaid; but in case of any wilful waste committed on the said lands, tenements, or hereditaments, by the person so having or enjoying the same, or any other, by his or her licence or authority, the party disabled, his or her executors and administrators, shall and may recover treble damages for the same against the person committing such waste, his or her executors or administrators, by action of debt in any of his majesty's courts of record at *Westminster*; and that from and after the 10th day of *April*, 1700, every papist, or person making profession of the popish religion, shall be disabled, and is hereby made incapable to purchase, either in his or her own name, or in the name of any other person or persons to his or her use, or in trust for him or her, any manors, lands, profits out of lands, tenements, rents, terms, or hereditaments, within the kingdom of *England*, dominion of *Wales*, and town of *Berwick-upon-Tweed*: and that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after the said 10th day of *April*, to be made, suffered, or done, to or for the use or behoof of any such person or persons, or upon any trust or confidence mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and

11 & 12 W. 3. c. 4., [repealed by 18 G. 3. c. 60. as to all papists or persons professing the popish religion, claiming under titles not then- tofore liti- gated, who within six months after the act passed, or their coming of age, should take the oath thereby pre- scribed. — Upon this act a case was decided in Chancery, on the 18th *December* 1783, under the name of *Bunting v. William- son*. In that case, a bill had been filed, claiming an estate given to a person pro- fessing the popish re- ligion, by will, alleging the in- capacity occa- sioned by the act of 11 & 12 W. 3. The testator died many years before, and after his death a suit had been insti- tuted by another per- son, who claimed as his heir at law, and that suit was depending at

" of

the time when "of none effect, to all intents, constructions, and purposes this statute of "whatsoever."

18 G. 3. was

passed; but was afterwards dismissed for want of prosecution. The plaintiff filed his bill, some time after the act, claiming in right of his wife, as heir at law. The defendants pleaded their title under the testator's will; and that the defendant, who was beneficially interested, having or claiming the estate under that will, had taken the oath prescribed by the act, and concluded with an averment that the title had not been before litigated by the plaintiff or any one under whom he claimed. The plaintiff, on argument of the plea, contended, that the words *not hitherto litigated*, extended to the case then before the court, because the title had been litigated, and was in litigation at the time the act passed. But the lords commissioners *Ashurst* and *Hotham*, were clearly of opinion, that the plaintiff not having before litigated the title, nor claiming under any person who had litigated it, the case of the defendants was within the benefit of the act, notwithstanding the prior litigation: and the plea was allowed. Co. Lit. last edit. 591. a. note 2. — *Note*, The oath prescribed by the 18 G. 3. c. 6., and that prescribed by the 31 G. 3. c. 52. are different. As the last act was originally framed, and as it stood, when, having past the Commons, it was brought into the House of Lords, the first clause in it directed, that the oath contained in the act of the 18th year of the reign of his present majesty should be taken no longer; but that the oath appointed by the bill should, in future, be administered in its stead, and should give the same benefits and advantages and should operate to the same effects and purposes, as the oath contained in the 18th of his present majesty. This clause was altered in the House of Lords to the form in which it now stands. It does not express, that the oath contained in it shall entitle the persons taking it to the benefits of the act of the 18th of his present majesty: it only expresses, that *it shall be lawful* for catholics to take the oath of the 31st of his present majesty at the places and times, and in manner therein mentioned. Thus, it is very uncertain, whether persons taking only the oath prescribed by the 31st of his present majesty, will be entitled to the benefit of the act of the 18th of his present majesty. It seems therefore advisable for every Roman Catholic, who wishes to be secure in the enjoyment of his landed property, to take both the declaration and oath prescribed by the act of the 31st, and the oath prescribed by the 18th of his present majesty. *Ibid.*] ||But this uncertainty is now removed by the 43 G. 3. c. 30. which provides, that the oath and declaration in the 31 G. 3. c. 52. shall give the same benefits and advantages to all persons taking and making the same as were by the act of the 18th of his majesty enacted and declared concerning the oath thereby prescribed.]]

3 G. 1. c. 18.

(a) *Viz.* An act passed in the sessions before, intituled, *An Act to oblige papists to register their names and real estates.*

By the 3 G. 1. c. 18. reciting, that some doubts have arisen upon the (a) act therein recited, as also upon one other act made and passed in the parliament held in the 11 & 12. W. 3. c. 4. intituled, *An Act for the further preventing the growth of popery*; and upon another act made in the 1 Jac. 1. c. 4., for the due execution of the statutes against Jesuits, seminary priests, recusants, and other acts made against papists and popish recusants, touching the sale of the real estates of persons professing the popish religion, or incurring the disabilities and incapacities in the said acts mentioned, it is enacted, "That no sale, for a "full and valuable consideration, of any manors, messuages, "lands, tenements, or hereditaments, or of any interest therein, "by any person or persons being reputed owner or owners, or "in the possession or receipt of the rents or profits thereof, "heretofore made, or hereafter to be made, to or for any "protestant purchaser and purchasers, and merely and only for "the benefit of protestants, shall be avoided or impeached for "or by reason or upon pretence of any of the disabilities or "incapacities in the said acts or any of them contained, incurred, "or supposed to be incurred, by any of the persons making or "joining in such sale, or by any other person or persons, from "or through whom the title to such manors, &c. is or shall be "derived, or supposed to be derived, unless before such sale the

"person

“ person entitled to take advantage of such disability or incapacity
 “ shall have recovered such manors, messuages, lands, tenements,
 “ and hereditaments by reason of such disability or incapacity,
 “ and have entered such claim in open court at the general
 “ sessions of the peace for the county, city, riding, or division
 “ wherein such manors, messuages, lands, tenements, or here-
 “ ditaments lie or arise, and *bonâ fide*, and with due diligence,
 “ pursued his remedy in a proper course of justice for the
 “ recovery thereof.

“ Provided nevertheless, that whereas it was amongst other
 “ things enacted, by the said 11 & 12 W. 3. c. 4. that from and
 “ after the tenth day of *April* which should be in the year 1700,
 “ every papist or person making profession of the popish religion
 “ should be disabled, and was thereby made incapable to pur-
 “ chase, either in his or her own name, or in the name of any
 “ other person or persons to his or her use, or in trust for him or
 “ her, any manors, lands, profits out of lands, tenements, rents,
 “ terms, or hereditaments, within the kingdom of *England*, do-
 “ minion of *Wales*, and town of *Berwick-upon-Tweed*; and that
 “ all and singular estates, terms, and any other interests or pro-
 “ fits whatsoever out of lands, from and after the said 10th day
 “ of *April* to be made, suffered, or done, to or for the use or
 “ behoof of any such person or persons, or upon any trust or confi-
 “ dence, mediately or immediately, to or for the benefit or relief
 “ of any such person or persons, should be utterly void and of
 “ no effect, to all intents, constructions, and purposes whatsoever:
 “ It is hereby declared and enacted, that the said recited part of
 “ the said act of parliament shall not be hereby altered or repealed,
 “ but the same shall be and remain in full force as if this act had
 “ never been made.”

And if it is further enacted, by the authority aforesaid, “ That
 “ from and after the 29th of *September* 1717, no manner of lands,
 “ tenements, hereditaments, or any interest therein, or rent or
 “ profit thereout, shall pass, alter, or change from any papist, or
 “ person professing the popish religion, by any deed or will, ex-
 “ cept such deed within six months after the date, and such will
 “ within six months after the death of the testator, be enrolled in
 “ one of the king’s courts of record at *Westminster*, or else within
 “ the same county or counties wherein the manors, lands, and
 “ tenements lie, by the *custos rotulorum* and two justices of the
 “ peace and the clerk of the peace of the same county or coun-
 “ ties, or two of them at the least, whereof the clerk of the peace
 “ to be one.”

The 11 G. 2. c. 17. reciting that “ Whereas persons professing
 “ or educated in the popish religion are by divers acts of parlia-
 “ ment subjected to several disabilities and incapacities, which
 “ may affect persons conforming from the popish to the pro-
 “ testant religion, and whereas many persons have already con-
 “ formed to the protestant religion, and are willing to submit to
 “ his majesty’s government in as full and ample manner as any
 “ other of his majesty’s subjects, and others are likely so to do,
 it

[Repealed ab-
 solutely by
 51 G. 3.

“ it is enacted, That all and every person or persons, being re-
 “ puted owner or owners, or in possession or receipt of the rents
 “ and profits of any manors, messuages, lands, tenements, or
 “ hereditaments, or of any interest therein, who having been or
 “ reputed to be a papist or papists, or educated in the popish re-
 “ ligion, hath or have conformed to, or hereafter shall conform
 “ to and profess the protestant religion, and hath or have taken
 “ or shall take the oaths of allegiance, supremacy, and abjuration,
 “ and also subscribed or shall subscribe the declaration set down
 “ and expressed in an act of parliament made the 30th Car. 2.
 “ stat. 2. intituled, *An Act for the more effectual preserving*
 “ *the king’s person and government, by disabling papists from*
 “ *sitting in either house of parliament,* to be by him, her, or them
 “ repeated and subscribed in the Courts of Chancery or King’s
 “ Bench, or quarter sessions of the county where such person or
 “ persons shall reside, (all which shall be recorded in one of his
 “ majesty’s courts of record at *Westminster*, or such quarter
 “ sessions as aforesaid,) and all and every person and persons
 “ conforming and performing the requisites as aforesaid, for their
 “ own benefit, or for the benefit of any other protestant or pro-
 “ testants, and not for the benefit of any papist or papists, shall
 “ hold, possess, and enjoy all such manors, messuages, lands,
 “ tenements, and hereditaments, freed and discharged of and
 “ from the disabilities and incapacities in the said acts or any of
 “ them contained, incurred, or supposed to be incurred, by such
 “ person or persons so reputed owner or owners, or in possession
 “ or receipt of the rents and profits as aforesaid, or by any other
 “ person or persons, by, from, or through whom the title to such
 “ manors, messuages, lands, tenements, or hereditaments, or any
 “ interest therein, was or shall be derived or supposed to be de-
 “ rived for such estate, right, title, or interest, as he, she, or they
 “ had or would have, if no such disability or incapacity had
 “ been incurred; unless the person or persons entitled to take
 “ advantage of such disability, incapacity or defect of title hath or
 “ have actually and *bona fide* recovered, or shall hereafter recover
 “ such manors, messuages, land, tenements, hereditaments, by
 “ judgment or decree in some action or suit already commenced,
 “ or hereafter to be commenced, six calendar months at least
 “ before the making of such record, and to be prosecuted with
 “ due diligence.

“ Provided nevertheless, that this act, or any thing herein con-
 “ tained, shall not take away or prejudice the right of any per-
 “ son or persons, entitled to take advantage of such disability or
 “ incapacity, who now is or are in the actual possession of, or
 “ shall have, precedent to the making of such record, been in
 “ quiet possession of any such manors, messuages, lands, tene-
 “ ments, or hereditaments, by the space of two calendar months.

“ Provided always, and it is further enacted, that if any such
 “ person or persons, so conforming as aforesaid, shall, after such
 “ conformity, return to or again profess the popish religion, every
 “ such person and persons shall for ever afterwards be disabled
 “ from

“ from, and be incapable of, having or enjoying any benefit, privilege, or advantage of this act, and shall from thenceforth be liable to the same disabilities, incapacities, and forfeitures as if he, she, or they had not taken the said oaths and subscribed the declaration as aforesaid.

“ Provided always, that nothing in this act contained shall extend to take away or prejudice the right of any person entitled to any remainder or reversion in any such manors, messuages, lands, tenements, or hereditaments, in case such person shall pursue his or her said right by some action or suit, to be commenced within the space of twelve calendar months next after the precedent estate or estates, on which such remainder or reversion depends and is expectant, shall be determined; or within twelve calendar months from and after the 29th of September 1738, if such precedent estate or estates be already determined by the death or deaths of any person or persons whose deaths have been concealed from or not known to the person entitled to such remainder or reversion, by reason of their having been buried beyond the seas, or in a private and clandestine manner at home, and shall prosecute such action or suit with due diligence.”

On the first of these statutes there have been the following cases and resolutions:

John Roper, Esq. being seised in fee of several manors, lands, &c. by indentures of lease and release, bearing date respectively the 17th and 18th of *January* 1708, granted and conveyed the same to *William Constable*, *Richard Snow*, and *Daniel Hickman*, and their heirs, in trust to sell the same, and out of the purchase-money and rents till sale to pay a debt of 4000*l.* due to *E.* and *H. W.* by mortgage of the premises, with interest, and after satisfaction thereof, then in trust for payment of the debts mentioned in the schedule annexed to the indenture of release; and the overplus of the money so to be raised, or to be paid as the said *John Roper* by any attested writing or by his will should appoint; and for want of such appointment, in trust for the benefit of the said *John Roper* and his heirs. The 5th of *March* 1708, the said *John Roper* made his will, and after reciting the said lease and release, and the power reserved to him over the surplus of the said estate, he bequeathed several pecuniary legacies to his relations, and the residue of all his real and personal estate he gave to *William Constable* and *Thomas Radclyffe*, and to *Robert Hewett* and *Daniel Hickman*, and to their heirs and assigns for ever, and appointed them joint executors: the 1st of *April* 1709, he added a codicil to his will, and thereby gave the further several legacies therein mentioned, and all the remainder, whether in lands or personal estate, he gave to his executors *Mr. Radclyffe* and *Mr. Constable*. The said *John Roper* died soon after; and *Mr. Radclyffe* and *Mr. Constable* brought their bill in Chancery against *Edward Roper*, Esq. the heir at law of the said *John Roper*, and also against *Hickman*, *Hewett*, *Snow* and others, to have the trust-estate sold, and for an account of the profits, and after the debts

Roper v.
Radclyffe,
Hil. 1713.
in Canc.
9 Mod. 181.
S. C. 1 Bro.
P. C. 450. S. C.

and

(a) But it seems, that where lands are devised to or vested in trustees, to be sold for payment of particular sums to several people, some of whom happen to be papists, that this act does not prevent such papists from taking the particular sums or legacies intended for them; because they cannot insist upon paying off the other incumbrances, and holding the estate, as a person can do to whom the residue of the purchase-money is devised. [*A fortiori* then it does not prevent a papist, who is a creditor, from receiving his debt out of money arising from the sale of an estate by the appointment of a will. *Foone v. Blount*, Cowp. R. 464.] Lord Der-

and legacies paid, to have the surplus money arising by sale equally divided between the plaintiffs, according to the said codicil. The said *Edward Roper* by his answer insisted, that as heir at law to the testator he was entitled to all such real estate as was undisposed of by him, and that Mr. *Radclyffe* and Mr. *Constable* were then and at the testator's decease papists, and as such, by 11 & 12 W. 3. c. 4. were incapable of purchasing any manors, lands, profits out of lands, &c. The said *Hewett* and *Hickman* by their answer insisted, that the real estate devised by the said will ought to be considered as the remaining part of the testator's lands, (after a sufficient part sold for payment of debts and legacies,) and not as a personal estate, and that so much only ought to be sold as would be sufficient to pay the debts; and that in case Mr. *Radclyffe* and Mr. *Constable* were incapable of taking them, they as protestants claimed the said real estate, as being the only devisees capable to take the same: they also insisted, that the codicil, with reference to the devise of the remainder of the testator's lands, did not control the devise thereof mentioned in the will; for that if the plaintiffs were incapable to take the lands as purchasers by the devise, they were to be esteemed as persons not *in esse*, and that the codicil as to the lands was void; but if the plaintiffs were capable, yet such devise did not give the remainder of the premises to them but for their lives, and that the reversion in fee belonged to them the said *Hewett* and *Hickman*; and they brought a cross-bill, insisting thereby on the same matters; and the legatees brought a bill for payment of their legacies. The 27th of June 1712, the said causes came on to be heard before the Lord Chancellor *Harcourt*, who desired to have the assistance of the judges; and a case was made and argued before my Lord Chancellor *Parker*, *Trevor* Chief Justice of C. B., Justice *Powel*, and the Master of the Rolls, and after time taken to consider of the case, my Lord Chancellor, *Trevor* C. J., the Master of the Rolls, and Justice *Powel* were of opinion, that the devise of the surplus of the purchase-money (after debts and legacies paid) to Mr. *Radclyffe* and Mr. *Constable* was good, notwithstanding the said disabling act; the surplus-money being a personal interest in them, and not made void by the words or intention of that statute; and as to *Hewett* and *Hickman*, my Lord Chancellor was of opinion, that the first codicil was a revocation of the will, as to the residue of the real and personal estate. Mr. *Roper* appealed to the House of Lords, and it was there ordered, before the appeal was determined, that the estates should be sold, and all debts and legacies paid; which was accordingly done; but afterwards the Lords reversed the decree, principally for this reason, that (a) if the devise of the residue to the plaintiffs was good they would in equity be entitled to pay off the antecedent debts and legacies, and when that was done keep the estate, which would be a means of evading the statutes, and enabling a papist to take an estate contrary to the intention of them. It was also resolved, in this case, that a devise is a purchase within the meaning of the act.

The Earl of *Derwentwater* was tenant in tail, with remainder in

in fee to himself, and intending to marry Sir *John Webb's* daughter, he, by advice of counsel, suffered a common recovery without declaring any uses, it being intended that he should thereby become tenant in fee, and be enabled to make a proper settlement. Accordingly, by indentures of lease and release, he settled his estate to the use of himself for life; remainder to trustees for preserving contingent uses; remainder in tail successively to the first and other sons of the intended marriage, with remainders over. The marriage took effect, and there was issue a son and a daughter. The said earl was attainted of high treason on account of the *Preston* rebellion, and was executed; and by an act made thereupon, all the forfeiting persons' lands were vested in commissioners for the use of the public; and it was expressly provided, that where the forfeiting person was seised of an estate-tail at the time of the forfeitures, the same should be vested in the commissioners as an absolute fee discharged of all remainders and reversions. The commissioners of forfeitures, on a claim exhibited before them in the name of the said earl's son, determined that the whole estate was in them on this foundation, that the earl continued tenant in tail notwithstanding the recovery, and, consequently, nothing more than estate for his own life passed by the lease and release. The reason they went upon was, that if by suffering a common recovery he could turn his estate-tail into a fee, then he would gain a new estate by purchase, which they apprehended he, being a papist, was disabled to do by the statute 11 & 12 W. 3. c. 4. But the majority of the judges, upon an appeal from the decree of the commissioners, were of a contrary opinion, and held, that this was only a new modelling of the estate, and not a purchase or acquisition within the act; and that the earl was capable of taking a new fee at least for the benefit of his heirs and posterity, and that he was capable of settling the same by lease and release; and therefore allowed of the son's claim.

It was likewise resolved, by the delegates appointed to hear appeals from the determination of the commissioners for the estates forfeited in the year 1716, that a papist may be a trustee for a protestant, notwithstanding the statute 11 & 12 W. 3. c. 4.

Anne Stephenson had two grandchildren, one the plaintiff *Hill*, the other *Frances* the wife of the defendant *Filkins*, who was educated by her in the popish religion: the grandmother, by will made in the year 1716, devised the lands in question to trustees, in trust to be sold for the payment of her debts and legacies, and the residue of the money arising by such sale she devised to her said grand-daughter *Frances*, when she should attain her age of twenty-one years, or be married with the consent of the said trustees, and soon after died. The said *Frances*, at the age of fifteen, was married to *Filkins* according to the ceremony and usage of the church of *Rome*, and a week afterward by a minister of the church of *England*: at the age of eighteen she conformed according to the directions of the statute: it was held, that she was within the first clause, and that a devise to a papist

wentwater's case, upon an appeal to the Lords Delegates from the judgment of the Commissioners for forfeited Estates. Hil. 6 G. 1. 9 Mod. 172. S. C.

Hill v. Filkins, Trin. 11 G. 1. 2 P. Wms. 9. S. C.

papist under the age of eighteen is good, if he conforms within six months after he comes to that age; and the age of eighteen was a proper period for them to make their election, whether they would conform or not; and the bill exhibited by the protestant heir was dismissed with costs.

Carrick v.
Errington,
Trin. 9 G. 1. in
Canc. 2 P.
Wms. 361.
S. C. 9 Mod.
33. S. C.
2 Eq. Abr.
623. pl. 13.
624. fol. 20.
625. pl. 21.
22, 23. S. C.

J. S., a papist, made a settlement of his estate to trustees, to the use of the trustees and their heirs, in trust for *A.* for life; remainder to the said trustees to preserve contingent remainders; remainder to the first and every other son of *A.*, and for default of such issue, then in trust for *B.* and his issue. *A.* was a papist and *B.* a protestant. *B.* exhibited his bill in Chancery, suggesting that *A.* was a papist and had no son, and that therefore the trustees might account to him for the rents and profits; he also made the heir at law defendant; and on hearing this cause before the Lord *Macclesfield*, and afterwards by the Lord *King*, they both held, that though the trust to *A.* was void, he being a papist, yet that notwithstanding the legal estate was still in the trustees, because they were trustees not only for the papist but also for *B.* the protestant, and for the sons of *A.*, who were yet unborn; and as they were trustees to preserve contingent remainders for such sons who might be protestants, they thought that the estate should remain in the trustees for that purpose: and they held that the heir at law was entitled to receive the profits during the life of *A.* as a trust undisposed of, but that *B.* the remainder-man could have no right till the death of *A.*, without a son capable of taking. And this decree was affirmed in the House of Lords.

Marwood v.
Dorrel, Hil.
8 G. 2. in *B.R.*
Ca. temp.
Hardw. 91.
S. C.

The case upon a special verdict in ejectment was: *Thomas Dorrel* had one brother and four sisters, and being seised in fee by will 4th *December* 1703, devised the lands in question to trustees, to the use of them and their heirs, in trust for his first and every other son in tail male; and for want of such issue, remainder to his brother *Arthur* for life, remainder to his first and every other son in tail male; and for want of such issue, that then the trustees should stand and be seised for the sole and proper use and benefit of such eldest and first son lawfully begotten, or to be begotten of *John Dorrel*, as shall not be heir at law and inheritor to the said *John Dorrel*, and the heirs of his body; and for default of such issue by him, remainder to the third, fourth, and fifth, and every other son of the said *John Dorrel*, and the heirs of their respective bodies. The trustees, by a clause in the will, were empowered, by the rents and profits of the estate, or by mortgage and sale, to raise so much money as would satisfy the testator's debts: *Thomas* and *Arthur* both died without issue, *John Dorrel* is living, and has seven sons; *George* the defendant is the second son; all the sons of *John* are papists, and educated in the popish religion, except his younger son, who is too young to be said, as yet, to be of any religion: *George Dorrel* was under eighteen years of age when the limitation by the devise fell upon him, but is now above eighteen years, and has not taken the oaths directed by 11 & 12 W. 3.

c. 4., and is married, and has now two sons very young, for whom, as well as for his wife, he has made a settlement of these lands; the four sisters of *Thomas Dorrel* are lessors of the plaintiff, as heirs at law; and the question is, Whether *George* the son of *Arthur*, or the heirs at law, be entitled to the lands? For the plaintiffs, the heirs at law, it was urged, 1st, That *George* is a papist, and that papists who shall refuse above six months after they arrive at the age of eighteen to take the oaths of allegiance, &c. are by the said statute expressly disabled from purchasing; and therefore as a devise is a purchase, and so held Co. Lit. 18., and by the Lords, in the case of *Roper v. Radclyffe*, consequently *George Dorrel* takes nothing by it. 2dly, That the devise was void for uncertainty, being to such eldest and first son of *J. D.* as shall not be heir at law to him; but as no one can say who will be heir to *J. D.*, so it is impossible to say who will not, for *nemo est hæres viventis*; and he who is to be heir is not to take, so that none but a son who will not be heir can take; for both descriptions must coincide. Hob. 29. *Hardwicke* C. J. breaking the case said, two objections have been made to the defendant's title; 1st, That the limitation under which he claims is void for the uncertainty of the description. 2dly, That supposing the description to be certain enough, yet by 11 & 12 W. 3. c. 4. the defendant is disabled from taking the estate, as being a papist. There seems at present to be a good deal of weight in the first objection, and yet it may possibly be reduced to a certainty, and if so, may be made good. And it seems natural to imagine, that by the words of the will the testator intended the second son of *John Dorrel* should take, and the rather as the testator has made the next limitation to the third, fourth, and fifth sons, &c. of the said *John Dorrel*. But if the second son cannot take, yet if the third, &c. sons are well described, the daughters of *Thomas* cannot recover; and at present they seem to be certainly described. As to the second objection, I think myself bound by the determination of the House of Lords in the case of *Roper* and *Radclyffe*, that the word *purchase* extends to a devise, and therefore that a papist is incapable of taking an estate by will. But yet, be the defendant's title as it will, the plaintiff must recover on his own strength, and not on the weakness of the defendant's title; and my greatest doubt is this, — the devise here is to trustees to the use of them and their heirs, &c. I think this would clearly be a devise to the use of the trustees, though the clause of raising money by rents and profits was omitted; so here is a devise to trustees, in trust not only for the second son of *John Dorrel*, but for all other his sons now living, one of which is not found to be a papist. It hath been said indeed, that this devise being for the benefit of papists, the trust itself is void; but the question is, if the entire trust should not be for the benefit of papists? In the present case, the youngest son of *John Dorrel* may be able to take for aught appears to the contrary; and therefore I think that this latter part of the trust being lawful, will support the legal estate in the trustees. And

here he put the case *suprà* of *Carrick v. Errington*, and said, that according to the resolution in that case, the lands in question cannot be in the heirs at law, but in the trustees; because here is a trust for a son of *John Dorrel*, who was not a papist, as well as for other children yet unborn; so that the plaintiffs have no title to recover in this action, but have mistaken their remedy; for if they have any, it seems to be by bill in equity against the trustees for an account of the profits. And it is certain, in the above-mentioned case, that the estate could not vest in the remainder-man, because he being then in by purchase it could never be afterwards divested for the benefit of such child as *A.* should happen to have; but he said that he did not give this as his absolute opinion, but only to point out the difficulties which stuck with the court: it was adjourned, and no farther proceedings were had therein.

Pelham v.
Fletcher Mich.
1729.

A mortgage was made to a papist, who assigned to a protestant for a full consideration: an ejectment was brought against the assignee by a subsequent mortgagee, who recovered by reason of the disability of the first mortgagee: all this appeared upon a bill brought in Chancery; and my Lord Chancellor was of opinion that a mortgage to a papist is void: but in this case the assignment to the protestant, and the trial in ejectment, were both before the 3 Geo. 1. c. 18. which, were it otherwise, would, it seems, have made an alteration.

On Lord
Dover's will.

In a case which came on before my Lord *King* in the Court of Chancery, it appeared that my Lord *Dover* was possessed of a long term for years, and made his will, and his lady, who was a papist, executrix thereof. It was resolved by my Lord Chancellor, that notwithstanding the disabling act 11 & 12 W. 3. c. 4. the term vested absolutely in her, and that this was not a purchase within that act; and he said, that a papist may be tenant in dower, or by the courtesy; because in all these cases it is by operation of law, and not by any act of the party, that the estate comes to him.

Mallom v.
Bringloe,
Pasch. 1738,
in C. B.

It hath been adjudged, that a papist may devise to a protestant; in which case it was agreed, that where an ancestor dies seised of an estate of inheritance, it descends upon and vests in his heir (though a papist) for the benefit of his heirs, and that the next protestant a-kin has only a right to the perception of the profits during the nonconformity of the heir.

Smith v.
Read, Trin.
12 G. 2.
1 Atk. 526.

Upon the marriage of Mr. *Paine* with one Mrs. *Gage*, lands in the county of *Surrey* were settled and conveyed to the use of the husband and wife for their lives, and the life of the survivor of them; then to the use of the first and every other son in tail, remainder to the right heirs of the husband: the marriage took effect, but Mr. *Paine* the husband died in the lifetime of Mrs. *Paine*, without leaving issue, having first devised all his lands to his wife and her heirs. In 1730, Mrs. *Paine*, the wife, devised all her real estate to the defendant, subject to a few legacies mentioned in her will, but lived and died a papist; but that being difficult to prove at law, the plaintiff Mr. *Smith* who had married *Eliz. Paine*, heir at law to Mr. *Paine*, he and his wife filed their bill against

against the defendant to set aside the marriage settlement and will of Mr. *Paine* the husband, under which Mrs. *Paine* claimed ; and, in particular, prayed that the defendant might discover whether Mrs. *Paine* the wife, under whose will he claimed, was a papist or not ? To which the defendant pleaded the statute of 11 & 12 W.3. c. 4. Upon arguing this plea, it was insisted upon for the defendant, that it was a standing rule in this court, that no person was bound to discover what might subject him to the penalty of an act of parliament ; that the statute of 11 & 12 W. 3. c. 4. was a penal law, and the party, who would take advantage of such law, would never be assisted in a court of equity, which never assists a forfeiture ; he, who would claim any thing forfeited, must make out the forfeiture himself ; for no person shall be obliged to discover a fact that would be a forfeiture of his own estate. If a copyholder commits waste, it is a forfeiture of his estate to the lord of the manor ; but if the lord of the manor comes into this court for a discovery whether the copyholder has been guilty of waste or not, the copyholder is not bound to answer ; for no law in the world obliges a man to accuse himself : if an estate is given to a woman *durante viduitate*, she is not bound to discover whether she is married or not ; because the discovery of that fact might be the loss of her estate. That disabilities and forfeitures were of the same nature ; that a total incapacity or disability to hold at all (which is the case of papists) was certainly as much a penalty as a forfeiture of an estate which the party before was capable of holding ; that as Mrs. *Paine* would not have been obliged in her lifetime to discover whether she was a papist or not, the defendant, who claims under her, ought not to be obliged to discover it. On the other hand, it was insisted by the counsel for the plaintiff, that it was not their business to examine, whether the acts of parliament made against papists were hard laws or not ; they were laws, and that was sufficient for their purpose : that this was not the case of a forfeiture, but it was to discover a fact, which, if true, the estate was never in Mrs. *Paine*, because the act of parliament makes all papists absolutely incapable of being purchasers ; if she was a papist, the estate never vested in her ; and as she was not capable of holding it, she could not give it away to the defendant, therefore could never forfeit the estate ; for no person can be said to forfeit an estate he never had. An alien is incapable of holding lands at common law, yet he is obliged to discover whether he is an alien or not ; and his discovery of that fact, whether he is so or not, can never be a forfeiture of his estate, because he never had a right to it : so in case of a bastard who is *nullius filius*, and incapable of claiming lands by descent, he shall discover whether he is so or not, for the same reason : so a person claiming under a bankrupt, whose goods are vested in the assignees of the commission of bankruptcy for the benefit of creditors, must discover whether the person under whom he claims was a bankrupt or nor at the time of the conveyance : That all these cases depend upon the same reason, and were no forfeitures, because the estates were never in them ; so if Mrs. *Paine* was a papist, she was incapable

capable of having the estate herself, and could not give it away; and therefore the defendant could never forfeit it, because the estate was never in him. But my Lord *Hardwicke* was of opinion, that the defendant was not obliged to discover whether Mrs. *Paine* was a papist or not; that there is no rule better established in this court than that a man shall not be obliged to answer to what may subject him to the penalty of an act of parliament. No person can doubt whether this act is not a penal law, and whether the clauses relating to papists are not disabilities or incapacities, imposed by way of penalty upon all persons exercising that religion. It is objected, that this is not the case of a forfeiture, because the estate was never vested, and therefore can never be devested; yet it all falls under the same reason; and an incapacity or disability to hold at all by act of parliament is certainly as much a penalty as the forfeiture of an estate by a person who had a right to enjoy it before the forfeiture. That if a bill is brought against the person for a discovery whether he is a papist or not, he is not bound to discover; and where is the difference between him and the person claiming under him? Here is a disability imposed by parliament, by way of penalty, upon a particular set of men upon the account of their religion, the discovery of that fact subjects them to a penalty; and this is not like the case of an alien or bastard, who are incapable by the general laws of the land to inherit: besides, what sways with me much, is the great inconvenience that would follow should this plea be disallowed; we should have nothing in this court but bills of discovery, whether such and such persons were papists or not, and nobody knows what confusion would follow; therefore the plea must be allowed (a).

[(a) So, in *Harrison v. Southcote*, the same plea was allowed to a bill brought against a purchaser, to discover whether the person under whom he derived title were a papist.

1 Atk. 528.

2 Ves. 389.

S. C.

[(a) But Lord C. *Eldon* refused to administer the oath appointed by the 31 G. 3. c. 32. to a Catholic attorney, who was appointed a *Master extra in Chancery*, on the ground that he must take the same oath as the ordinary masters. *Ex parte Agar*, 3 V. & B. 169.]

[All the statutes of recusancy are now repealed by the 31 Geo. c. 32. in favour of persons taking the oaths thereby required. Nor is any catholic to be summoned to take the oath of supremacy prescribed by 1 W. & M. §1. c. 8. and 1 G. 1. §2. c. 13. or the declaration against transubstantiation required by 25 Car. 2. The act dispenseth persons acting as a counsellor at law, barrister, attorney, clerk or notary, from taking the oaths of supremacy or declaration against transubstantiation (b). It also tolerates under due regulations the public exercise of the popish religion, provides against disturbing the congregation, and misusing the officiating minister, and exempts the ministers from serving upon juries, and from ward and parochial offices. The regulations under which the public exercise of the religion is tolerated are, that no congregation for religious worship shall be had in any place with the doors locked, barred, or bolted, during any time of such meeting together; and that no congregation or assembly for religious worship shall be permitted until the place of such meeting shall be recorded at the sessions.

As to the double land tax, that being imposed by the annual land-tax act, a repeal of it could not be effected by any prospective act; it is repealed, by omitting from the subsequent annual land-tax acts the clause imposing it.]

PARDON.

PARDON.

- (A) By whom to be granted.
 - (B) In what Cases, and for what Offences, it may be granted.
 - (C) Where a Pardon is grantable of common Right.
 - (D) Of the Validity of a Pardon: And herein, by what Words Treason, Murder, Felony, and other Offences may be pardoned: And herein, of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.
 - (E) Whether a Pardon may be conditional.
 - (F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.
 - (G) In what Manner a Pardon is to be taken Advantage of: And herein,
 1. *In what Manner a general Pardon by Parliament is to be taken Advantage of.*
 2. *In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.*
 - (H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.
-

(A) By whom to be granted.

THE power of pardoning offences is inseparably incident to the crown; and this high prerogative the king is intrusted with upon a special confidence that he will spare those only whose case, could it be foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case. Show. 284.

But, it seems, that anciently the right of pardoning offences within certain districts was claimed by the Lords of Marches and others, who had *jura regalia* by ancient grants from the crown, or by prescription. But now by the 27 H. 8. c. 24. § 1. it is enacted, "That no person or persons, of what estate or degree soever they be, shall have power to pardon or remit any
Co. Lit. 114.
3 Inst. 233.

“treasons or felonies whatsoever, nor any accessories to the same, nor any outlawries for such offences, whether committed in *England* or *Wales*, or the Marches of the same, but that the king shall have the whole and sole power and authority thereof united and knit to the imperial crown of this realm, as of good right and equity it appertaineth.”

(B) In what Cases, and for what Offences it may be granted.

Plow. 487.
Keilw. 134.
12 Co. 29, 30.
3 Inst. 237.
Vaugh. 333.

IT is laid down in general, that the king may pardon any offence whatever, whether against the common or statute law, so far as the public is concerned in it, after it is over, and, consequently, may prevent a popular action on a statute, by pardoning the offence before the suit is commenced. But it seems that he cannot wholly pardon a public nuisance while it continues such, because such pardon would take away the only means of compelling a redress of it. Yet, it is said, that such a pardon will save the party from any fine to the time of the pardon.

Day. 75.
5 Co. 35.
12 Co. 29.

But it seems agreed that the king can by no previous licence, pardon, or dispensation, make an offence dispunishable which is *malum in se*; as being either against the law of nature, or so far against the public good as to be indictable at common law; and that a grant of this kind, tending to encourage the doing of evil, which it is the chief end of government to prevent, is plainly against reason and the common good, and therefore void.

2 Hawk. P.C.
c. 37. § 28.

And hence it hath been insisted that the king's grant to the Bishop of *Salisbury* and his successors, having the custody of a prison, that they should be quiet from all escapes, which hath been (a) adjudged to be a good grant, is not law; as being but a single instance, and contrary to this rule; because a grant of this kind, tending to make a gaoler less diligent in his duty, by taking off the legal punishment of his negligence, is plainly against the common good.

2 Hawk. P.C.
c. 37. § 29. and
several
authorities
there cited.

But, where a thing in its own nature lawful, is made unlawful by parliament, as the carrying bell-metal, &c. out of the realm, importing merchandizes in foreign ships, selling wines beyond a certain price, or without a licence, multiplying gold, &c. coining money of a base alloy, &c. it was formerly taken as a general rule, that the king might dispense with it, as to a particular time or place, or person, so far as the public was concerned in it; unless such dispensation could not but be attended with an inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made; as, the licensing a particular person to import foreign cards or wines, &c.; in which cases it was commonly taken to be void. Also where a statute gives a particular interest or right of action to the party grieved, as the statutes of mortmain (b), those against maintenance, forcible entries, carrying distresses out of the hundred, escapes, &c., it has been always agreed, that no charter from the king can bar the right of the party

[(b) By
7 & 8 W. 3.
c. 38. such
licence may
be granted by
the king alone.]

party grounded on such statute (a). Also where a statute is express, that the king's charter against the purport of it, though with the clause of *non obstante*, shall be void; it seems to have been always generally agreed, that regularly no such clause could dispense with it.

discharge the forfeiture of twenty-five pounds to the city of *London*, for acting as a broker without licence. *Ludlam v Lopez*, 1 *Stra.* 529. Neither will it discharge penalties given by a popular statute between the informer and the poor. *Howel v. James*, 2 *Stra.* 1272.]

[(a) Hence, it hath been holden, that an act of grace doth not

Also it seems to be agreed, that no dispensation of any statute, except the statutes of mortmain, was of any force without a clause of *non obstante*; neither is such clause of any effect at this day; for it is declared and enacted by 1 W. & M. sess. 2. c. 2. that no dispensation by *non obstante* of or to any statute, or to any part thereof, be allowed; but that the same shall be held void, except a dispensation be allowed in such statute. But it is provided, that no charter, grant, or pardon, granted before 23d of *October* 1699, shall be any ways invalidated by that act, but that the same shall be and remain of the same force, and no other, as if the said act had never been made.

2 Hawk. P. C. c. 37. § 30, 31.

The king can by no charter whatsoever bar any right of entry or action, or any legal interest or benefit before vested in the subject; and therefore it seems clear that he cannot bar any action on a statute by the party grieved, nor even a popular action commenced before his pardon, nor a recognizance for the peace before it is forfeited.

Plow. 487.
2 *Roll. Abr.*
178. *Cro. Car.*
199. *Keilw.*
154.

Neither can the king pardon an appeal, except only where it is carried on at his suit, after a nonsuit; and therefore if a person attainted on an appeal carried on at the suit of the party get the king's pardon, he must sue a *scire facias* against the appellant before the pardon shall be allowed.

2 Hawk. P. C. c. 37. § 35.

And if the appellant appear on the *scire facias*, he may pray execution notwithstanding the pardon; but if the sheriff return a *scire feci*, or two *nihiis*, and the appellant appear not on demand, or if he return the appellant dead, the appellee shall be discharged. But some have holden that, in this last case, a *scire facias* shall go against the heirs of the deceased.

2 Hawk. P. C. c. 37. § 36.

But there is no need of any *scire facias* against the lord by escheat, because the pardon no way tends to reverse the attainder whereon the title of escheat is founded.

Hawk. P. C. c. 37. § 37.

If several persons be outlawed on an appeal, and one get his pardon allowed on the non-appearance of the appellant on a *scire facias*, it seems that the rest can take no advantage thereof, but must sue their *scire facias*, &c. in the same manner as if there had been no such default.

Hawk. P. C. c. 37. § 38.

It hath been strongly holden that the king may pardon the burning of the hand on a conviction of manslaughter on an appeal, as being no part of the judgment at the suit of the party, but a collateral and exemplary punishment inflicted by statute, and intended only by way of satisfaction to the public justice, like the finding of sureties by one convicted on the statute against trespassers in parks.

But for this *vide* 2 Hawk. P. C. c. 37. § 39. and 1 *Stra.* 530.

5 Co. 51.
Latch. 190.
Cro. Eliz. 684.
Hob. 81. Cro.
Jac. 335. 2
Hawk. P. C.
c. 27. § 41.

A pardon will not only discharge any suit in the spiritual court *ex officio*, but also any suit in such court *ad instantiam partis pro reformatione morum*, or, *salute animæ*, as, for defamation or laying violent hands on a clerk, &c. And if the time to which the pardon has relation be prior to the award of the costs to the party, or, as it is generally holden, if it be subsequent to the award but prior to the taxation, it shall discharge them, but not if it be subsequent to the taxation. And the same rule holds as to costs taxed to the party grieved on a contempt in a court of equity. But *quere* as to costs taxed by the prothonotary on an attachment; for they are not given by the court of course, but the offender submits only to pay them by way of composition.

Jon. 227.
2 Roll. Abr.
178. Cro.
Jac. 159.
8 Co. 68, 69.

If a person be imprisoned on an *excommunicato capiendo* for nonpayment of costs, and the king pardon all contempts, it is said that he shall be discharged without any *scire facias* against the party, and that the party must begin anew to compel a payment of the costs; because the imprisonment was grounded on the contempt, which is wholly pardoned.

5 Co. 51.
Latch. 190.
Cro. Car. 46,
47.
(a) There cannot now be any suit in the ecclesiastical courts to compel marriage by reason

But no pardon will discharge a suit in the spiritual court, any more than in a temporal, for a matter of interest or property in the plaintiff; as for tithes, legacies, matrimonial (*a*) contracts and such like. Also, it is agreed, that after costs are taxed, in a suit in such court at the prosecution of the party, whether for a matter of private interest, or *pro reformatione morum*, or *pro salute animæ*, or for defamation, &c., they shall not be discharged by a subsequent pardon.

of any contract, &c. 26 G. 2. c. 35. § 13.

2 Roll. Abr.
304. Noy 85.
Latch, 155.

If the offence be pardoned after costs taxed, and then the defendant appeal, and the superior court give new costs for or against him, such costs shall not be avoided; because the costs in the first suit being taxed before the pardon, and therefore not avoided by it, the appeal was proper for determining whether they were well given or not, and, consequently, costs were as properly given on such appeal as in any other case. But if the offence be pardoned pending an appeal, and the pardon relate to a time precedent to the award of the costs, and then the appellant desert his appeal, and the court award costs against him in respect of such desertion, it seems that he may have a prohibition; because the pardon having discharged the costs of the first suit made the appeal to be of no purpose.

12 & 13 W. 3.
c. 2. § 3.
¶ (b) As to the protests of the

By the 12 & 13 W. 3. c. 2. § 3. "No pardon under the great seal shall be pleaded to an impeachment by the Commons in parliament." (b)

Commons against the power of pardon in such case, prior to the 12 & 13 W. 3. c. 2. *vide* Hat-sell's Preced. v. 4., pp. 183. 192. 210. 277. ||

4 Bl. Com.
392.

[But after the impeachment is solemnly heard and determined it is not understood that the king's royal grace is farther restrained or abridged; for after the impeachment and attainder of the six rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's pardon.]

(C) Where

(C) Where a Pardon is grantable of Common Right.

BY the statute of *Gloucester*, c. 9. it is enacted, “ That if it be
 “ found by the country, that a person tried for the death of
 “ a man did it in his defence, or by misfortune, then, by the re-
 “ port of the justices to the king, the king shall take him to his
 “ grace, if it please him.” 2 Inst. 316.
 But it seems to be settled at this day agreeably, to the ancient
 common law, in affirmance whereof this statute was made, that
 in such a case, or where one indicted of *homicide se defendendo*
 confesses the indictment, if the party cause the record to come
 into chancery, the chancellor will of course make him a pardon
 without speaking to the king, and that by such pardon the for-
 feiture of goods may be saved; for these words, *if it shall please the*
king, shall be taken as spoken only by way of reverence to him,
 and not intended to make such a pardon discretionary. But if
 the party be found to have fled, it is made a *quere*, if the pardon
 save the forfeiture for the flight; for that is not grounded on the
 homicide, but on the contempt of the law.

If an approver convict all the appellees, whether by battle or
 verdict, the king *ex merito justitiæ* ought to pardon him as to his
 life, and also give him his wages from the time of the appeal to
 the time of the conviction. 3 Inst. 129.
2 Hal. Hist.
P. C. 253.

By the 4 & 5 W. & M. c. 8. it is enacted, “ That if any person
 “ or persons out of prison shall commit any robbery, and after-
 “ wards discover two or more who then had or afterwards shall
 “ commit any robbery, so as two or more of them shall be con-
 “ victed, any such discoverer shall be entitled to a pardon for
 “ all robberies committed before the discovery, which also shall
 “ bar an appeal.” 4 & 5 W. & M.
c. 8.

And by the 6 & 7 W. & M. c. 17. it is enacted, “ That if any
 “ person or persons out of prison shall be guilty of clipping,
 “ coining, counterfeiting, washing, filing, or otherwise diminishing
 “ the coin of this realm, and afterwards discover two or more
 “ who then had or afterwards shall commit any of the said
 “ crimes, so as two or more of them shall be convicted, any such
 “ discoverer shall be entitled to a pardon for all his crimes com-
 “ mitted before the discovery.” 6 & 7 W. & M.
c. 17.

By the 10 & 11 W. 3. c. 23. (which excludes clergy from those
 who shall in any shop, warehouse, coach-house or stable, privately
 steal any goods, &c. of the value of 5s., though such shop, &c.
 be not broken open, and though no person be therein, or shall
 assist, hire, or command any person to commit such offence,)
 “ If any person or persons shall commit any burglary, house-
 “ breaking, or felony, in stealing of any horse or horses, or any
 “ money, wares, or goods from whom clergy is by that act taken
 “ away, and being out of prison shall discover two or more who
 “ then had or after shall commit any such felony, and shall be
 “ convicted thereof, or cause to be discovered and apprehended
 “ two or more who shall be convicted as aforesaid, every such
 “ discoverer” 10 & 11 W. 3.
c. 23.

“ discoverer shall be entitled to a pardon for the felonies aforesaid
“ committed before such discovery,” &c.

5 Ann. c. 31.

By the 5 Ann. c. 31. it is enacted, “ That every person who
“ shall be guilty of burglary, or of the felonious breaking and
“ entering a house in the day-time, and after shall discover two
“ who shall have committed such felony, so as they be con-
“ victed, &c. shall have 40*l.* and a pardon of all felonies except
“ murder,” &c.

8 G. 1. c. 18. § 7.

[It is enacted by 8 Geo. 1. c. 18. § 7. “ That if any runner of
“ foreign goods shall within two months after his offence, and
“ before his conviction, discover two or more of his accomplices
“ therein to the commissioners of the customs or excise in *Eng-
“ land* or *Scotland*, so as they or two of them at least be convicted
“ of such offence (as described in the act), the offender or offenders
“ so discovering shall receive the sum of 40*l.* for every such
“ offender so discovered and convicted, so as the value of the
“ goods recovered by such discovery shall exceed 50*l.*; and such
“ person so discovering shall be clearly acquitted and discharged
“ of such his or her offence.” And the like is enacted by
9 Geo. 2. c. 35.

Cowp. 333.

Persons to whom the king has, by special proclamation in the
Gazette, or otherwise, promised a pardon, are also entitled to it
of legal right.]

(D) Of the Validity of a Pardon : And herein, by what
Words Treason, Murder, Felony, and other
Offences may be pardoned : And herein, of Par-
dons by Implication, and where the King shall
be said to be deceived in his Grant thereof.

Yelv. 43. 47.

Cro. Jac. 18.

34. 548.

2 Roll. Abr.

138. Dyer,

352. pl. 26.

Raym. 13.

Sid. 41. 3 Inst.

IT is laid down as a general rule, that wherever it appears, by
the recital of the pardon, that the king was misinformed, or
not rightly apprized both of the heinousness of the crime and also
how far the party stands convicted upon record, the pardon is
void, upon a presumption that it was gained from the king by
imposition.

238.

2 Hawk. P. C.

c. 37. § 8.

And upon this ground it seems agreed, that if a man attainted of
felony get a pardon which doth not mention the attainer the
pardon will be ineffectual. Also it hath been holden, that the
pardon of a person convicted by verdict of felony is void unless
it recite the indictment and conviction. Also it hath been
questioned, if the pardon of a person barely indicted of felony be
good without mentioning the indictment : but it hath been ad-
judged, that such a defect is salved by the words *sive indictatus
sive non*.

2 Hawk. P. C.

c. 37. § 9.

Hal. Hist.

P. C. 466.

2 Hale's Hist.

P. C. 45.

It hath been holden, that anciently a pardon of all felonies in-
cluded all treasons as well as felonies ; and it seems to be taken
for granted in many books, that such a general pardon is even at
this day pleadable to any felony, except murder, rape, and piracy ;
and

and that the only reason why it may not also be pleaded to murder and rape is, because 13 R. 2. stat. 2. c. 1. and 16 R. 2. c. 6. require an express mention of them; and that the only reason why it is not pleadable to piracy is, because it is a felony by the civil law only.

By the 27 E. 3. c. 2. it is enacted, "That in every pardon of felony granted at any man's suggestion, the suggestion and the name of him that makes it shall be comprized; and if it be found untrue the charter shall be disallowed; and the justices, before whom the charter shall be alleged shall enquire of the same suggestion, and, if they find it untrue, shall disallow the charter."

No pardon of felony shall be carried beyond the express purport of it; and therefore if the king reciting an attainder of robbery pardon the execution, he thereby neither pardons the felony itself, nor any other consequence of it besides the execution.

It is enacted by 2 E. 3. c. 2. *That charters of pardon of man-slaughters shall not be granted but where the king may do it by his oath, that is to say, where a man slayeth another in his own defence, or by misfortune; neither is there any precedent in the register of the pardon of any other homicide, but such as is done either in self-defence or by misadventure, or by infants or madmen; and from hence some have disputed the king's power of pardoning any other homicide. But this is contrary not only to the general tenour of the books, but also to the plain purport of 13 R. 2. stat. 2. c. 1. which, reciting that murders, treasons, and rapes, had been frequently committed because pardons had been easily granted in such cases, enacteth, "That no pardon shall be allowed for murder, or for the death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman, unless the same murder, &c. be specified in the same charter; and if the charter of the death of a man be alleged before any justices in which it is not specified that the party was murdered or slain by await, assault, or malice prepensed, the same justices shall enquire by a good inquest of the visne where the dead was slain, if he were murdered or slain by await, &c. and if they find that he was murdered or slain by await, &c. the charter shall be disallowed."*

It hath been formerly often adjudged, that murder might be pardoned under the general description of a felonious killing, with a clause of *non obstante*; but by W. & M. sess. 2. c. 2. it is declared, *That no dispensation by non obstante of or to any statute shall be allowed.*

But pardons of manslaughter remain as they were at common law; and therefore the pardon of the felonious killing of *J. S.* may be pleaded to an indictment of manslaughter in killing him: but where such a pardon is pleaded to a coroner's inquest of manslaughter, the court may refuse to allow it till the fact be found manslaughter by a jury directed by a higher court.

If a general act expressly pardon petit treasons and except murders,

27 E. 3. c. 2.

6 Co. 13.
2 Hawk. P. C.
c. 37. § 12.2 E. 3. c. 2.
2 Hawk. P. C.
c. 37. § 14.
and several
authorities
there cited.Sid. 366.
Show. 283.
Keling, 24.
3 Mod. 37.2 Keb. 363. 415.
Keling, 24.
2 Jon. 56.

Dyer, 50. pl. 4.

235. pl. 19.
6 Co. 13.

murders, it cannot be avoided by indicting a person guilty of petit treason for murder only, omitting the word *proditorie*; for the less offence being included in the greater is pardoned by the pardon of it; and therefore such an exception of murder is to be intended of such murder only as is specially so called, and doth not amount to petit treason.

Lev. 8. 120.
Sid. 150.
Keb. 66. 548.

Neither doth the exception of murder in a general act of pardon of all felonies extend to a *felo de se*; for though his offence be in strictness murder, yet in common speech, according to which statutes are commonly expounded, it is generally understood as a distinct offence, the word *murder* seeming *primâ facie* to import the murder of another.

Plow. 401.
Cole's case.
Hal. Hist. P.C.
426. Dyer, 99.
pl. 65. (a) If
the felony has

It is said, that a general act of pardon of all felonies, misdemeanors, and other things done before such a day, pardons a homicide from a wound before the day, whereof the party died not till after; because, the stroke being pardoned the effects of it are consequently pardoned. (a)

its commencement before the pardon takes place, but not its completion, the pardon shall operate in favour of the prisoner, as it would have done had the felony been complete before the pardon. This is the true sense of the doctrine in Cole's case. Nicholas's case, 1748, Fost. 64.—But, if a man gives a stroke, or poison, (which, till death ensues upon it, is only a misdemeanor,) and a pardon is granted to all misdemeanors, &c. but not of murder or poisoning, and afterwards the party dies, the felony is not pardoned. *Id.*

Lev. 106.
Sid. 211.
2 Mod. 52.

It is said, that a pardon of all misprisions, trespasses, offences and contempts, will pardon a contempt in making a false return, and a striking in *Westminster-hall*, and barratry, and even a *præmunire*. Also, it is laid down in general that it will pardon any crime which is not capital.

2 Hal. Hist.
P. C. 252.
cited from
Dyer, 308. a.

If *A.* be indicted of piracy and refusing to plead have judgment of *peine fort et dure*, and by the general pardon piracies are excepted, but the judgment of *peine fort et dure* is pardoned by the general words of all contempts; *quære*, whether he may be arraigned for any other piracy; but, by the better opinion, he may be arraigned of any other piracy committed before that award.

(E) Whether a Pardon may be conditional.

Co. Lit. 274. b.
2 Hawk. P. C.
c. 37. § 45.

IT seems agreed that the king may extend his mercy on what terms he pleases, and, consequently, may annex to his pardon any condition that he thinks fit, whether precedent or subsequent, on the performance whereof the validity of the pardon will depend.

Moor, pl. 662.
(b) Persons
pardoned of
felony may be
bound to their
good beha-
viour for seven

Also it hath been held, that in every pardon for a capital offence where the party was obliged to give security, there is a condition in law annexed to such pardon, so that if he forfeits such recognizance his pardon becomes void, and he may be taken and executed on the first judgment. (b)

years. 5 W. & M. c. 15. which *vide post*.

(F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.

NOTWITHSTANDING all felonies are several, yet the felony of one man may be so far dependent on that of another, that the pardon of the one will necessarily enure to the benefit of the other; as, where the principal is allowed his pardon before his conviction, in which case the accessory may by a necessary consequence take benefit of it; because he cannot be arraigned till the principal is convicted.

Where a man is bound to the king as surety for another's debt it is clear that the discharge of the principal is a discharge of the surety; but where a man is bound to the king for another's performance of a future act, the discharging of the other from such future act will not discharge the surety. But *quere*, if both had been bound, and the subject no way interested in the matter.

The pardon of *A.*, *B.*, and *C.* of all felonies by them done, without adding or "any of them," is void; for it supposes them jointly guilty, and extends to none but joint felonies, whereas all felony is several in each offender, and cannot be joint.

(G) In what Manner a Pardon is to be taken Advantage of: And herein,

1. *In what Manner a general Pardon by Parliament is to be taken Advantage of.*

HEREIN we must first observe a difference between a pardon by parliament and that under the great seal; that as to pardon by (a) parliament the same cannot be waived, because no one by his admittance can give the court a power to punish him where it judicially appears there is no law to do it; but a man may waive a pardon under the great seal by pleading other matter without taking any notice of it.

pleaded under the great seal. Keb. 707.

If the body of a general act of pardon either except divers persons by name, or except all who come under a general description, as, all who adhered to *J. S.*, the court is not bound (neither ought it, as some say,) to give any one the advantage of it, unless he plead it, and shew, in the first case, that he is not one of the persons excepted, and in the other, that he is not included in such description; neither will it be safe for him, if he be of the same name with one of those excepted by name, to aver that he is not one of the persons excepted by name, without adding, that he is a different person from such other of the same name. But if the body of the statute except one person only, or, if it be general as to all, and afterwards some be excepted in the provisoes, it may be pleaded, as some say, without any averment that he who pleads it is not one of the persons excepted, &c. and the exceptions ought to be shewn on the other side.

Cro. Eliz. 30,
31. Dyer, 34.
pl. 21.
2 Hawk. P. C.
c. 37. § 22.

2 Hawk. P. C.
c. 37. § 23.

Dyer, 34.
pl. 21.
2 Hawk. P. C.
c. 37. § 24.

2 Hawk. P. C.
c. 37. § 58, 59.
(a) That a coronation pardon cannot be taken advantage of, unless it be taken out and

2 Hawk. P. C.
c. 37. § 60.
and several authorities there cited.

Noy, 100. Also, where a general act of pardon excepts certain kinds of crimes, there is no need to aver that the crime whereof a person is indicted is not one of such excepted crimes, but the court ought judicially to take notice whether it be excepted or not.

Cro. Eliz. 125. Also, where such a statute excepts only one particular person, it hath been said, that there is no need of an averment that a person indicted is not such person, but that the court is to take notice whether he be or not.

2. *In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.*

Cro. Eliz. 153. The party, as hath been observed, must insist on the benefit of this kind of pardon; and therefore it hath been held to be error, to allow a man the benefit of a pardon under the great seal, unless he plead it.

2 Hawk. P. C. c. 37. § 65. He who pleads such a pardon ought to produce it (a) *sub pede sigilli*; because it is presumed to be in his custody, and the property of it belongs to him. Yet, if a man pleads such pardon without producing it, it seems that the court may indulge him a farther day to put in a better plea.

(a) That it is sufficient to plead and shew the exemplification of the pardon, &c. because such exemplification is expressly within the 15 Eliz. c. 6. 5 Co. 53. Carth. 158. cited.

Bull v. Tilt, 1 Bos. & Pull. 199. || A pardon, if pleaded, must be averred to be under the great seal. ||

5 Inst. 240. If there be a variance between the pardon and the record of conviction, &c. yet, if there be no repugnancy to intend that the same person is meant in both, it may be supplied by a proper averment; as, if he be called *J. S. gentleman* in the one, and *J. S. yeoman* in the other; or *B. the father* in the one, and *B. the son of W.* in the other; or, if the stroke which caused the death of *J. S.*, &c. be supposed to have been given on the second of *August* in the one, and on the third in the other: also, if such variant pardon be pleaded without such averment, the court may give the party a farther day to perfect his plea.

2 Hawk. P. C. c. 37. § 67. It seems that such pardon cannot be pleaded after the general issue, unless it be of a date subsequent to the pleading of it; because the making defence, without taking any notice of the pardon, seems to amount to a waiver of it. And *quære*, if a pardon can be pleaded at the same time with a general issue.

2 Hawk. P. C. c. 37. § 68. The party is not bound to lay the stress of his case on any particular clause of the pardon, but may take advantage of the whole.

2 Hawk. P. C. c. 37. § 69. After an amerciamen in the King's Bench is estreated into the Exchequer, and the party hath insisted on a pardon there, and been denied any benefit of it, he may be brought by *habeas corpus cum causâ* to the King's Bench, because the record remains there, and plead his pardon; and if it be adjudged sufficient, have a *supersedeas* to the barons.

Plow. 502. While the statute 10 E. 3. c. 2. stood in force no pardon of felony

felony (*a*) could be allowed without a writ of allowance, testifying that the party had found sureties according to that statute. But this is now repealed by 5 & 6 W. 3. c. 13. which provides, "That the justices, before whom a pardon of felony shall be pleaded, may in discretion remand or commit the party to prison till he shall enter into a recognizance, with two sufficient sureties, for the good behaviour for any time not exceeding seven years; provided that, if such person be an infant or feme covert, it shall be sufficient to find two sureties, who shall enter into a recognizance for his or her being of the good behaviour as aforesaid." (*b*)

this statute (as it is said) of the court's requiring recognizance for the good behaviour of a person pardoned for murder. *Rex v. Chetwynd*, 2 Stra. 1205.

The judges may insist on the usual fee of gloves to themselves and officers, before they allow a pardon.

Where a prisoner hath a pardon to plead, and any difficulty arise thereon, the court will of course assign him counsel. (c)

demeanor, the defendant shall not be put to the bar, nor plead it on his knees. *Rex v. Hales*, 2 Stra. 816. — Defendant in an information for maihem shall have the benefit of an act of grace, though he did not insist on it at his trial; but shall pay prosecutor full costs. *Rex v. Haines*, 1 Wils. 214. — [The mode of taking advantage of a pardon upon the circuits and at the Old Bailey is, to procure the king's sign manual or privy seal, signifying his majesty's intention to afford a pardon to the prisoner either absolutely or conditionally as the case may be, and directing the justices of the gaol-delivery to bail him, on his entering into a recognizance to appear and plead the next general pardon that shall come out. This mandate the justices obey; taking security, if the pardon is conditional, for the performance of the stipulations on which it is granted, and afterwards issuing their warrant to the gaoler for his discharge. 1 Bl. R. 479. 2 Bl. R. 797.]

(H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.

IT seems agreed, that a pardon of treason or felony, even after an attainder, so far clears the party from the infamy, and all other consequences thereof, that he may have an action against any who shall afterwards call him traitor or felon ; for the pardon makes him as it were a new man.

Also a pardon restores a man to his credit so as to enable him to be a witness; but yet his credit must be left to the jury.

And it hath been admitted, that the king's pardon of the burning of the hand on a conviction of manslaughter hath the same effect, as to this purpose, as the burning would have had, which is agreed to restore the party to his credit.

But it hath been adjudged, that a pardon is of no manner of force, as to this purpose, till it have passed the great seal.

¶ Before the statutes 6 Geo. 4. c. 25. and 7 & 8 Geo. 4. c. 28. in order to prove that a witness after conviction had been restored to his competency, the general rule was, that it was necessary to produce the pardon itself under the great seal—the privy seal or sign manual being held only warrants and countermandable.

But now, by the former of these statutes (§ 1.), it is enacted, that

Sid. 41.

Raym. 13.

Carth. 121

(a) But there never was any necessity for such writ upon a pardon of treason.

Cro. Eliz. 814.

Noy, 31.

(b) There has not been any instance since behaviour of a

2 Jon. 56.

Sid. 452.

Keilw. 25.

5 Inst. 29.

(c) On a pardon for a mis-

Hob. 67. 81.

Moor, 863.

Roll. Abr. 87.

Raym. 23.

2 Hal. Hist.

278. *et vide*

tit. *Evidence.*

2 Hawk P C

c. 37. § 49.

2 Hawk. P.C.

c. 37. § 50.

Russ. on Cri.

that

vol. ii. p. 596.
(2d ed.)
6 G. 4. c. 25.
7 & 8 G. 4.
c. 28.

that in all cases in which the king shall be pleased to extend his royal mercy to any offender convicted of any felony whereby the offender is excluded from benefit of clergy, and by warrant under sign manual, countersigned by one of the secretaries of state, shall grant to the offender, either a free pardon, or a pardon on condition of transportation, imprisonment, or other punishment, the discharge of such offender out of custody in case of a free pardon, and the performance of the condition in case of a conditional pardon, shall have the effect of a pardon under the great seal for such offender, as to the felony of which he has been convicted. And by the latter of these statutes (§ 13.) this enactment is enlarged to cases where the royal mercy is extended to any offender convicted of any felony punishable with death "or otherwise." These statutes, it will be observed, do not extend to misdemeanors.

Doe d. Evans
v. Evans,
5 Barn. & C.
584.

Where a copyholder was convicted of a capital felony, but pardoned upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold, it was held that at the expiration of the two years the copyholder might maintain ejectment for the land against one who had ousted him, inasmuch as the pardon restored his competency under the above act, and the estate did not vest in the lord without some act done by him.

(a) Gilb. Ev.
128.
2 Bulst. 154.
Palm. 412.
1 Sid. 52.
It was said
*pæna polest
tolli, culpa
perennis erit.*

It was formerly doubted whether pardon could do more than take away the punishment, leaving the crime and its disabling consequences unremoved. (a) But it is now settled that a pardon, whether by the king or by act of parliament, removes not only the punishment but all the legal disabilities consequent on the crime. (b)

(b) Hob. 67. 81. Hale P. C. 278. Salk. 689. Lord Raym. 39. 4 Sta. Tri. 681. Ca. temp. Holt, 685. 5 Sta. Tri. 171. 2 Salk. 690. Fitzg. 107.

1 Ld. Raym.
257.
2 Salk. 690.
Gilb. Ev. 128.
Bull. N. P.
292.
5 Esp. Ca. 94.
The autho-

rities on the effect of the king's pardon, as to the restoration of competency, are all collected and commented upon with great learning by Mr. Hargrave, in the second vol. of his *Juridical Arguments*, p. 221. See Russ. on Cri. vol. ii. p. 596. (2d ed.)

6 G. 4. c. 32.
§ 3.

And by 9 Geo. 4. c. 32. § 3. it is enacted, "That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted."

Rex v.
Badcock,

Where a man was convicted of grand larceny, sentenced to transportation for seven years, and confined in the hulks for that

that time and then discharged, it was held that his suffering seven years aboard the hulks, in execution of sentence of seven years' transportation, operated as a statute pardon, and that his having escaped twice during the confinement, for a few hours each time, did not destroy the effect of it.||

It is said that the pardon of a felony will not make an arrest for it by one who did not know of the pardon unlawful; because such arrests, being for the public good, are to be favoured, and therefore shall not be actionable by reason of such a pardon, as scandalous words shall be, because they deserve no favour.

If a man be convicted or deprived, or otherwise punished for an offence during a session of parliament, and at the same session an act pass which pardons the offence, it seems agreed, that the conviction or deprivation, &c. are *ipso facto* avoided; because the act taking effect from the first day of the session (a), it now appears, that the offence was pardoned at the time of the conviction, &c. Also it hath been adjudged that where an act of parliament expressly pardons such and such crimes from a certain day before the sessions, it thereby avoids all convictions and deprivations, and awards of costs and amerciaments, &c. for such crimes, whether such convictions, &c. were before or after the session; because it appears to be the intent of the parliament that such crimes shall no way be punished, which cannot take effect, if such convictions, &c. continue in force.

But as no pardon from the king shall divest any interest vested in the subject, so neither shall it, without words of restitution, even divest any thing from the king. Yet, a pardon prior to a conviction shall prevent all forfeitures of lands or goods.

It hath been adjudged, that the release of all judgments and executions in a general pardon extends to debts due to the king by assignment or forfeiture; and that it doth not restore them to him who assigned or forfeited them, but extinguishes them in the hands of the debtor.

It seems agreed, that notwithstanding the king's pardon to a simonist coming into church, contrary to the purport of 31 Eliz. c. 6., or to an officer coming into his office by a corrupt bargain, contrary to the purport of 5 & 6 Edw. 6. c. 16., may save such clerk or officer from any criminal prosecution in respect of the corrupt bargain; yet shall it not enable the clerk to hold the church, nor the officer to retain the office, because they are absolutely disabled by statute.

A restitution of blood, in its true nature and extent, can only be by act of parliament; and therefore if a man attainted be pardoned by act of parliament, he is totally restored and inheritable to all persons: but if he be pardoned by charter he may thenceforth purchase lands, but cannot inherit his former relations; for the king's charter cannot alter or take away the right of others, or restore the relation that was lost.

If a man be attainted, and after pardoned by charter, the children born before such pardon shall not inherit; but if they

Russ. & Ry.
C. Ca. 248.;
and see Russ.
on Cri. v. ii.
595.

Hob. 67. 82.

2 Hawk.
P. C. c. 37.
§ 53.
[(a) But now
the act takes
effect only
from the day
it receives the
royal assent,
unless another
period of
commence-
ment be
provided by
the act,
St. 55. G. 3.
c. 15.]

Lev. 8. 120.
2 Mod. 55.
Saund. 562.
3 Mod. 101.
|| See 2 Term
R. 569. ||

Sid. 167.
Saund. 562.
Lev. 120.

Owen, 87.
Hutl. 104.
Co. Lit. 120.
3 Bulst. 90,
91.
3 Inst. 154.

Co. Lit. 8.
Hal. Hist.
P. C. 358.

Noy, 170.
Co. Lit. 391.

Hal. Hist.
P. C. 358.

fail, the children born after such pardon may inherit him ; for the pardon makes him capable of new relations as well as of new purchases, though all the old legal benefits and relations are lost.

Hal. Hist.
P. C. 358.

Restitutions by parliament are of two kinds ; one a restitution only in blood, which only removes a corruption thereof, but restores not to the party attain, or his heirs, the manors or honours lost by the attainder, unless it specially extend to it ; the other is a general restitution, not only in blood, but to the lands, &c. of the party attain.

Hal. Hist. P. C.
358.

A restitution in blood may be special and qualified ; but, generally, a restitution in blood is construed liberally and extensively.

3 Inst. 233.
Hal. Hist. P. C.
358, 359.

A. hath issue *B.* a son, and is attain of treason and dies ; *B.* purchaseth lands in fee-simple ; *B.* by parliament is restored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal ancestors, provided it shall not restore *B.* to any of the lands of *A.* forfeited by the attainder ; *B.* dies without issue : it was ruled, that the lands of *B.* shall descend to the sisters of *A.*, as aunts and collateral heirs of *B.* 1st, Because the corruption of blood by the attainder is removed by the restitution. 2dly, Although the words of the act of restitution be to restore *B.* only as heir to *A.*, &c. yet this doth not only remove the corruption, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes that impediment which would have hindered the descent to them.

8 G. 3. c. 15.
Bullock v.
Dodds, 2 Barn.
& A. 258.

¶ The 8 Geo. 3. c. 15. (one of the statutes providing for the transportation of offenders) provides that "*such transportation*" shall have the effect of a pardon under the great seal. To an action on a bill of exchange the defendant pleaded in bar that the plaintiff before the date of the bill had been convicted of felony and sentenced to death, that his majesty had extended his mercy to the plaintiff on condition of his being transported for life, whereupon the court gave judgment of transportation according to the form of the statute. Replication, that before the cause of action accrued the plaintiff was in due manner transported. Rejoinder, that after the plaintiff was so transported he was unlawfully at large in *England*. Sur-rejoinder, that before the cause of action accrued the governor of *New South Wales* (being duly authorized) had remitted the remainder of the plaintiff's term of transportation, whereby the plaintiff was lawfully at large, and traversing that he was unlawfully at large. The defendant demurred to the surrejoinder, and on argument the case turned principally on the meaning of the word "*transportation*" in the clause of the statute which gives it the effect of a pardon. And the court held that the word meant, not merely the conveying the party to the place of transportation, but also the remaining there during the period mentioned in the sentence ; and therefore that the plaintiff, not having fulfilled this condition, was still in the situation of an attainted felon, and had not regained his civil rights, either by merely being transported, or by the remission of the governor, which had not the effect of a general pardon : and judgment was given for the defendant.¶

PAUPER.

Partners see Merchants

PAUPER.

- (A) Of the Right to sue *in formá Pauperis*, and the Manner of Admittance.
- (B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue *in formá Pauperis*.
- (C) In what Cases to be so admitted.
- (D) In what Cases to be dispaupered, and to pay Costs.

- (A) Of the Right to sue *in formá Pauperis*, and the Manner of Admittance.

BY the 11 Hen. 7. c. 12. it is enacted in the words following, 11 H. 7. c. 12.
 “ Prayen the Commons in this present parliament assembled,
 “ that where the king our sovereign lord, of his most gracious
 “ disposition, willeth and intendeth indifferent justice to be had
 “ and ministered according to his common laws to all his true
 “ subjects, as well to the poor as rich, which poor subjects be
 “ not of ability ne power to sue according to the laws of this
 “ land, for the redress of injuries and wrongs to them daily
 “ done, as well concerning their persons and their inheritance
 “ as other causes; for remedy whereof, in the behalf of the
 “ poor persons of this land not able to sue for their remedy after
 “ the course of the common law, be it ordained and enacted,
 “ that every poor person or persons, which have or hereafter
 “ shall have cause of action or actions against any person or
 “ persons within this realm, shall have, by the discretion of the
 “ chancellor of this realm for the time being, writ or writs ori-
 “ ginal and writs of *subpcena*, according to the nature of their
 “ causes, therefore nothing paying to your highness for the seals
 “ of the same, nor to any person for the writing of the same
 “ writs to be hereafter sued; and that the said chancellor for the
 “ time being shall assign such of the clerks, which shall do and
 “ use the making and writing of the same writs, to write the
 “ same ready to be sealed; and also learned counsel and attor-
 “ nies for the same, without any reward taking therefore; and
 “ after the said writ or writs be returned, if it be before the
 “ king in his bench, the justices there shall assign to the same
 “ poor person or persons’ counsel learned, by their discretions,
 “ which shall give their counsel, nothing taking for the same; and
 “ likewise the justices shall appoint attorney and attornies for the
 “ same poor person or persons, and all other officers requisite
 “ and

“ and necessary to be had for the speed of the said suits to be
 “ had and made, which shall do their duties without any reward
 “ for their counsels, help, and business in the same; and the
 “ same law and order shall be observed and kept of all such suits
 “ to be made afore the king’s Justice of his Common Place and
 “ Barons of his Exchequer, and all other justices in the court
 “ of record where any such suit shall be.”

Lil. Reg. 633.

[(a) The same is necessary to entitle prosecutors to prosecute *in formâ pauperis*.

3 Burr. 1508.

(b) This affidavit must be made by the party himself, not by a third person. *Wilkinson v. Belsher*, 2 Bro. Ch. R. 272.]

2 Salk. 507.
 pl. 2.

On a motion to dispauper a person who was plaintiff in an action because he had a living of 40*l.* per annum; *Turton and Gould Js.* were against it, because he swore he was in debt more than it was worth; but *Holt C. J.* differed from them; for his being indebted, or his estate being mortgaged, is no reason; it is enough that he has a considerable estate in possession.

Lil. Reg. 633.

A person admitted to sue *in formâ pauperis* can only sue in that cause for which he is admitted; so that if any other cause arises, he must sue *de novo* to be admitted, *et sic toties quoties*.

Gibson v. M'Carty, Ca. temp. Hardw. 311.

[The admission in one court is not binding on the officers of another court; and therefore if an issue out of Chancery where the plaintiff had been admitted *in formâ pauperis*, comes to be tried in K. B., he must be admitted there also.

Say, Costs, 90.
 3 Wils. 24.

Andr. 306. ||*M'Clell. & Y.* 282.]

The admission to sue *in formâ pauperis* may be either at the commencement of the suit, or afterwards *pendente lite*.

Codron v. Hayman,
 5 Term R. 509.

A person suing *in formâ pauperis* is not entitled to the issue-money.]

(B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue *in formâ Pauperis*.

IT seems that after the statutes which introduced costs, neither plaintiffs nor defendants could sue or defend *in formâ pauperis*; for that would be a means of depriving the other party of the costs given him by statute; and as the above-mentioned statute 11 H. 7. c. 12. enables persons only to sue as paupers; and as the statute 23 H. 8. c. 15., hereafter set forth, excepts only plaintiffs who are paupers from paying costs, it seems, that a defendant cannot be admitted in a civil action to defend as a pauper. But it hath been (a) adjudged, that a person may be admitted to defend an indictment *in formâ pauperis* for a misdemeanor, such as a conspiracy, keeping a disorderly house, &c.; for in such proceedings there being no costs, the judges have a discretionary power of admitting or refusing them by the common law.

(a) Pasch.
 9 G. 2. King
v. Wright,
 2 Stra. 1041.

Also

Also by the 2 Geo. 2. c. 28. § 8. it is enacted, “ That in case ^{2 G. 2. c. 28. § 8.}
 “ any person, arrested and imprisoned by virtue of any writ of
 “ *capias* or information relating to the customs, shall make affi-
 “ davit before the judge or judges of such court where such
 “ action or information shall be brought, or before any other
 “ person commissioned by such court to take affidavits, that he
 “ is not worth, over and above his wearing apparel, the sum of
 “ 5*l.* (which affidavit the said judge or judges of such court, and
 “ such person so commissioned, is and are hereby authorized
 “ and required to take,) and such person shall thereupon pe-
 “ petition such court to be admitted to defend himself against
 “ such action or information *in formâ pauperis*, that then the
 “ judges of such court shall, according to their discretions, admit
 “ such person to defend himself against such action or inform-
 “ ation in the same manner, and with the same privileges as the
 “ judges of such court are by law directed and authorized to
 “ admit poor subjects to commence actions for the recovery of
 “ their right; and for that end and purpose it shall be lawful
 “ for the judges of such courts to assign counsel learned in the
 “ law, and to appoint an attorney and clerk of such court to
 “ advise and carry on any legal defence that such person can
 “ make against such action or information; which said counsel,
 “ attorney and clerk so assigned and appointed, is and are hereby
 “ required to give his and their advice and assistance to such
 “ person, and to do their duties without fee or reward.”

[A defendant upon an attachment for a contempt will not be
 admitted to defend *in formâ pauperis*. Rex v. Pearson, 2 Burr. 1039.

A person convicted of perjury, and outlawed for forgery, was
 admitted, no cause being shewn to the contrary, to plead the
 king's pardon *in formâ pauperis*. Rex v. Morgan, Stra. 1214.

¶ If a pauper be admitted to defend a suit in chancery *in formâ
 pauperis*, his solicitor can only recover of him money actually
 paid out of pocket for defence of the suit. 1 Car. & Pa. 533.

(C) *In what Cases to be so admitted.*

IT is said that none ought to be admitted to sue *in formâ pau-
 peris* in an action on the case for words. Lil. Reg. 633. *per Wild.*

Also it is said that a person who sues *in formâ pauperis* ought
 not to have a new trial granted him; because having had once
 the benefit of the king's justice, he ought to acquiesce in it. (a)
 Mod. 268. *per North.* (a) *Sed qu.* If this is not discre-
 tionary in the court, and more especially if the plaintiff will consent to pay the costs?

And it is said that paupers ought not to be admitted to re-
 move causes out of inferior courts, but ought to satisfy themselves
 with the jurisdiction within which their actions properly lie. Mod. 268. *per North.*

¶ It seems that an action for penalties is not within the statute
 11 H. 7. c. 12. And if it appear that the plaintiff has no me-
 ritorious cause of action, the court will discharge an order au-
 thorizing him to sue *in formâ pauperis*; though a judge's order
 for that purpose must be made a rule of court before the court
 will entertain a motion to discharge it. Hawes v. Johnson, 1 Younge & J. 10.

(D) In what Cases to be dispaupered, and to pay Costs.

Ord. Cur. 94.

BY the orders of the courts, if the party admitted to sue *in formâ pauperis* give any fee or reward to his counsel or attorney, or make any contract or agreement with him, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that suit to prosecute *in formâ pauperis*.

Ord. Cur. 95.

Also if it shall be made appear to the court that any person prosecuting *in formâ pauperis* hath sold or contracted for the benefit of the suit, or any part thereof, while the same depends, such cause shall be from thenceforth totally dismissed the court.

2 Salk. 506.
pl. 1. ||6 East,
505.||

It is said that if a pauper gives notice of trial and does not proceed he shall be dispaupered.

(a) Though
lands descend
to him after
cause tried,
yet he shall
not pay costs.

In the statute 23 H. 8. c. 15. there is a provision, "That who-ever sues *in formâ pauperis* shall (a) not pay costs, but shall "suffer such other punishment as the judge of the court shall "think fit."

Mod. Rep. in Law and Eq. 344.

2 Salk. 506.
pl. 1. Style,
386. (b) But
though the

But, notwithstanding this statute, if he be dispaupered or nonsuited, the (b) usual practice is to tax the costs, and for non-payment to order him to be whipped.

usual course in such cases is to tax the costs, and if not paid to whip the plaintiff, yet upon consideration of the circumstances of the case, it is in the discretion of the court to spare both. Sid. 261. And *per Holt C. J.* on motion to whip a pauper who had been nonsuited. There is no officer for that purpose, nor did he ever know it done. 2 Salk. 506. pl. 1. [In *Solomon v. Agnel*, Fortesc. 320. it was holden, that a pauper, though dispaupered should not pay costs; and if taken in execution for costs he should be discharged on motion.]

Abr. Eq. 125.

(c) But *vide*
Preced. in
Chan. 219.
where a pau-
per having a
decree to re-
cover with
costs, it was
held on mo-
tion *per curiam*

A. brought in a bill *formâ pauperis*, to which the defendant put in a plea and demurrer, which were both overruled; and it was insisted upon that he should have no costs, being at none: but my Lord *Somers*, after long debate and enquiry of all the ancient counsel and clerks, who agreed that he should have costs, ordered him his costs (c) like other suitors: for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labour to the defendant but to the pauper.

to be unreasonable that any one should have more costs than he was out of pocket; and thereupon ordered the plaintiff and his solicitor to make oath before the Master, and what they swore they had paid, or were to pay, was to be allowed, but no farther. — Costs cannot be given against a pauper lessor of the plaintiff for not going on to trial; if vexatious, he may be dispaupered. *Nokes v. Watts*, Fort. 319. 3 Wils. 24. S. C. 1 Stra. 420. S. C. *contr.* [Unless the pauper's conduct appears to have been vexatious, the court will not stay the proceedings in a second action, until the costs are paid of a nonsuit in a prior one for the same cause. *Winter v. Slow*, 2 Stra. 878. *Brittain v. Grenville*, *id.* 1121. 5 Wils. 24., but where the costs of a former nonsuit in trespass were not paid, the court, though no circumstances of vexation were stated, stayed the proceedings, notwithstanding the plaintiff was a prisoner at the time of bringing the second action, and sued *in formâ pauperis*. *Weston v. Withers*, 2 Term R. 511.] — If a pauper is nonsuited, brings a second action, and recovers, the costs of the first shall not be deducted out of the recovery in the second. *Butler v. Inneys*, 2 Stra. 891. If pauper gives several notices, and does not go on to trial, the court will not restrain him from going on to trial till he has paid costs of former notices, but they will make an order to dispauper him *nisi*. *Taylor v. Lowe*, 2 Stra. 983. ||Doe dem. *Leppingwell v. Trussell*, 6 East, 505.|| [A person suing in equity *in formâ pauperis* shall not amend his bill by leaving out

out some of the defendants, *Wilkinson v. Belsher*, 2 Br. Ch. Rep. 272.; or dismiss it as against some of them without payment of costs, *Pearson v. Belcher*, 3 Br. Ch. Rep. 87. Nor it seems will a party be protected by an order to sue *in formâ pauperis* from the costs of proceedings previous to the order. Mosel. 103.]

||So where a cause at suit of a pauper was made a remanet at the defendant's instance by order of *nisi prius*, and on the defendant's undertaking to pay the costs of the day, an attachment was granted against the defendant for the nonpayment of costs.|| *Rice v. Brown*, 1 Bos. & Pull. 39.

PERJURY.

||See *Russell on Crimes*, b. 5. ch. 1. (2d ed.)||

PERJURY by the common law seemeth to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not. Hawk. P. C. c. 69.

Subornation of perjury by the common law is an offence in procuring a man to take a false oath amounting to perjury, who actually takes such oath. But it seems clear, that if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment. Roll. Abr. 41. 57. Yelv. 72. Cro. Jac. 158. 2 Keb. 399. 3 Mod. 122. Hawk. P. C. c. 69. § 10.

For the better understanding the nature of perjury, we shall consider,

- (A) What it is by the Common Law, and how restrained and punished.
- (B) How restrained and punished by Statute.
- [(C) How charged and assigned.]

- (A) What it is by the Common Law, and how restrained and punished.

1st, **I**T is necessary, to constitute the offence perjury, that the false oath be taken wilfully, *viz.* with some degree of deliberation, and not merely owing to surprise or inadvertency, or a mistake of a true state of the question. 5 Mod. 350.

2dly, The oath must be taken either in a judicial proceeding, or in some other public proceeding of the like nature, wherein Hawk. P. C. c. 69. § 3. and several

authorities there cited. || 1 Term R. 69. (a) In Calliaudv. Vaughan, 1 Bos. & Pull. 210. the court threw out a doubt, whether a person could be indicted for perjury, given in evidence before a commission to examine witnesses in Scotland. And it

has been doubted whether a false oath taken in Doctors' Commons, for the purpose of obtaining a marriage licence, amounts to perjury. *Vide* Russ. on Crimes, 1755. And it has lately been decided that a false oath taken before a surrogate, in order to procure a marriage licence, cannot be the subject of a prosecution for perjury; for perjury cannot be charged on an oath taken before a surrogate. And the Judges were also of opinion, that as the indictment did not charge that the defendant took the oath to procure a licence, or that a licence was promised, no punishment at all could be inflicted. *Rex v. Foster*, Russ. & Ry. Ca. 459.; and see *Rex v. Verelst*, 3 Camp. 451.; and Russ. on Cri. vol. i. p. 520. (2d ed.) It seems, however, that if the purpose of the oath is to obtain a licence, and the licence is obtained, and marriage had, the party may be indicted for a misdemeanor. See 4 G. 4. c. 76. § 23, 24, 25. as to the forfeiture of property by the guilty party obtaining a marriage with a minor by a false oath or fraud; and see tit. *Marriage* (C), Vol. V. In a case where a party was indicted for perjury, in giving evidence on a trial, and it appeared that one of the two plaintiffs in the cause died after issue joined, and the other proceeded to trial, without suggesting his death, according to the stat. 8 & 9 W. 3. c. 11. Lord *Ellenborough* said, that the action having abated, the evidence was given in an unauthorized cause, and therefore could not amount to perjury. *Rex v. Cohen*, 1 Stark. R. 511.; *et vide* *Rex v. Schoole*, Peake's Ca. 112. Though an affidavit cannot, by reason of certain omissions in the *jurat*, be received in evidence in the Court of Chancery for which it is sworn, yet, if it is false, the party may be indicted for perjury on it; for the perjury is complete at the time of swearing. *Rex v. Hailey*, Ry. & Moo. Ca. 94.||

Hawk. P. C. c. 69. § 4.

3dly, The oath ought to be taken before persons lawfully authorized to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having in truth no such authority, it is not punishable as perjury. Yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the king, is perjury, if taken before such time as the commissioners had notice of such demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void.

Hawk. P. C. c. 69. § 5. || (b) An attorney ordered to answer the matters of an affidavit, may be indicted for perjury committed in his affidavit in answer; and this, although the affidavit be never used. *Rex v. Crossley*, 7 Term R. 315.||

4thly, The oath ought to be taken by a person sworn to depose the truth; and therefore a false verdict comes not under the notion of a perjury, because the jurors swear not to depose the truth, but only to judge truly of the depositions of others. But a man may be as well perjured by an oath in his own cause, as in an answer in Chancery, or in an answer to interrogatories concerning a contempt, or in an affidavit (b), &c. as by an oath taken by him as witness in another cause.

5thly, It is not material, whether the thing sworn be in itself true or false, where the person who swears it in truth knows nothing of it.

Hawk. P. C. c. 59. § 6.;
||and see *per*
Lawrence J.
6TermR.619.||

6thly, The oath must be taken absolutely and directly; and therefore if a man only swears as he thinks, remembers, or believes, he cannot be guilty of perjury. (a)

Hawk. P. C. c. 59. § 7.
||(a) But in
Miller's case,

3 Wils. 427. 2 Black. R. 881. Lord C. J. *De Grey* said, that it was a mistake that a person could not be convicted of perjury, who swore that he *thought* or *believed* a fact to be true; for that he certainly might. And in the case of the King v. *Pedley*, 1 Leach C. Ca. 567. Lord *Mansfield* confirmed this opinion; and the question appears to have been so decided in the C. P. in Mich. Term, 1780, when Lord *Loughborough* and all the other judges were unanimous that *belief* was to be considered as an absolute term, and that an indictment might be supported on it. 2 Hawk. P. C. 88. note (a) (edit. 1795.)||

||An indictment for perjury cannot be sustained upon an assertion, the correctness of which depends on the construction of a deed.||

Rex v. *Crespigny*, 1 Esp. Ca. 281.

7thly, The thing sworn ought to be some way material; for if it be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give the readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is wholly idle and insignificant; as where a witness introduces his evidence with an impertinent preamble of a story concerning previous facts, no way relating to what is material, and is guilty of a falsity as to such facts. But it seems a reasonable opinion (b), that a witness may be guilty of perjury in respect to a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence; as if in trespass for spoiling the plaintiff's close with the defendant's sheep, a witness swears that he saw such a number of the defendant's sheep in the close; and being asked how he knew them to be the defendant's, swears that he knew them by such a mark, which he knew to be the defendant's, where in truth the defendant never used any such mark.

Hawk. P. C. c. 59. § 8.
||(b) It is not necessary that it appear to what degree the point in which the man is perjured was material to the issue; for if it is but circumstantially material, it will be sufficient. 1 Ld. Raym. 258.
Still less is it necessary that the evidence be material for the plaintiff to recover upon; for an

evidence may be very material, and yet it may not be full enough to prove directly the point in question. 2 Ld. Raym. 889.; ||*et vide* Rex v. *Pepys*, Peake's Ca. 138. Where a bill was filed against the defendant for specific performance of a *parol* agreement to purchase land, and the defendant in his answer relied on the statute of frauds, but also *denied* having entered into the agreement, it was held by Abbot C.J. that this denial was wholly *immaterial*, and that an indictment for perjury could not be maintained upon it. Rex v. *Dunston, Ry. & Moo.* Ca. 109.; *sed vide* *Bartlett v. Pickersgill*, 4 East, 577. notā.||

8thly, It does not seem material, whether the false oath were credited or not, or whether the party in whose prejudice it was taken were in the event any ways damaged by it; for the prosecution is not grounded on the damage to the party, but on the abuse of public justice. (c)

Hawk. P. C. c. 59. § 6.
||(c) But a party injured by the perjury of a wit-

ness may proceed against him by action on the case for damages. *Per* Lord *Ellenborough*, 1 Camp. 16.||

|| Although

Omealy v.
Newell,
8 East, 364.

|| Although a person making a false affidavit of debt abroad, cannot be indicted for perjury here, yet a person knowingly making use of such affidavit is guilty of a misdemeanor in attempting to pervert public justice.||

(B) How restrained and punished by Statute.

||(a) Made per-
petual by
29 Eliz. c. 5.
§ 2. and
21 Jac. 1.
c. 28. § 8.||

[The judg-
ment for the
pillory need
not specify
the time when
it is to be
executed.
Rex v. Atkin-
son, Dom.
Proc. July 1.
1785.]

BY the 5 Eliz. c. 9. (a) it is enacted, " That whoever shall unlawfully and corruptly procure any witness or witnesses " by letters, rewards, promises, or by any other sinister and un- " lawful labour or means whatsoever, to commit any wilful and " corrupt perjury in any matter or cause whatsoever depending " in suit or variance by any writ, action, bill, complaint, or in- " formation in anywise concerning any lands, tenements, here- " ditaments, or goods, chattels, debts, or damages in any of " the queen's courts of Chancery, *Whitehall*, or elsewhere, " within any of the queen's dominions of *England* and *Wales*, or " the marches of the same, where any person or persons shall " have authority by virtue of the queen's commission, patent, or " writ, to hold plea of land, or to examine, hear, or determine " any title of lands, or any matter or witnesses concerning the " title, right, or interest of any lands or tenements, or heredit- " aments, or in any of the king's courts of record, or in any leet, " view of frank-pledge, or law, ancient demesne court, hundred " court, court baron, or in the court or courts of the stannary in " the counties of *Devon* or *Cornwall*; or shall unlawfully and " corruptly procure or suborn any witness or witnesses, who " shall be sworn to testify *in perpetuam rei memoriam*, shall for " for such offence, being thereof lawfully convicted or attainted, " forfeit the sum of 40*l*. And if any such offender, so being " convicted or attainted, shall not have any goods or chattels, " lands or tenements, to the value of 40*l*., that then every such " person shall suffer imprisonment by the space of one half " year, without bail or mainprise, and stand upon the pillory " the space of one whole hour, in some market town next ad- " joining to the place where the offence was committed, in open " market there, or in the market town itself where the offence " was committed."

§ 5.

And § 5. it is further enacted, " That no person, being so " convicted or attainted, shall from thenceforth be received as a " witness in any court of record in any of the king's dominions " of *England*, *Wales*, or the marches of the same, till such judg- " ment against him shall be reversed by attain, or otherwise, and " that upon every such reversal the party grieved shall recover " damages against the party who did procure the said judgment " so reversed to be first given."

§ 6.

And § 6. it is farther enacted, " That if any person or persons " shall either by the subornation, unlawful procurement, sinister " persuasion, or means of any other, or by their own act, consent, " or agreement, wilfully and corruptly commit any manner of wil- " ful perjury by his or their deposition in any of the courts before " mentioned,

“ mentioned, or being examined *in perpetuum rei memoriam*, that
 “ then every such offender being duly convicted or attainted shall
 “ forfeit 20*l.* and have imprisonment by the space of six months,
 “ without bail or mainprise, and the oath of such offender shall
 “ not from thenceforth be received in any court of record in
 “ *England or Wales*, until such judgment shall be reversed, &c.
 “ on which reversal the party grieved shall recover damages in
 “ the manner before mentioned.”

And § 7. it is farther enacted, “ That if such offender shall
 “ not have goods or chattels to the value of 20*l.* that then such
 “ person shall be set on the pillory in some market-place within
 “ the shire, city, or borough where the offence shall be committed,
 “ by the sheriff or his ministers, if it shall fortune to be without
 “ any city or town corporate; and if it happen to be within any
 “ such city or town corporate, then by the head officer of such
 “ city &c. where he shall have both ears nailed.”

§ 7.

And § 8 & 9. it is farther enacted, “ That one moiety of the
 “ said forfeitures shall be to the king, and the other moiety to
 “ such person as shall be grieved, hindered, or molested by reason
 “ of any of the offences before mentioned, that will sue for the
 “ same, &c. and that as well the judge and judges of every such
 “ of the said courts where any such suit shall be, and whereupon
 “ any such perjury shall be committed, as also the justices of
 “ assize and gaol-delivery, and justices of peace at their quarter
 “ session both within the liberties and without, may enquire of,
 “ hear, and determine all offences against the said act.”

§ 8 & 9.

But it is provided § 11. “ That the said act shall no way ex-
 “ tend to any spiritual or ecclesiastical court, but that every such
 “ offender as shall offend in term as aforesaid, shall be punished
 “ by such usual and ordinary laws as are used in the said
 “ courts.”

§ 11.

Provided also § 13. “ That the said statute shall not restrain
 “ the authority of any judge having (a) absolute power to punish
 “ perjury before the making thereof, but that every such judge
 “ may proceed in the punishment of all offences punishable before
 “ the making of the said statute, in such wise as they might have
 “ done and used to do to all purposes, so that they set not on the
 “ offender less punishment than is contained in the said act.”

§ 13. (a) And there the Court of King's Bench, &c. proceeding upon an indictment or information of perjury, or subornation of

perjury at common law, may not only set a discretionary fine on the offender, but also condemn him to the pillory, without making any enquiry concerning the value of his lands or goods. Hawk. P. C. c. 69. § 16.

In the construction of this statute the following opinions have been holden :

That every indictment or action on this statute must exactly pursue the words of it; and therefore if it allege that the defendant deposed such a matter *falso et deceptivè*, or *falso et corruptè*, or *falso et voluntariè*, without saying *voluntariè et corruptè*, it is not good, though it conclude, that *sic voluntarium et corruptum commisit perjurium contra formam statuti*, &c. Also, it is (b) said to be necessary expressly to shew that the defendant was sworn ;

Cro. Eliz. 147.
 Hetl. 12.
 Savil, 43.
 2 Leon. 211.
 3 Leon. 230.
 Show. 190.
 Holt, 534. pl. 1.
 Skin. 403.
 pl. 59. (b) Cro.
 Eliz. 105.

and

and that it is not sufficient to say, that *tacto per se sacro Evangelio deposuit*.

5 Bulst. 147.

But there is no need to shew whether the party took the false oath through the subornation of another, or of his own act, though the words of the statute are, *If persons by subornation, &c. or their own act, &c. shall commit wilful perjury*, for there being no medium between the branches of this distinction, they seem to be put in *ex abundanti*, and to express no more than the law would have implied, and therefore operate nothing.

5 Co. 99. Cro.

Jac. 120.

3 Inst. 164.

2 Leon. 201.

Yelv. 120.

Cro. Eliz. 148.

2 Roll. Abr. 77.

(a) See observ.

on st. 71.

It hath been adjudged, that a man cannot be guilty of perjury within this statute in any case wherein he may not possibly be guilty of subornation of perjury within it; for it is reasonable to give the whole statute the same construction; neither can it be well intended that the makers of the statute meant to extend its purview (a) farther as to perjury, which they seem to esteem the less crime, than to subornation of perjury, which they seem to esteem the greater; and therefore since the clause concerning the subornation of perjury, mentioning only matters depending by writ, bill, plaint, or information, concerning hereditaments, goods, debts, or damages, &c., extends not to perjury or an indictment or criminal information; the clause concerning perjury, though penned in more general words, has been adjudged to come under the like restriction. Also, since the clause concerning subornation of perjury relates only to perjury by witnesses, that concerning perjury shall extend only to the like perjury; and therefore not to perjury in an answer in Chancery, or in swearing the peace against a man, or in a presentment by a homager in a court-baron, or in a wager of law, or in swearing before commissioners of enquiry of the king's title to lands; and, by the opinions of some, a false affidavit against a man in a court of justice is not within the statute. But if such affidavit be by a third person, and relate to a cause depending in suit before the court, and either of the parties in variance be grieved, hindered, or molested, in respect of such cause, by reason of the perjury, it may strongly be argued that it is within the purview of the statute. Also, it seems the better opinion, that a false oath before the sheriff on a writ of enquiry of damages is within the statute.

Hawk. P. C.
c. 69. § 22.
and several
authorities
there cited.

It hath been collected from the clause which gives an action to the party grieved, that no false oath is within the statute, which doth not give some person a just cause of complaint; and therefore, that if the thing sworn be true, though it be not known by him that swears it to be so, the oath is not within the statute, because it gives no just cause of complaint to the other party, who would take advantage of another's want of evidence to prove the truth. Also, upon the same ground, no false oath can be within the statute, unless the party against whom it was sworn suffered some disadvantage by it; and therefore, in every prosecution on the statute, you must set forth the record wherein you suppose the perjury to have been committed, and must prove at the trial that there is such a record, either by actually producing it, or

an

an attested copy; and in the pleadings you must not only set forth the point wherein the false oath was taken, but must also shew how it conduced to the proof or disproof of the matter in question; and if an action on the statute be brought by more than one, you must shew how the perjury was prejudicial to each of the plaintiffs. But it seems that a perjury which tends only to aggravate or extenuate the damages is as much within the statute as a perjury that goes directly to the point in issue; and a perjury in a cause wherein an erroneous judgment is given is a good ground of a prosecution upon the statute till the judgment be reversed.

If perjury be committed that is within this statute, but concludes not *contra formam statuti*, yet it is a good indictment at common law, but not to bring the offender within the corporal punishment of the statute.

By the 2 Geo. 2. c. 25. § 2. the more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury, it is enacted "That, besides the punishment (a) already "to be inflicted by law for so great crimes, it shall and may be "lawful for the court or judge before whom any person shall be "convicted of wilful and corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person "to be sent to some house of correction within the same county, "for a time not exceeding seven years, there to be kept to hard "labour during all the said time, or otherwise to be transported "to some of his majesty's plantations beyond the seas, for a "term not exceeding seven years, as the court shall think most "proper; and therefore judgment shall be given, that the person "convicted shall be committed or transported accordingly, over "and beside such punishment as shall be adjudged to be inflicted "on such person agreeable to the laws now in being; and if "transportation be directed, the same shall be executed in such "manner as is or shall be provided by law for the transportation "of felons; and if any person so committed or transported shall "voluntarily escape or break prison, or return from transportation before the expiration of the time for which he shall be "transported as aforesaid, such person being lawfully convicted "shall suffer death as a felon without benefit of clergy, and shall "be tried for such felony in the county where he so escaped, or "where he shall be apprehended."

[By 12 Geo. 1. c. 29. § 4. "If any person who shall be convicted of wilful and corrupt perjury, or subornation of perjury, "shall act or practise as an attorney or solicitor, or agent in "any suit or action, in any court of law or equity in *England*, "the judge or judges of the court where such suit or action "shall be brought, shall, upon complaint or information thereof, "examine the matter in a summary way in open court, and if it "shall appear to the satisfaction of such judge or judges, that "the party hath offended contrary to this act, such judge or "judges shall cause such offender to be transported for seven "years."

2 Hal. Hist.
P.C. 191, 192.

2 G. 2. c. 25.
§ 2.

|| (a) The st. 18.
G. 2. c. 18.
subjects persons guilty of perjury in falsely taking the freeholders' oath at elections to the pains and penalties imposed by the 5 Eliz. c. 9., and by the 2 G. 2. c. 25.; and it has been decided that this provision makes the punishment cumulative, and that the party is to be sentenced under both the acts. Rex v. Price, 6 East, 323. ||

12 G. 1. c. 29.
§ 4.

8 G. 1. c. 6.
 || *Vide* 22 G. 2.
 c. 46.||

By 8 Geo. 1. c. 6. ||an Act for giving the effect of an oath to the affirmation of Quakers,|| “ If any person making such affirmation or declaration as is appointed by this act shall be lawfully convicted of wilful, false, and corrupt affirming and declaring any matter or thing, which, if sworn in the common or usual form, would have amounted to wilful and corrupt perjury; every person so offending shall incur such and the same pains, penalties and forfeitures as are inflicted or enacted by the laws against persons convicted of wilful and corrupt perjury.”

31 G. 2. c. 10.
 § 24.

By 31 Geo. 2. c. 10. § 24. “ Whoever shall willingly and knowingly take a false oath, or procure any person to take a false oath, to obtain the probate of any will or wills, or to obtain letters of administration in order to obtain the payment of any wages, pay, or other allowances of money or prize-money, due, or that were supposed to be due to any officer, seaman, or other person entitled, or supposed to be entitled to any wages, pay, or other allowances of money or prize-money, for service due on board of any ship or vessel of his majesty, &c. or the executor, administrator, wife, relation, or creditor of any such officer or seaman, or other person who has really served, or was supposed to have served on board any ship or vessel of his majesty, &c. shall be deemed guilty of felony; and suffer death without benefit of clergy.”

28 G. 2. c. 13.
 § 14.

And by 28 Geo. 2. c. 13. § 14. for the relief of insolvent debtors, “ If any sheriff or other officer perjure himself in taking the oaths directed by the act, he shall forfeit 500*l*. And if the offence be committed by a prisoner or other person enabled and intending to take the benefit of the act, it is felony without benefit of clergy.”

23 G. 2. c. 11.
 § 5.

The better to prevent great offenders from escaping punishment by reason of the expense attending prosecutions, it is enacted by 23 Geo. 2. c. 11. § 3. “ That it shall be lawful for any of his majesty’s justices of assize, or *nisi prius*, or general goal-delivery, or any of the great sessions of *Wales*, or of the counties palatine, and they are hereby authorized (sitting the court, or within twenty-four hours after) to direct any person, examined as a witness upon any trial before him or them, to be prosecuted for the said offence of perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and that it shall appear to him or them proper so to do; and to assign the party injured, or other person undertaking such prosecution, counsel, who shall and are hereby required to do their duty without any fee, gratuity, or reward for the same.” Such prosecution is also exempt from tax or duty and fees of court, and the clerk of the assize is ordered to give the prosecutor a certificate of the same, being directed, with the names of the counsel assigned; which certificate is to be deemed sufficient proof of such prosecution having been directed, but no such direction or certificate is to be given in evidence upon the trial of the person against whom the prosecution is directed.]

||A variety of statutes impose the penalties of perjury on persons

sons falsely swearing in affidavits, depositions, evidence, &c. in numerous cases where such false swearing might not amount to the crime of perjury at common law. Some of the principal of these statutes are the 48 Geo. 3. c. 142. § 26. 52 Geo. 3. c. 129. § 7. enabling the commissioners of the national debt to grant life annuities. 51 Geo. 3. c. 15. respecting an issue of exchequer bills to commissioners. 6 Geo. 4. c. 106. § 31. as to the management of the customs. The 46 Geo. 3. c. 112. § 3. contains a general provision applicable to all oaths relating to the duties of excise. The statute 49 Geo. 3. c. 46. § 2. relating to oaths before officers of customs in *America* and the *West Indies*. 43 Geo. 3. c. 56. for regulating foreign passage vessels. 55 Geo. 3. c. 184. § 53. contains a general provision as to oaths relating to the stamp duties. 39 & 40 Geo. 3. c. 89. for preventing embezzlement of naval stores. 55 Geo. 3. c. 157. § 8. as to oaths before commissioners appointed by the *Irish* courts for taking affidavits. 55 Geo. 3. c. 60. relating to execution of letters of attorney, and wills of seamen, &c. 57 Geo. 3. c. 127. § 4. as to obtaining probates in order to receive prize-money,—the annual Mutiny Acts. The 22 Geo. 2. c. 33. § 17. as to naval courts martial. The 45 Geo. 3. c. 10. § 37. and 46 Geo. 3. c. 98. § 10. as to quarantine. The 48 Geo. 3. c. 104. pilot act. The 46 Geo. 3. c. 52. § 16. the slave-trade act. 50 Geo. 3. c. 65. § 11. relating to the woods and land revenues of the crown. The general inclosure act, 41 Geo. 3. c. 109. The *Yorkshire* registry acts, 2 & 3 Ann. c. 4. § 19. 5 & 6 Ann. c. 18. 8 Geo. 2. c. 6. § 33. and the *Middlesex* registry act, 7 Ann. c. 20. § 15. The election bribery acts, 2 Geo. 2. c. 24. § 5. and 18 Geo. 2. c. 18. § 1. The 10 Geo. 3. c. 16. as to trial of controverted elections before committees of the House of Commons. The 6 Geo. 4. c. 16. § 99. as to oaths of bankrupts or creditors before commissioners of bankrupt. The insolvent debtors' act, 7 Geo. 4. c. 57. § 71. The 1 & 2 Geo. 4. as to oaths relating to *East India* prize money. 6 Geo. 4. c. 78. § 29. as to oaths touching quarantine. 4 Geo. 4. c. 41. § 47. as to oaths relating to registering vessels. The 5 Geo. 4. c. 113. § 41. as to oaths under the slave-trade act; and various other statutes of limited and local operation.||

Vide Russell on Crimes, vol. ii. 533. (2d ed.)

[(C) How charged and assigned.

BY 23 G. 2. c. 11. "In every information or indictment for wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom the oath was taken, (aver-
ring (a) such court, or person or persons, to have a competent authority to administer the same,) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration or any part of any record or proceeding, either in law or equity, other than as aforesaid; and without setting forth the (b) com-
mission

23 G. 2. c. 11.
(a) Before the passing of this act, this averment seems not to have been made. Dougl. 156.
(b) *Rex v. Dowlin*, 5 Term R. 317. If, however, the prosecutor un-

dertakes to set out in the indictment more of the proceedings than he need under this act, he must set them forth correctly. *Ibid.*

“mission or authority of the court, or person or persons before whom the perjury was assigned.”

§ 2.
|| *Vide*, as to the form of the indictment, the evidence, trial, and punishment, Russ. on Cri. v. ii. 553.; *et seq.* (2d ed.)||

And by § 2. “In every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit wilful and corrupt perjury, it shall be sufficient to set forth the substance of the offence charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed, or was agreed or promised to be committed.”

Rex v. Atkinson, Dom. Proc. July 1. 1785.

The fact in the affidavit in which the defendant was charged to have perjured himself was, that he never did, at any time during his transactions with the commissioners of the victualling-office, charge more than the usual sum of sixpence *per* quarter, beyond the price he actually paid for any malt or grain purchased by him for the said commissioners as their corn-factor: the assignment in the indictment to falsify this alleged that the defendant did charge more than sixpence *per* quarter *for and in respect of* such malt and grain so purchased. It was objected, that the words *in respect of* may include lighterage, freight, and many collateral and incidental expenses attending the corn and grain jointly with the charge for the corn or grain, and bearing that sense, the defendant was not guilty of perjury. This objection however was over-ruled.

Rex v. Aylett, 1 Term R. 70. Dom. Proc. July 6. 1786.

A complaint having been made *ore tenus* by a solicitor, before the Chancellor, in the Court of Chancery, of an arrest in returning home after the hearing of a cause, the indictment stating that “*at and upon the hearing of the said complaint,*” the defendant deposed, &c. it was holden a sufficient averment that the complaint was heard.

Ibid.

It is sufficient if the assignments of perjury falsify the meaning attributed by the verdict to the matter sworn.

Rex v. Dowlin, 5 Term R. 318.

Where it was stated, that *at such a court J. K. was in due form of law tried upon a certain indictment then and there depending against him for murder, and that at and upon the said trial it then and there became and was made a material question* — Whether, &c. it was adjudged, that these were sufficient averments, that the perjury was committed on the trial of *J. K.* for the murder, and that the question on which the perjury was assigned was material on that trial. For it is not necessary to set forth so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; it is sufficient to allege generally, that that question became a material question.

Rex v. Morris, 2 Burr. 1189.

In perjury in an answer in Chancery, it is not necessary to prove the identity of the person who swore the oath; it is enough if the hand writing be proved, and that the jurat was subscribed by the Master as being sworn before him.

|| Where

¶ Where the perjury was assigned in an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of court, it was held no variance, the amended bill being part of the original bill.

Rex v. Waller,
5 Stark.
Evid. 1138.

An indictment, stating a bill of *Middlesex* as issuing out of the office of the chief clerk assigned to enroll pleas in the court of our lord the king before the king himself is bad; for it does not issue out of such office.

Rex v. Schoole
Peake's Ca.
111. It was
not necessary
to state out of
what office the bill of *Middlesex* was to issue.

So where the indictment alleged that the cause came on to be tried before *Lloyd Lord Kenyon, &c. William Jones* being associated, &c., and from the judgment roll it appeared that *R. Kenyon* was associated, &c. the variance was held fatal.

Rex v. Eden,
1 Esp. Ca. 97.

If the oath is stated to have been at the assizes holden before justices assigned to take the said assize, before *A. B.*, one of the said justices, the said justice then and there having power, &c. it will be a fatal variance if the oath was administered when the judge was sitting under the commission of oyer and terminer and gaol delivery.

Rex v. Lincoln, Russ. &
Ry. Ca. 421.

If there is a clerical error, or omission in the instrument set out, the indictment must not supply it as if it were inserted. Thus, where the indictment stated that the defendant went before a justice of the peace, and swore in substance to the effect following, &c., and part of the deposition so set forth was that a person therein named assaulted the deponent with an umbrella, and *at the same time* threatened to shoot, &c., but the deposition when produced ran "*and at the same threatened to shoot, &c.*" the variance was held fatal. The deposition should have been set out *verbatim*, and the meaning explained by an *innuendo*.

Rex v. Taylor,
1 Camp. 104.

If it is alleged that the defendant swore in substance and effect as follows, &c. it must be shown that the defendant swore, in substance and effect, the whole of what is set out.

Rex v. Leefe,
2 Camp. 134.;
and see Russ.
on Cri. vol. 2.
p. 538.

An indictment may be supported on an answer in a court of equity, though the answer is not correctly entitled, and the name of one of the parties be mistaken. Thus, where an indictment alleged that *Francis Cavendish Aberdeen* and others exhibited their bill in the exchequer, and on the production of the bill the complainants purported to be *J. C. Aberdeen* and others, it was holden not a variance, and that it was competent for the prosecutor to prove by other means than the bill itself, the allegation that *Francis Cavendish Aberdeen* did in fact exhibit the bill.

Rex v. Roper,
1 Stark. Ca.
518.; and see
further Russell
on Cri. vol. 2.
p. 539. (2d ed.)

The indictment must contain an allegation of time, which is sometimes material and requires to be laid with precision, and sometimes not. Where it is not material it need not be positively averred, and if under a *videlicet* it may be rejected.

Rex v. Aylett,
1 Term R. 69,
70, 71.

In a case where an indictment for perjury charged to have been committed in the defendant's answer to a bill of discovery in the exchequer, alleged that it was filed on a day specified, it was holden that the day was not material, as it was not alleged

Rex v. Hucks,
1 Stark. Ca.
521.; and see
Rastally.
Stratton,
1 H. Black. 49.
as Woodford v.

Ashley,
2 Camp. 193.
1 Stark.Crim.
Plead. 243.

as *part of the record*; and therefore it was held no variance, though the bill when produced appeared to be entitled generally of a preceding term.

Rex v. Hucks,
1 Stark. Ca.
521.

But in the same case, where an indictment of perjury alleged that the defendant, at the time of effecting a policy of assurance *purporting to have been underwritten by A., B., and C., and others, on a day specified*, well knew, &c., and it appeared on producing the policy that *A.* underwrote it on a different day, the defect was holden fatal, though it appeared that *B., C., &c.* did underwrite it on that day.||

2 Hawk. P. C.
c. 25. § 146.
(a) Id. c. 27.
§ 28. ||In a late
case *Abbott*
Lord C. J. said
that inas-
much as an
objection
taken to an

In general the court will oblige the defendant to plead or demur to even a defective indictment; and they are very cautious in granting a *certiorari* to remove it (a). And Lord *Thurlow* refused permission to amend the answer in Chancery, where an indictment for perjury had only been threatened, though the party, having no interest, could not be supposed to make the false oath intentionally. For it is the province of the grand jury to judge of the intention. (b)]

indictment for perjury appeared on the record, he did not feel warranted in taking notice of it at *N. P. Rex v. Souter*, 2 Stark. R. 423.|| (b) *Earl Verney v. Macnamara*, 1 Bro. Ch. Rep. 419.

Rex v. Emden,
9 East. 437.

||A party was indicted for perjury in an affidavit of debt, and the indictment, after setting out the substance of the affidavit, concluded with a *prout patet* by the affidavit filed in the Court of *B. R.* at *Westminster*; on this indictment he was acquitted; after which he was indicted again for the same perjury, with this difference only, that the second indictment set out the jurat of the affidavit, stating it to have been sworn at *No. 15. Furnival's Inn, London, &c.* and the indictment then averred, that in fact the defendant made the said affidavit in *Middlesex*, and not in *London*. Held, that the defendant was entitled to plead *auterfois acquit*; for the jurat was not a necessary part of the affidavit to be stated in the indictment, and therefore the difference between the two indictments was not material, and the same evidence as to the *real* place of swearing might have been given under the last indictment as under the first; and therefore the defendant had once before been put in jeopardy for the same offence.

Rex v. Price,
6 East. 323.

On an indictment for perjury on the stat. 18 Geo. 2. c. 18. in falsely taking the freeholder's oath at an election of a knight of the shire, in the name of *John Wright*, it appeared by competent evidence that the oath was administered to a person who polled on the second day by the name of *John Wright*, and swore to his freehold and place of abode, and that there was no such person, and that the defendant voted on the second day and was no freeholder, and sometime afterwards boasted that he had *done the trick, &c.*, and was afraid he should be pulled for his *bad vote*; and it not appearing that more than one false vote was given on the second day's poll, or that the defendant voted in his own name, or in any other name than that of *J. W.*: held, that there was sufficient evidence for the jury to presume that the defendant voted in the name of *J. W.*, and consequently to find him guilty of the charge as alleged in the indictment.||

PIRACY.

PIRACY is incurred by depredations on or near the sea, without authority from any prince or state. For if these violations of property be perpetrated by any national authority, they are not acts of piracy. Thus, when a *Bristol* merchant ship, in the reign of *Charles* the Second, was taken by the *Algerines*, and afterwards driven on the coast of *Ireland* with some *Turks* and renegadoes on board, Sir *Leoline Jenkins*, then Judge of the Admiralty, certified to the king in the following words (a): "As for the *Moors* and *Turks*, that are so by birth, and were found on board this ship, it is my humble opinion, that since the government of *Algiers* is owned as well by several treaties of peace and declarations of war, as by the establishment of trade, and even of consuls and residents amongst them, by so many princes and states, and particularly by your majesty, they cannot, as I humbly conceive, be proceeded against as pirates or sea-rovers, acting without a commission, but are to have the privileges of enemies in an open war, and must be received to their ransom by exchange or otherwise, the ordering of which doth in this case belong to the Lord High Admiral."

King *Alfred*, tells us, *Rex Ælfredus jussit cymbas et galeas i. e. longas naves fabricari per regnum, impositisque piratis in illis vias maris custodiendas commisit.* (a) 2 Sir L. Jenk. 791.

So when one *Cheline* attacked a *Dutch* ship near the port of *Dublin*, and carried her away, having two *British* subjects on board, though it was a crime against our sovereign as a neutral power, under whose protection the ship lay, yet it was holden not to be punishable as piracy; for the captor had a commission of war in due form against the enemies of the *French* king.

It is established by many authorities that goods taken by pirates remain the property of the original owners, although sold here, unless the sale be in market overt.

Indeed the contrary is asserted (2 Burr. 694, 695.); but the reason assigned, (viz. that there can be no condemnation to entitle the pirate,) shews he acquired no property, and therefore could transmit none. See 2 Wooddes. 431.

Such goods therefore the king cannot grant; for by an express press statute (b), the merchant robbed on the seas shall be received to prove that the goods or chattels belong to him by his chart or cocket, or by other lawful proof of merchants, &c., and then the said goods shall be delivered without any suit at the common law; which act is general, be the party robbed privy or a stranger.

But it was holden (c) by all the judges in the reign of *Richard* the Third, that any foreigner, who sues on this statute, must

2 Wooddes. 422. The word "pirate" was formerly used in a better sense, than that in which it is now received. It signified the person to whose care the mole, or pier of a haven, which in Latin was called *pera*, was intrusted. It was used too sometimes, according to Spelman, for a sea-captain, or soldier. Asser, in the life of

2 Sir L. Jenk. 754.

Jenk. 165.
Godb. 193.
3 Bulstr. 29.
Cro. Eliz. 685.

(viz. that there
(b) 27 E. 3.
stat. 2. c. 13.

(c) 4 Inst. 154.
3 Bulstr. 28.

prove his own sovereign and the sovereign of the captor to have been in mutual amity, and also his own sovereign to have been in amity with our king, at the time of the capture. For in our municipal law books it is generally and indiscriminately asserted, that piracy cannot be committed by the subjects of states at enmity.

5 Bulstr. 148.

The goods of pirates, not taken from others, belong, after attainder, to the crown or its grantee; and those of which others have been despoiled will be forfeited in the same manner, if the owners come not within a reasonable time to vindicate their property. And until they do so, the king may seize them, and if they be *bona peritura*, he may sell them, and upon proof, restore the value. But by stat. 22 & 23 Car. 2. c. 11. § 11. if the company belong to any *English* merchant ship take any ship, which first assaulted them, the officers and mariners shall receive such share of the condemned ship and goods as is usually practised in private men of war.

12 Co. 73.

2 Sir L.
Jenk. 714.

About the time of the treaty of *Nimeguen*, the captain of a *French* merchant ship, having put into a port in *Ireland*, was accused by his crew of robberies on the seas, and fled. His ship and goods were confiscated, as having belonged to pirates. The *French* ambassador presented memorials, requiring the cause to be remanded to the natural judge, as was pretended, in *France*. But the king and his council finally adjudged, that he was sufficiently founded in point of jurisdiction to confiscate the ship and goods, and to try capitally the person himself, had he been in hold, the matter of *renvoy* being a thing quite disused among princes; and as every man by the usage of our *European* nations is *justiciable* in the place where the crime is committed, so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they are taken.]

Staunf.
P. C. 10.
3 Inst. 112.
2 Hal. Hist.
P. C. 369,
370.
Hawk. P. C.
c. 37 § 2.

Piracies and depredations at sea are capital offences, by the civil law. Piracy is said to have been punishable at common law, before the 25 E. 3. stat. 5. c. 2. as petit treason, if committed by a subject, and as felony, if committed by a foreigner. But, it seems agreed, that after that statute, by which all treason is confined to the particulars therein set down, it was cognizable only by the civil law.

[(a) By the 39 G. 3. c. 37. this provision is extended to all offences committed on the high seas, and by the 2d sect. persons tried for murder on the seas and found guilty of manslaughter only, are to have benefit of

But this proving very inconvenient, because by that law no offender shall have judgment of death without his own confession, or direct proof by eye witnesses, it was enacted by (a) 28 H. 8. c. 15. "That all *treasons*, *felonies*, and *robberies*, *murders* "and *confederacies* upon the sea, or in any haven, river, creek, "or place where the admiral or admirals have or *pretend* (b) to "have power, authority, or jurisdiction, shall be enquired, tried, "heard, determined, and judged in such shires and places in the "realm as shall be limited by the king's commission or commis- "sions to be directed for the same, in like form and condition as "if any such offence or offences had been committed or done in "or upon the land; and such commissions shall be had under "the king's great seal, directed to the admiral or admirals, or to "his

“his or their lieutenant deputy and deputies, and to three or four
 “such other substantial persons as shall be named or appointed
 “by the Lord Chancellor of *England* for the time being, from
 “time to time and as oft as need shall require, to hear and deter-
 “mine such offences after the common course of the laws of this
 “land used for felonies, and robberies, &c. done and committed
 “upon the land within this realm.

clergy, and be
 subject to the
 same punish-
 ment as if they
 were guilty of
 manslaughter
 on land. See
Rex. v. Bailey,
 Russ. & Ry. 1.

This statute applies to felonies created by subsequent statutes, which it seems the 27 Hen. 8. c. 4. did not. *East*, P. C. 807. A party was held not triable under both or either of these statutes for maliciously shooting within 43 G. 3. c. 58. But this decision proceeded on the particular terms of the 43 G. 3. which confined its operation to *England* and *Ireland*, *Rex v. Amarro*, Russ. & Ry. 286.; and this is now remedied by 1 G. 4. c. 90. § 2. See Russ. on Cri. vol. 1. p. 109. and 596. (b) These words are not to be extended to a pretence without any shadow of right. 2 Hale P. C. 17.||

And it is farther enacted by the said statute, “That if any
 “person or persons happen to be indicted for any such offence
 “done or hereafter to be done upon the seas, or in any other
 “place above limited, that then such order, process, judgment,
 “and execution shall be used, had, done, and made to and
 “against every such person and persons, so being indicted, as
 “against felons, &c. for any felony, &c. upon the land, by the
 “laws of the land is accustomed.”

And it is farther enacted by the said statute, “That such as
 “shall be convict of any such offence by verdict, confession, or
 “process by authority of any such commission, shall have and
 “suffer such pains of death, losses of lands, goods, and chattels,
 “as if they had been attainted and convicted of such offence done
 “upon the land, and also that they shall be excluded from the
 “benefit of the clergy.”

||The 4th section provides that the act shall not extend to any
 persons (compelled by necessity) taking victuals, cables, anchors,
 &c. out of any ship which may conveniently spare the same, so
 as such persons pay out of hand for the same, or deliver a bill
 obligatory for payment thereof, to be paid in four months; if
 the taking be on this side the *Straits of Morocco*, or within
 twelve months, if beyond the *Straits*.

And when any commission under the act is directed to any
 place within the jurisdiction of the cinque ports, it is to be
 directed to the Lord Warden, and three or four other persons
 whom the Lord Chancellor shall appoint.||

In the construction of this act the following opinions have
 been holden:—

That it does not alter the nature of the offence, so as to make
 that which was before a felony only by the civil law, now be-
 come felony by the common law; for the offence must still be
 alleged as done upon the sea, and is no way cognizable by the
 common law, but only by virtue of this statute; which, by or-
 daining that in some respects it shall have the like trial and
 punishment as are used for felony at common law, shall not be
 carried so far as to make it also agree with it in other particulars
 which are not mentioned; and from hence (a) it follows that this

3 Inst. 112.
 2 Hal. Hist.
 P. C. 370.
 (a) Moor.
 756.
 3 Inst. 112.
 Co. Lit.
 391.
 2 Hal. Hist.
 P. C. 370.

offence remains as before, of a special nature, and that it shall not be included in a general pardon of all felonies.

3 Inst. 112.
Hawk. P. C.
c. 37. § 7.

From the same ground also it follows, that no persons shall in respect of this statute be construed to be or punished as accessories to piracy before or after, as they might have been if it had been made a felony by the statute, whereby all those would incidentally have been made accessories in the like cases in which they would have been accessories to a felony at common law; and from hence it follows that accessories to piracy, being neither expressly named in the statute, nor by construction included in it, remain as they were before, and were triable by the civil law, if their offence were committed on the sea; but if on the land, by no law, until 11 & 12 W. 3. c. 7., for 2 & 3 Ed. 6. c. 24.; which provides against accessories in one county to a felony in another, extends not to accessories to an offence committed in no county, but on the sea; but, by the said statute of 11 & 12 W. 3. c. 7. they are triable in like manner as the principals are by the statute of 28 H. 8. c. 15.

3 Inst. 112.
Hawk. P. C.
c. 37. § 8.
||(a) *Vid. tamen*
cont. Co. Litt.
391. a.; and

From the same ground also it follows, that an attainder for this offence corrupts not the blood (a), inasmuch as the statute only says that the offender shall suffer such pains of death, &c. as if he were attainted of a felony at common law, but says not that the blood shall be corrupted.

Lord Hale says that if there be an attainder of treason or felony done upon the sea, upon this statute by jury, according to the *course of the common law*, it seems that the judgment works a corruption of blood: and further, that if an indictment of piracy, before commissioners under the statute, be formed as an indictment of robbery at common law, viz. *vi et armis et felonice*, the blood may be corrupted; but if the indictment be in the style of the civil law, viz. *piraticè deprædavit*, then that the attainder corrupts not the blood. And this distinction reconciles the passages on the subject, which are otherwise contradictory, in 3 Inst. p. 112., and Co. Litt. 391. a. *Vide* 1 Hale, P. C. 355.]]

3 Inst. 114.
Dyer, 241.
pl. 49. 308.
pl. 75.

Yet it has been resolved that an offender standing mute on an arraignment by force of this statute, shall have judgment of *paine fort et dure*; for the words of the statute are, *That a commission shall be directed, &c. to hear and determine such offences after the common course of the laws of the land.*

3 Inst. 112.
Roll. Rep. 175.
Hawk. P. C.
c. 37. § 10.

It has been holden, that the indictment for this offence must allege the fact to be done on the sea, and must have both the words *felonice* and *piraticè*; and that no offence is punishable by virtue of this act as piracy, which would not have been felony if done on the land, and, consequently, that the taking of an enemy's ship by an enemy is not within the statute.

Moor, 756.
Roll. Rep. 175.
Hawk. P. C.
c. 37. § 11.

It is agreed that this statute extends not to offences done in creeks or ports within the body of a county, because they are and always were cognizable by the common law.

2 Hale, P. C.
16.

[[This doctrine, which is also found in the 3 Inst. 113. and 4 Inst. 134, 135. and which is opposed to Lord Hale's opinion, has been lately held by the judges to be erroneous, and a place within the body of a county, and therefore subject to the common law jurisdiction, was held to be also within the concurrent jurisdiction of the admiral. John Bruce was found guilty at the Admiralty Sessions, before Lord Ellenborough and Thomson B., com-

commissioners under the 28 Hen. 8. c. 15. of the wilful murder of *James Dean*, committed in a part of *Milford Haven*, where it was about three miles across, about seven or eight miles from the mouth, and about sixteen miles below any bridge. The place was about twenty-three feet deep, and never known to be dry but at very low tides. Sloops and cutters of 100 tons were able to navigate where the body was found, and nearly opposite to that place men of war were able to ride at anchor. All the Judges, except *Grose J.*, met to consider whether the place where the offence was committed was to be deemed within the jurisdiction of the commissioners, and they were unanimously of opinion that it was; although it was within the body of the county of *Pembroke*, and although the common law tribunals had a concurrent jurisdiction.

It is not distinctly settled what are the precise limits bounding the concurrent jurisdiction of the Admiral, on the one hand, in places *infra corpus comitatus*; nor, on the other hand, what is the exact boundary between the *corpus comitatus* and the exclusive jurisdiction of the Admiralty in respect of the matter arising on the high sea. With respect to the first point, viz: the extent of the concurrent jurisdiction of the Admiral when exercised on spots undoubtedly *infra corpus comitatus*; Lord *Hale*, commenting on the words of the 28 Hen. 8. c. 15. says, "This seems to me to extend to great rivers where the sea flows and reflows, below the first bridges, and also in creeks of the sea at full water, where the sea flows and reflows; and upon high water, upon the shore, though these possibly be within the body of the county," &c. And it seems that in *Bruce's* case (*supra*) the Judges thought that the 28 Hen. 8. applied to all great waters frequented by ships; that in such waters the Admiral, in the time of *Henry* the Eighth, pretended jurisdiction; that by *havens*, &c., havens in *England* were meant, though they were all in the body of some county; and that the mischief in the first section, of the witnesses being seafaring men, was likely to apply to all places frequented by ships.

With regard to the second point, viz. the boundary between the *corpus comitatus* and the high seas, where the exclusive jurisdiction of the Admiral commences; it is clear, that upon the open sea-shore the common law and the Admiral have alternate jurisdiction between high and low water mark. But it is sometimes matter of difficulty to fix the line of demarcation between the county and the high sea, in harbours, or below the bridges in great rivers. The question is often rather one of fact than of law; but the legal principle on which the boundary is to be drawn does not appear to be settled. Mr. *East* says, "In general it is said that such parts of the rivers, arms, or creeks, are deemed to be within the bodies of counties, where persons can see from one side to the other." Lord *Hale*, in his *Treatise De Jure Maris*, p. 1. ch. 4. says, that the arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county. *Hawkins*, however, considers the line more

Rex v. *Bruce*,
Leach, C. C.
1093. Russ. &
Ry. C. C. 243.
S. C.

See MS. Bay-
ley J. Russ.
on Cri. vol. 1.
p. 107. (2d ed.)

3 Inst. 113.
2 Hale, 17., and
see 2 Hawk.
c. 9. § 14.

2 East, P. C.
c. 17. § 10.
p. 803, 804.

15 Co. 52.

accurately confined, by other authorities, to such parts of the sea where a man standing on the one side may *see what is done on the other* : and the reason assigned by Lord *Coke*, in the Admiralty case, in support of the county coroner's jurisdiction, where a man is killed in such places, because *that the county may know it*, seems rather in support of the more limited construction. The distance, however, from shore to shore, in *Bruce's* case, seems so considerable, that it may be doubted whether the Judges, in considering the place within the body of the county, must not have recognized the criterion of Lord *Hale*, rather than that of *Hawkins*.

Per *Mansfield*
C. J. Rex. v.
Depardo,
1 Taunt. 29.

The statute 28 Hen. 8. merely altered the mode of trial in the Admiralty Court, and its jurisdiction still continues to rest on the same foundations as before that act. It is regulated by the civil law *et per, consuetudines marinas*, grounded on the law of nations, which may possibly give to that court a jurisdiction that our common law has not.

Vide 2 Hale,
P. C. 16.

The Admiralty hath also a *concurrent* jurisdiction with the common law, within the body of the county, in certain particular cases of maihem and homicide, by virtue of the stat. 15 Ric. 2. c. 3., which enacts, "Nevertheless of the death of a man, and of a maihem done in great ships being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognizance."||

11 & 12 W. 3.
c. 7. made
perpetual by
6 G. c. 19. § 3.
||And by the
46 G. 3. c. 54.
not only the
offences men-
tioned in the
text, but *all*
offences what-
soever com-
mitted on the
high seas, or in
the jurisdic-
tion of the ad-
miral, may be
tried in any
of the islands

By the 11 & 12 W. 3. c. 7. it is enacted, "That all *piracies, felonies, and robberies* committed in or upon the sea, or in any place where the admiral has jurisdiction, may be tried and determined at sea, or upon the land in any of his majesty's islands or plantations, &c. to be appointed by the king's commission under the great seal, or the seal of the Admiralty, directed to any of the admirals, &c., and such persons and officers by name or for the time being, as his majesty shall think fit, who shall have power jointly or severally, by warrant under hand and seal of any of them, to commit any person against whom information of any such offences shall be given upon oath, and to call a court of admiralty, which shall consist of seven persons at the least, and shall proceed in the trial of the said offenders according to such directions as are set forth at large in the said statute."

or colonies, by virtue of a commission under the great seal, and the commissioners to have the like power as commissioners appointed under the 28 Hen. 8. c. 15., and the offenders to incur the same punishment as if tried within the realm by virtue of a commission under that statute.||

||(*b*) This clause was inserted to remove doubts whether persons capturing *English* vessels under commissions granted by *James II.* at *St. Ger-*

And it is further enacted by the said statute, § 8. (*b*) "That if any of his majesty's natural-born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility, against other his majesty's subjects upon the sea, under colour of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender and offenders, and every of them, shall be deemed, adjudged, and taken to be pirates, felons, and robbers, and they and every of them, being duly convicted thereof ac-

cording

“ cording to this act, or the aforesaid act of 28 Hen. 8. c. 15., shall have and suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer.” *main's* after his abdication could be treated as pirates, 1 Hawk. P. C. p. 268.||

And it is further enacted by the said statute, “ That if any commander or master of any ship, or any seaman or mariner, shall in any place, where the Admiral hath jurisdiction, betray his trust and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandize, or yield them up voluntarily to any pirate; or bring any seducing message from any pirate, enemy, or rebel; or consult, combine, or confederate with, or attempt or endeavour to corrupt, any commander, master, officer, or mariner, to yield up or run away with any ship, goods, or merchandize, or turn pirate, or go over with pirates, or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or that shall confine his master, or make, or endeavour to make, a revolt in his ship, shall be adjudged to be a pirate, felon, and robber; and being convicted thereof, according to the directions of this act, shall have and suffer pains of death, loss of lands, goods and chattels, as pirates, felons, and robbers upon the seas ought to have and suffer.”

And it is further enacted by the said statute, “ That all and every person and persons whatsoever, who shall either on the land or upon the seas wittingly and knowingly set forth any pirate, or aid and assist, or maintain, procure, command, counsel, or advise any person or persons whatsoever to do or commit any piracies or robberies upon the seas, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person or persons whatsoever so as aforesaid setting forth any pirate, or aiding or assisting, maintaining, procuring, commanding, counselling, or advising the same, either on the land or upon the sea, shall be adjudged to be accessory to such piracy and robbery done and committed. *And farther*, that after any piracy or robbery is or shall be committed by any pirate or robber whatsoever, every person or persons, who, knowing that such pirate or robber has done or committed such piracy and robbery, shall, upon the land or upon the sea, receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods or chattels which have been by any such pirate or robber, piratically and feloniously taken, shall be by this statute likewise adjudged to be accessory to such piracy and robbery, and that all such accessories to such piracies and robberies shall be inquired of, heard, and determined, and adjudged according to the common course of the law, according to the said statute of 28 H. 8. c. 15. as the principals of such piracies and robberies may be, and no otherwise; and being thereupon attainted, shall suffer pains of death, loss of lands, goods and chattels, and in like manner as the principals

“pals of such piracies, robberies, and felonies ought to suffer according to the said statute of 28 H. 8. c. 15. which is declared to be in full force; any thing in this act to the contrary notwithstanding.”

4 G. 1. c. 11.

And by 4 G. 1. c. 11. “All persons who shall commit any offence for which they ought to be adjudged pirates, felons, or robbers, by 11 & 12 W. 3. c. 7., may be tried and judged for every such offence, according to the form of 28 H. 8. c. 15., and shall be excluded from their clergy.”

8 G. 1. c. 24.
Made perpetual by 2 G. 2.
c. 28. § 7.

By the 8 G. 1. c. 24. for the more effectual suppressing of piracy, it is declared and enacted, “That if any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas with any ammunition, provision, or stores of any kind, or shall fit out any ship or vessel knowingly, and with a design to trade with, or supply or correspond with any pirate, felon, or robber upon the seas; or if any person or persons shall anywise consult, combine, confederate, or correspond with any pirate, felon, or robber on the seas, knowing them to be guilty of any such piracy, felony, or robbery; such offender and offenders, and every of them, shall in each and every of the said cases be deemed, adjudged, and taken to be guilty of piracy, felony, and robbery, and he and they shall and may be enquired of, tried, heard, and adjudged of and for all or any of the matters aforesaid, according to the statute made 28 H. 8. c. 15. for pirates, and the statute made 11 & 12 W. 3. c. 7., and he and they, being convicted of all or any of the matters aforesaid, shall suffer such pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas ought to suffer; and in case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize and carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandizes belonging to such ship or vessel, the person and persons, who shall be guilty thereof, shall in all respects be deemed and punished as pirates as aforesaid.”

And § 2. it is farther enacted, “That every ship or vessel, which shall be fitted out with a design to trade with, or supply or correspond with any pirate, and all and every goods and merchandizes put on board the same for any intent or purpose to trade with any pirate, felon, or robber on the seas, shall be *ipso facto* forfeited; one moiety thereof to the use of the king’s majesty, his heirs and successors, the other moiety to the person or persons who shall first make discovery, and give information of such intent or design; and such person or persons, who shall first make such discovery, shall and may sue for and recover the said ship or vessel, and all and every the goods and merchandizes on board the same, in the High Court of Admiralty.”

And

And § 3. “Whereas there are some defects in laws for bringing persons who are accessories to piracy and robbery upon the seas to condign punishment, if the principal who committed such piracy and robbery is not or cannot be apprehended and brought to justice; be it therefore enacted, That all and every person and persons whatsoever, who by the said statute made 11 & 12 W. 3. c. 7. are declared to be accessory or accessories to any piracy or robbery therein mentioned, are hereby declared and shall be deemed and taken to be principal pirates, felons, and robbers, and shall and may be enquired of, heard, determined, and adjudged in the same manner as persons guilty of piracy and robbery may and ought to be enquired of, tried, heard, determined, and adjudged by the said statute 11 & 12 W. 3. c. 7. and being thereupon attainted and convicted, shall suffer such pains of death, loss of lands, goods and chattels, and in like manner, as pirates and robbers ought by the said act to suffer.”

And § 4. it is farther enacted, “That all and every offender or offenders convicted of piracy, felony, or robbery, by virtue of this act, shall not be admitted to have the benefit of clergy, but be utterly excluded of and from the same.”

And § 5. “To the end that a farther encouragement may be given to all seamen and mariners to fight and defend their ships from pirates, it is farther enacted, That in case any seaman or mariner on board any merchant ship or vessel, or any other ship or vessel, shall be maimed in fight against any pirate, every such seaman and mariner, upon due proof of his being maimed in such fight, shall not only have and receive the rewards appointed by 23 Car. 2. c. 11. but shall also be admitted into and provided for in *Greenwich* Hospital, preferably to any other seaman who is disabled from service or getting a livelihood merely by his age.”

And by § 6. “If any commander, master, or other officers, or any seaman or mariner of any merchant ship or vessel, which carries guns and arms, shall not, when they are attacked by any pirate, or by any ship or vessel on which such pirate is on board, fight and endeavour to defend themselves and their said ship and vessel from being taken by the said pirate, or shall utter any words to discourage the other mariners from defending the said ship, and by reason thereof the said ship or vessel shall fall into the hands of such pirate, then, and in every such case, every such commander or other officer, and every seaman and mariner, who shall not fight and endeavour to defend and save the said ship or vessel, or who shall utter any such words as aforesaid, shall lose and forfeit all and every part of the wages due to him and them respectively by the owner and owners of the said ship or vessel, and shall not be permitted to sue for or recover the same, or any part thereof, in any court either of law or equity, and as a farther punishment shall suffer six months’ imprisonment.”

And § 7. “For prevention of seamen or mariners from desert-
“ing

“ing merchant ships or vessels abroad in the plantations, or in
 “any other parts beyond the seas, which is the chief occasion of
 “their turning pirates, and of great detriment to trade and navi-
 “gation, and is chiefly occasioned by the owner or owners or
 “ships or vessels paying wages to the seamen or mariners when
 “abroad, it is enacted, That no master or owner of any merchant
 “ship or vessel shall pay or advance, or cause to be paid or
 “advanced, to any seaman or mariner, during the time he shall
 “be in parts beyond the seas, any money or effects on account
 “of wages, exceeding one moiety of the wages which shall be
 “due at the time of such payment, until such ship or vessel shall
 “return to *Great Britain* or *Ireland*, or to the plantations, or to
 “some other of his majesty’s dominions whereto they belong,
 “and from whence they were first fitted out; and if any such
 “master or owner of such merchant ship or vessel shall pay or
 “or advance, or cause to be paid or advanced, any wages to
 “any seaman or mariner above the said moiety such master or
 “owner shall forfeit and pay double the money he shall so pay
 “and advance, to be recovered in the High Court of Admiralty
 “by any person who shall first discover and inform of the
 “same.”

18 G. 2. c. 50.

[By 18 Geo. 2. c. 30. “All persons, being natural-born subjects
 “of his majesty, who during any wars have com-
 “mitted any hostilities upon the sea, or in any haven, river,
 “creek or place where the Admiral or Admirals have power,
 “authority, or jurisdiction against his majesty’s subjects, by
 “virtue or under any colour of any commission from any his
 “majesty’s enemies upon the sea, or any the places where the
 “Admiral hath jurisdiction as aforesaid, may be tried as pirates,
 “felons, and robbers in the said Court of Admiralty, on ship-
 “board, or upon the land, in the same manner as persons guilty
 “of piracy, felony, and robbery are directed to be tried; and
 “on conviction shall suffer as any other pirates, &c. ought by
 “virtue of 11 & 12 W. 3. c. 7. or any other act: Provided that
 “any person who shall be tried and acquitted, or convicted,
 “according to this act, for any of the said crimes, shall not be
 “liable to be prosecuted for the same crime or fact as high
 “treason. But this act shall not prevent any persons who shall
 “not be tried according to it, from being tried for high treason
 “by 28 H. 8. c. 5.”]

Evans’s case,
 East’s P. C.
 p. 798.

|| Adhering to the king’s enemies, by cruizing hostilely in their
 ships, with intent to seize the ships and goods of the king and his
 subjects, is triable as piracy under this statute.||

32 G. 2. c. 25.
 § 12. By 22
 G. 5. c. 25. all
 contracts for
 ransoming any
 private vessel,
 &c. captured
 by the king’s
 enemies, are

[And by 32 Geo. 2. c. 25. § 12. “In case any commander of
 “any private ship of war duly commissioned according to the
 “directions of this act, or the 29 Geo. 2. c. 34. shall agree with
 “the commander or other person of or belonging to any neutral
 “or other ship or ships, vessel or vessels, except those of his
 “majesty’s declared enemies, for the ransom of any such neutral
 “or other ship, &c. or the respective cargo or cargoes thereof,
 “or any part thereof, after the same shall have been taken as
 “prize,

“prize, and shall, in pursuance of any such agreement or agreements, actually quit, set at liberty, or discharge any such prize or prizes, instead of bringing the same into some port or ports belonging to his majesty’s dominions, every such offender shall be deemed guilty of piracy, felony, and robbery, and on conviction (in the manner the act describes) shall suffer such pains of death, &c. as pirates, felons, and robbers upon the seas ought to suffer according to the laws now in being. But the commander of any private ship of war, upon the capture of any neutral vessel, which by any law or treaty shall be liable only to the forfeiture of such contraband goods as shall be on board thereof, may receive such goods in case the commander is willing to deliver them, and thereupon quit, set at liberty, or discharge such neutral ship or vessel.”

void, and the offender liable to a penalty of 500*l*.

By 30 Geo. 2. c. 25. § 20. and 33 G. 3. c. 66. § 70. a session of oyer and terminer, and gaol-delivery, for the trial of offences committed on the high seas, shall be holden twice at the least in every year at the Sessions House in the *Old Bailey*, or at such other place as the Lords of the Admiralty shall appoint. And the commissioners named in the commissions of oyer and terminer for the trial of such offences, as also any justices of the peace, may take informations touching offences committed upon the seas, and cause the parties to be apprehended and committed: they may also oblige any persons they think necessary to enter into recognizances to appear, prosecute, and give evidence at the sessions, and upon their refusal to do so, may commit them; which recognizances and informations are to be transmitted to the registrar of the Court of Admiralty.]

30 G. 2. c. 25.
§ 20. and 33 G.
3. c. 66. § 70.

¶ By the stat. 7 Geo. 4. c. 38. it is enacted, “That it shall and may be lawful to or for any one or more of the commissioners for the time being, named or to be named in the commission of oyer and terminer, for trying of offences committed within the jurisdiction of the Admiralty of *England*, and also to and for any one or more of the commissioners for the time being, named, or to be named, in any commission made or granted under or by virtue of the act of the 46 Geo. 3. c. 54. and also to or for any one or more of his majesty’s justices of the peace for the time being for any county, riding, division, or place in the United Kingdom; and they are hereby respectively authorized, empowered and required, from time to time, to take any information or informations of any witness or witnesses upon oath, which oath they and each of them are hereby respectively authorized to administer, touching any treason, piracy, felony, robbery, murder, conspiracy or other offence, of what nature or kind soever, committed upon the sea, or in any river, haven, creek, or place where the Admiral or admirals hath or have power, authority, or jurisdiction; and thereupon (if such commissioner or commissioners, justice or justices of the peace shall see cause,) by any warrant or warrants under his or their hand and seal, or hands and seals,

7 G. 4. c. 38.

“to

“to cause the person or persons charged in such information or informations, to be apprehended and committed to safe custody, to remain in such custody until discharged in due course of law, or until bailed, in cases in which bail may by law be taken.”

7 & 8 G. 4.
c. 28. § 12.

By 7 & 8 Geo. 4. c. 28. § 12. it is enacted, That all offences committed within the jurisdiction of the Admiralty shall, upon every first and subsequent conviction, be subject to the same punishments, whether of death or otherwise, as if such offences had been committed upon land.

7 G. 4. c. 64.
§ 27.

By 7 Geo. 4. c. 64. § 27. it is enacted, That it shall be lawful for the judge of the Court of Admiralty, in every case of felony, and in every case of misdemeanor thereinbefore enumerated (in §. 23.) committed on the high seas, to order the assistant to the counsel for the affairs of the admiralty and navy to pay such costs and expenses, and compensation to prosecutors and witnesses, in like manner as other courts may order the treasurer of the county to pay them; and such assistant is required on sight of every such order to pay the money mentioned, and shall be allowed the same in his accounts.

This enactment puts prosecutors in the Court of Admiralty on the same footing as those in other criminal courts, in regard to the allowance of expenses.]]

[PISCHARY.]

Blount's Law
Dict. verb.
Pischary. But
a man may have

A PISCHARY is said to be a right or liberty of fishing in the soil of another.

liberam pischeriam in his own soil. Skin. 678.

2 Salk. 637.

Our law books make mention of three sorts of fishery, *libera*, *separalis*, *communis*.

Seymour v.
Lord Courtenay, 5 Burr.
2814.

In order to constitute a *several* fishery, it is necessary that the party claiming it should so far have the right of fishing independently on all others, as that no person should have a *co-extensive* right with him in the subject claimed; for where any person has such co-extensive right, there it is only a *free* fishery. But a partial, independent right in another, or a limited liberty, is not inconsistent with a right to a *several* fishery.

5 Burr. 2814.
Dougl. 56.

Whether ownership of the soil is essential a *several fishery* is a point upon which there hath been a great diversity of opinion, and which is not yet finally settled.

That it is necessarily included in a *several* fishery, see 2 Bl. Com. 39. 2 Salk. 637. Dav. 55. b. 17 Edw. 4. 6. 18 Edw. 4. 4. 10 Hen. 7. 24. 26. 28. Plo. Com. 154. That it is not, Co. Litt. 4. b. 112. a. Bract. 108. b. Bro. tit. Tenures, pl. 75. Fitzh. Sci. Fa. 100. Godb. 117. 20 Vin. Abr. 201.

The

The latter seemeth to be the better opinion; for the utmost that can be deduced from the cases cited in support of the former is, that a several fishery shall be presumed to include the soil, until the contrary is proved. See Co. Litt. 112. a. note 7. last edition. || See 5 Barn. & C. 885.||

A free fishery is considered by Sir Wm. Blackstone as an exclusive right of fishing in a public river, and is referred by him to the head of franchises. But this doctrine is, at least, questionable, our law books (a) extending this kind of fishery to all streams indiscriminately, whether *private* or *public*. The same learned writer too saith, that a *free fishery* imports an exclusive right, and so differeth from *common of pischary*; that in a *free fishery* a man hath a property in the fish before they are caught; in a *common of pischary* not till afterwards. But this doctrine, though supported by some (b) authorities, is impugned by others. Lord Coke (c) considers common of fishery and free fishery as the same thing. For, he saith, that a man may prescribe to have *separalem piscariam* in such a water, and the owner of the soil shall not fish there; but if he claim to have *communiam piscariae*, or *liberam piscariam*, the owner of the soil shall fish there. And Eyre J. said (d), that the word *libera*, *ex vi termini*, implied *common*. And that a man cannot declare in trespass for taking his fish in a *free fishery* was expressly holden in two cases (e), and the judgment for that reason reversed. The right to the property of the fish in a free fishery, till caught, was negatived by the court incidentally in a still earlier case. (g) Lord Mansfield, in the case of *Seymour v. Lord Courtenay*, saith, that where any person hath a *co-extensive* right with another, it is a *free fishery*. (h)

2 Bl. Com. 39.
(a) F. N. B. 88. G. Fitz. Abr. Ass. 422. 4 Ed. 4. 28. 17 Ed. 4. 6. b. 7. a. 7 Hen. 7. 13 b. Cro. Car. 554. 1 Ventr. 122. Skin. 677. Carth. 285. (b) Reg. 95. b. 43 Ed. 3. 24. 2 Salk. 637. Carth. 285. (c) Co. Litt. 112. a. (d) 2 Salk. 637. Carth. 285. (e) Upton v. Dawkins, 3 Mod. 97. Com. 11. S. C. Peake v. Turner, cited in Carth. 286. in margin. (g) Child v. Greenhill, Cro. Car. 554. (h) 5 Burr. 2816.

If a man justifies for using a pischary he ought to shew whether it be common, free, or several. So whether it be appurtenant to a manor or messuage, &c. for it is an interest, and not a mere liberty or easement.

A fishery, without more, is a tenement within the statute 9 & 10 W. 3. c. 11. so as to entitle a person renting it to a settlement, for the court will intend that the soil passed with it. It indeed doubtful, whether it is material for this purpose that the soil should pass.

is reported to lay it down broadly, that a fishery is a *tenement*; that trespass will lie for an injury to it; and it may be recovered in ejectment.

|| *Separalis piscaria* enjoyed by a subject in a navigable river where the tide flows, under a grant before time of memory, is an incorporeal hereditament; and consequently a term for years in it cannot be created without deed.||

In rivers not navigable, the proprietors of the land have the right of fishery on their respective sides; and it generally extends *ad flum medium aquæ*. (a) But in navigable rivers the proprietors of the land on each side have it not; the fishery is common, it is *primâ facie* in the king, and is public. But the crown may grant a several fishery in a navigable river, where the sea flows

Hardr. 407.
Rex v. Old Alresford, 1 Term R. 358. In this case, one learned judge will lie for an Duke of Somerset v. Fogwell, 5 Barn. & C. 875. Carter v. Muscot, 4 Burr. 2362. Lord Fitzwalter's case, 1 Mod. 105. Dav. 55.

Mayor, &c. of
Oxford v.
Richardson,
4 Term R.
439.

||(a) Proof of
the owner's
right to fish
opposite his

own land *ad medium filum aquæ* cannot be given under a plea claiming a common of fishery.
Benett v. Costar, 8 Taunt. 185. 2 Moo. 83.]

Bagott v. Orr,
2 Bos. & Pull.
472.

||It is clear that *primâ facie* every subject of the realm has a right to take fish found on the sea-shore between high and low water-mark; but this general right may be abridged by an exclusive right in some individual. And it is doubtful whether the subject has *primâ facie* a right to take *fish-shells* on the sea-shore between high and low water-mark.

Gray v. Bond,
2 Bro. & Bing.
667. 5 Moo.
527.

Where the lessees of a fishery had publicly landed their nets on the shore at *A.* for more than twenty years, and had at various times dressed and improved the landing place, (both the fishery and the landing place having originally belonged to one person, but no evidence being offered to shew that he, or those who under him owned the shore at *A.*, knew of the landing nets by the lessees of the fishery,) the court held that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery, by some former owner of the shore at *A.*

Weld v.
Hornby,
7 East, 195.

Where one has a right, under ancient deeds, to have a wear across a river for taking fish, and such wear has theretofore been made of brushwood, through which fish could escape, he cannot convert it into a *stone* wear, whereby the fish are prevented from escaping. And an acquiescence in such an alteration for twenty years, will not bind the party from seeking his remedy after that period, where the public are interested in the right.

Shape v.
Dobbs,
1 Bing. R. 202.
8 Moo. 23.

Where, under an act of parliament, a canal reservoir was made over lands in which *A.* and *B.* had separate interests, and the act provided that it should be lawful for the owner or owners of the land, on which any such reservoir should be made, to let all the water out of such reservoir once in seven years, for the purpose of taking fish therein; it was held that *A.* and *B.* were not tenants in common of this fishery, but that each had a several right of fishery in the water over his own land; and that when the reservoir was exhausted, each must take his chance of the fish left aground on his own soil.

WHALE-FISHERY. It may, perhaps, be questioned, whether the decisions on the customs of the whale fishery strictly fall under the present head; but convenience requires their insertion in this place.

Littledale v.
Scaith,
1 Taunt. R.
243. *notâ.*;
and see Fen-
ning v. Lord

In one case it was agreed, that the custom, as settled by determinations at *Guildhall*, was as follows:— While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time struck by a har-

a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker, and of him alone. But if the first harpoon or line breaks, or the line attached to the harpoon is not in the power of the striker, the fish is a loose fish, and will become the property of any other person who strikes and obtains it.

Grenville.
1 Taunt. 211.

But in a subsequent case, the custom proved was, that the first striker is entitled to the fish, though his harpoon be detached from the line when the second striker strikes, if the fish be so entangled in his line that he might probably have secured him without the interference of the second striker; and *Best C. J.* thought this custom more reasonable than that stated in *Little-dale v. Scaith*, and the jury found accordingly.

Hogarth and
others v. Jack-
son and
others, Moo.
& Malk. 58.

And it was lately held by *Bayley J.*, that if, while the fish is fast to the harpoon of the first striker, another come up unsolicited, and so disturb the fish that she breaks from the first harpoon, and then he strikes her with a harpoon himself, and secures her, the fish continues the property of the first striker. ||

Skinner v.
Chapman,
Moo. & Malk.
59.

[By the stat. of 5 Geo. 3. c. 14. persons convicted of stealing, taking, or destroying any fish, ||bred, kept, or preserved (a)|| in any river or stream, pond, pool, or other water, in any park or paddock, or in any garden, orchard, or yard, adjoining or belonging to any dwelling-house, or aiding or assisting therein, or receiving or buying the fish knowing them to be stolen or taken, shall be transported for seven years. The prosecution, however, must be within six months after the offence committed; and any offender convicting an accomplice is entitled to a pardon.

|| (a) See *Rex v. Carradice*, Russ. & Ry. C. C. 205. This statute is repealed by 7 & 8 G. 4. c. 27.; and see *infra*. ||

By § 3. every person convicted of taking or destroying, or attempting to take or destroy any fish in any river or stream, &c., not being in any park or paddock, or in any garden, orchard, or yard adjoining or belonging to any dwelling-house, but shall be in any other enclosed ground (b) which shall be private property, shall forfeit the sum of five pounds to the owner of such river or stream, &c. But this clause, it is expressly provided, § 5. shall not extend to any person who shall have a just right or claim to take, kill, or carry away any such fish.

|| (b) A stream of water running by the side of a piece of ground which is enclosed on every side, except that on which it is bounded by

the water, is not a *stream in enclosed ground*, within the meaning of this clause. *Lisle v. Brown*, 1 Marsh, 127. 5 Taunt. 440. ||

It is obvious, therefore, that a person who fishes in a fishery belonging to another, but to which he has a claim, for the purpose of giving occasion to an action in order to try the right, is not liable to a penalty under this act.]

Kinnersley v. Orpe, Dougl. 517.

|| By the stat. 7 & 8 Geo. 4. c. 29. § 34. it is enacted, "That if any person shall unlawfully and wilfully take or destroy any fish in any water which shall run through, or be in any land adjoining or belonging to the dwelling house of any person being the owner of such water, or having a right of fishery therein, every such offender shall be guilty of a misdemeanor, and, Vol. VI. N "being

7 & 8 G. 4. c. 29. § 34.

“ being convicted thereof, shall be punished accordingly ; and if
 “ any person shall unlawfully and wilfully take or destroy, or
 “ attempt to take or destroy, any fish in any water not being
 “ such as aforesaid, but which shall be private property, or in
 “ which there shall be any private right of fishery, every such
 “ offender, being convicted thereof before a justice of the peace,
 “ shall forfeit and pay, over and above the value of the fish
 “ taken or destroyed, (if any) such sum of money, not exceeding
 “ five pounds, as to the justice shall seem meet : provided al-
 “ ways, that nothing hereinbefore contained shall extend to any
 “ person angling in the day-time ; but if any person shall, by
 “ angling in the day-time, unlawfully and wilfully take or
 “ destroy, or attempt to take or destroy, any fish in any such
 “ water as first mentioned, he shall, on conviction before a justice
 “ of the peace, forfeit and pay any sum, not exceeding five
 “ pounds ; and if in any such water as last mentioned, he shall,
 “ on the like conviction, forfeit and pay any sum, not exceeding
 “ two pounds, as to the justice shall seem meet ; and if the
 “ boundary of any parish, township, or vill, shall happen to be
 “ in or by the side of any such water as is hereinbefore men-
 “ tioned, it shall be sufficient to prove that the offence was
 “ either committed in the parish, township or vill named in the
 “ indictment or information, or in any parish, township, or vill
 “ adjoining thereto.”

§ 35.

By the 35th section of the same statute, it is enacted,
 “ That if any person shall at any time be found fishing at any
 “ time against the provisions of this act, it shall be lawful for the
 “ owner of the grounds, water, or fishery where such offender
 “ shall be so found, his servants, or any person authorized by
 “ him, to demand from such offender any rods, lines, hooks,
 “ nets, or other implements for destroying or taking fish, which
 “ shall then be in his possession ; and in case such offender
 “ shall not immediately deliver up the same, to seize and take
 “ the same from him for the use of such owner : provided al-
 “ ways, that any person angling in the day-time against the pro-
 “ visions of this act, from whom any implements used by anglers
 “ shall be taken, or by whom the same shall be delivered up as
 “ aforesaid, shall by the taking or delivering thereof be ex-
 “ empted from the payment of any damages or penalty for such
 “ angling.”

7 & 8 G. 4.
 c. 30. § 15.

By the stat. 7 & 8 Geo. 4. c. 30. § 15. it is enacted, “ That if
 “ any person shall unlawfully and maliciously break down or
 “ otherwise destroy the dam of any fish-pond, or of any water
 “ which shall be private property, or in which there shall be any
 “ private right of fishery, with intent thereby to take or destroy
 “ any of the fish in such pond or water, or so as thereby to
 “ cause the loss or destruction of any of the fish, or shall un-
 “ lawfully or maliciously put any lime or other noxious material
 “ in any such pond or water, with intent thereby to destroy any
 “ of the fish therein, or shall unlawfully and maliciously break
 “ down or otherwise destroy the dam of any mill-pond, every
 “ such

“such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment.”||

PLEAS AND PLEADINGS.

PLEADING in general signifies the allegations of parties to suits when they are put into a proper and legal form; which are distinguished, in respect to the parties who plead them, by the names of bars, replications, rejoinders, sur-rejoinders, rebutters, sur-rebutters, &c. And though the matter in the declaration or count does not properly come under the name of pleading, yet, being often comprehended in the extended sense of the word, we have considered it under this head.

Pleading in strictness is no more than setting forth that fact which in law shews the justness of the demand made by the plaintiff, or the discharge and defence made by the defendant. And herein, no greater certainty is required than is sufficient to bring on a trial without inveigling judge or jury. It seems that originally pleadings were so formed, and were very plain and concise; but in progress of time pleaders, yea, and judges, became too curious in them, so that the art and dexterity of pleading, which in its (a) use, nature, and design was only to render the fact plain and intelligible, and to bring the matter to judgment with convenient certainty, began to degenerate from its primitive simplicity and true use, and end in a piece of nicety and curiosity; which, how it hath improved therein in later times, the length of the pleadings, the many unnecessary repetitions, and the many miscarriages of causes upon small and trivial objections, do but too sufficiently testify.

— And it seems, that anciently fines were imposed *pro stulte loquio*, or *stulte dicto*, which were mulcts laid on pleaders by the courts for barbarous and disorderly pleading. 2 Inst. 125.

Pleas were anciently (b) *ore tenus*, and afterwards minuted down by the prothonotaries, and entered of record in the *Latin* tongue, that being a dead language, and least subject to variation, to remain as muniments and precedents of the law; that the pleadings should be in *Latin* is expressly enacted by the 36 E. 3. c. 15. which statute was made to abolish a law introduced by *William* the Conqueror, which ordained that the pleadings in the courts of justice should be in *French*.

(a) Recommended by Littleton as the most honourable, laudable, and profitable thing in the laws of England. Lit. § 534. and by Lord Coke, Co. Lit. 17. a. 168. 305. 2 Co. Tooker's case, and Hob. 162. 292. 295.

10 Co. 132. (b) And being so is the reason that a plea, whilst in paper, may be amended. *Vide* title Amend-ment.

4 G. 2. c. 26.

But now by 4 G. 2. c. 26. it is enacted, "That all writs, process, pleadings, rules, indictments, records, and all proceedings in any courts of justice within *England*, and in the court of Exchequer in *Scotland*, shall be in the *English* tongue, and be written in such common hand as acts of parliament are usually engrossed in, the lines and words to be written at least as close as the said acts usually are, and not abbreviated; and all persons offending against this act shall forfeit 50*l.* to any person who will sue for the same."

6 G. 2. c. 14.
[See a similar reservation in the above act of 56 E. 5.]

But by 6 G. 2. c. 14. it is provided, "That the above penalty shall not be extended to the expressing the names of writs, or technical words in the same language, as hath been used, nor to abbreviations used in the *English* language."

In pleading, there are several general rules laid down in our books; as,

Co. Lit. 303.
Plow. 65. 81.
Cro. Jac. 562.

That good matter must be pleaded in right form, apt time, and due order, but that that which is but inducement or conveyance to the substance, need not be so certainly alleged as that which is the gist of the plea.

Co. Lit. 303.
7 Co. 40.
Dyer, 16.

That that which is apparent to the court, and appears from a necessary implication in the record, need not be averred.

Co. Lit. 303.
Hob. 234.
Latch. 186.
2 Mod. 5.

That every man's plea shall be taken most strongly against himself, as every body is presumed to make the most of his own case

That what the parties have agreed in pleading shall be admitted, though the jury find otherwise.

Vaugh. 58.
60. *per* Ld.
Vaughan.

That when a man will recover a thing from another, it is not enough for him to destroy such person's title, but he must prove his own a better, according to the rule, *melior est conditio possidentis*.

Co. Lit. 285.
303.

That every man shall plead such pleas as are pertinent and proper for him, according to the quality of his case, estate, or interest.

Hob. 164.
per Ld. *Hobart*.

That the law requires in every plea two things, the one, that it be in matter sufficient, the other, that it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting it is cause of demurrer.

Dyer, 66.
Godb. 253.
Leon. 78.

That every plea in bar, being a confession and avoidance of the plaintiff's action, must be substantive and certain, with an avoidance of the plaintiff's demands, which he may traverse, and thereon go to issue; because the declaration of the plaintiff stands confessed as far as it is not avoided by the defendant.

7 Co. 25. a.
8 Co. 120. b.
Co. Lit. 503.
(a) Dupli-
city in the
declaration
cured by
pleading

That if a count, avowry, which is in nature of a count, replication, &c. want (a) form, or (b) omit circumstance of time, place, &c. they may be made good by the plea of the adverse party; but, if they want substance, they cannot be made good; so, in such cases, the bar may be made good by the (c) replication, and the replication by the rejoinder, &c.

over. 2 Vent. 222. (b) A suit depending must shew in what court, but cured by pleading over. 1 Lev. 195.—Not alleging *prout patet per recordum* cured by pleading over. 3 Lev. 11. In debt for rent, if no place be assigned where the lease was made, the defendant in

his

his plea confessing the lease makes the declaration good. Hob. 82. (c) Fault in the plea cured by the replication. Carth. 66.—And that if a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side, which he could not take advantage of upon a general demurrer. 2 Salk. 519. pl. 18. *Per Holt C. J.*

That all pleas must be alleged directly, and not by way of rehearsal; nor is it sufficient that what ought to be expressly pleaded may be deduced by argument from what is pleaded. Co. Lit. 503. *Vide postea.*

That in matters triable by our law, all things issuable ought to be specially alleged in order to have a convenient trial; but in matters spiritual (a) the law is otherwise; because there is no peril in the trial; and therefore, if certain enough to ground a certificate, it is sufficient. 5 Leon. 500. Laid down as a rule by Ld. Anderson, cited in Show. P. C. 94.

(a) Sentences in the spiritual courts may be alleged summarily; as, that a divorce was betwixt such parties for such a cause, and before such a judge; but the judge must be named, that the court may write to him: that this is sufficient, it being to no purpose to allege them particularly, because the forms of these courts are different from those of the common law; and our judges presume that they are observed by the judges of those courts. Co. Lit. 503.

That surplusage does not vitiate, unless it be contrariant to the matter pleaded before. *Vide postea.*

That where one is authorized to do a thing by common law, statute, custom, grant, or commission, he ought to shew that he hath pursued the substance of it accordingly. Co. Lit. 503.

That general estates in fee-simple may be generally alleged, as that *J. S.* was seised in fee; but the commencement of particular estates must be shewn, because they could not originally commence without a conveyance, which must be shewn unless they be alleged by way of inducement only. Co. Lit. 121. a. 505. But for this, and the pleading a *Que Estate*, vide Bro. tit.

Que Estate. 18 Edw. 4. 10. Dyer, 258. b. Cro. Eliz. 22. Cro. Car. 190. 428. Cro. Jac. 675. Yelv. 76. Lev. 190. Sid. 297. 2 Keb. 87. 96. Skin. 503. pl. 7. 2 Mod. 55. Raym. 589. 2 Salk. 562. Carth. 9. 208. 432. 444.

That pleas ought to conclude properly, those to the writ to conclude to the writ, those in bar to the action; estoppels must rely on the estoppel. Co. Lit. 503.

But for the better understanding of these matters, we must more particularly consider,

(A) The several Parts, and the Order of Pleading.

(B) The Declaration: And herein,

1. *The Nature thereof; and therein, of adding several Counts in the same Declaration.*
2. *Who may join or be joined in the same Declaration.*
3. *What Matters may be joined in the same Declaration.*
4. *Of the Declaration's agreeing with the Writ.*
5. *Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gist of the Action: And herein,*

1. Where by the Declaration it must appear that the Plaintiff hath a Right.

2. Where the Plaintiff must shew that he hath performed what was requisite on his Part: ||And herein, of Conditions precedent and subsequent, and independent Covenants.||
3. Where general Allegations in the Declaration are sufficient; and therein, of Misrecitals, Omissions, ||and Variances.||
4. Where the Averments must be positive and express in the Declaration.
5. Of the Certainty required in the Description of the Thing declared for.
6. Of the Declaration's being good in Part, and void in Part.

(C) Of Imparlane: And herein,

1. *Of the Nature thereof, and the several Kinds.*
2. *What the Defendant must do before any Imparlane.*
3. *What he is to plead after a general Imparlane.*
4. *What may be pleaded after a special Imparlane.*
5. *In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlane.*

(D) Of making Defence: And herein, of the Difference between full and half Defence.

(E) The several Kinds of Pleas: And herein,

1. *Of Pleas to the Jurisdiction: And therein,*
 1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction and a Claim of Conusance.
 2. The Manner and Time of pleading to the Jurisdiction.

(F) Of Pleas in Abatement.

(G) Of Pleas in Bar and in Chief: And herein,

1. *Of the General Issue, and how formed.*
2. *Immaterial and informal Issues, and where aided.*
3. *Of special Pleas; and therein, of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.*
4. *Of sham Pleas, and the Consequence of false Pleading.*

(H) Traverse: And herein,

1. *The Nature thereof.*
2. *In what Cases a Traverse is permitted.*
3. *In what Cases a Traverse is necessary.*

4. *Whether*

4. *Whether there may be a Traverse upon a Traverse.*
5. *To what Point the Traverse shall be taken ; and therein what Matters are traversable, and of the Manner of taking thereof.*

(I) Pleas in Bar, their Sufficiency and Certainty ; And herein,

1. *That the Plea must be proper, and adapted to the Action.*
2. *That the Plea must be good in Substance ; and therein, of Matter of Inducement, and that which is the Gist of the Defence.*
3. *Of general Pleading to avoid Prolixity ; and therein, of affirmative and negative Pleas.*
4. *Of Surplusage and Repugnancy in Pleading.*
5. *That the Pleading ought to be direct and not argumentative.*
6. *Negative Pregnant.*
7. *What Things must be pleaded according to their Operation in Law.*
8. *Of Colour in Pleading.*
9. *Of Pleading Non-tenure and Disclaiming.*
10. *Pleading Hors de son Fee.*
11. *Estoppels in Pleading.*
12. *Pleading with a Profert, and demanding Oyer : And herein,*
 1. *In what Cases there must be a Profert or Monstrans de Fait.*
 2. *Of demanding Oyer.*
13. *Pleading a Recovery in a former Action.*

(K) Duplicity in Pleading : And herein,

1. *The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.*
2. *What shall be said Duplicity in Pleading.*
3. *Of pleading double by Leave of the Court.*

(L) Departure in Pleading.

M) Repleader : And herein,

1. *Of the Nature of a Repleader, and Manner of awarding it.*
2. *A Repleader in what Cases to be awarded.*
3. *Repleader at what Time to be awarded.*

(N) Demurrer : And herein,

1. *The Definition and Nature of a Demurrer.*
2. *The Manner and Form of Demurring ; and therein, of joining in Demurrer, and waiving thereof.*
3. *What Facts are admitted by a Demurrer.*
4. *How far a Judgment on a Demurrer is peremptory.*
5. *Of the Difference between a general and special Demurrer.*
6. *What Things are good on a general Demurrer, that would be otherwise on a special one.*
7. *Demurrer to Evidence.*

(O) Plea at what Time to be put in, and the Ceremony requisite therein.

(P) Continuance and Discontinuance in Pleading.

(Q) Pleas *Puis darrein continuance*.

(A) Of the several Parts, and the Order of Pleading.

Deet. pl. 84.
Co. Lit. 17. a.
Plow. 84.
Vide the next
title.

THE first thing in pleading is the plaintiff's count or declaration, in which he sets forth the causes of his complaint particularly, and thereby explains his writ ; and this he must do in such a manner as to make it appear to the court there is sufficient foundation for his bringing the action ; and all essentials, or whatever is of the substance of the action, must be alleged, that the court may be enabled to give judgment for him in case a verdict should be found in his favour.

The next thing is the defendant's plea or bar. Pleas are variously distinguished : the more general division of them is that of being dilatory or peremptory ; or they are, 1stly, Pleas in abatement ; 2dly, Such as suspend the action ; or, 3dly, Such as bar the plaintiff for ever. And as the plaintiff's declaration must set forth all essentials necessary to maintain it, so the defendant's bar must be substantially good and certain, with an avoidance of the plaintiff's demands, which the plaintiff may traverse, and thereon go to issue.

The replication is the plaintiff's answer to the defendant's plea, which fortifies and supports his declaration ; the rejoinder is the defendant's answer thereto : so, of sur-rejoinders, rebutters, sur-rebutters, &c. in which the material thing is that they pursue what hath been at first alleged and insisted upon, otherwise it will be a departure in pleading ; as if a matter be pleaded at common law, this cannot be maintained by a custom : as in covenant

Vide under the
division, *De-
parture in
Pleading.*

on

on an indenture of apprenticeship to serve seven years, the breach assigned was, that he did not serve, &c. the defendant pleaded infancy; the plaintiff replied the custom of *London*, and adjudged a departure. So an action at common law cannot be made good in the replication by an act of parliament. But if one pleads a statute, and the other says it is repealed, he may reply, that it is revived by another, for this fortifies the first matter.

In debt upon a bond, conditioned to save a parish harmless concerning a bastard child which the obligor was forced to father, he pleads *non damnificatus*; they reply, that the child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.*: Defendant rejoins that he was ready to pay the money and save the parish harmless; upon this they demurred, and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue on the child's being ready to starve; for if the plaintiffs had once cause of expense about the child, and were thereupon actually damnified, the defendant's being ready to pay the money will not save the condition of the bond.

lar rejoinder, though it is clearly demurrable; and *vide* Serjeant Williams's note,

Pasch.
22 Car. 2. in
B. R. 2 Sand.
80. Sid. 444.
Mod. 43.
2 Keb. 612.
619. S. C.
Richards v.
Hodges.
|| *Vide Hayes v.*
Bryant,
1 H. Bl. 253.,
where the
plaintiff took
issue on a simi-
lar case, 2 Saund. 84. ||

When the plaintiff replies, sur-rejoins, &c. and it thereby appears that he has no cause of action, he shall never have judgment, though the bar or rejoinder be insufficient, nor can any admittance of the adverse party make it good, for the court ought to judge on the whole record; as, in debt on a bond for performance of covenants, the defendant pleads performance generally, where some of the covenants are in the negative, whereby his plea is insufficient; if the plaintiff reply, and shew a breach which of his own shewing is no breach, judgment shall be given against him; for on the whole record it appears he has no cause of action.

But if the bar be insufficient in substance, or amount to a concession of the point of the action, and the plaintiff in his replication shew no matter against himself but matter explanatory, or perhaps not material, the declaration being good, the plaintiff shall have judgment for the insufficiency of the bar, without any regard to the replication; as if the defendant plead a grant by letters patent in bar which are not sufficient, and the plaintiff in his replication shew another clause in the said letters patent which is not material, the defendant demur, the plaintiff shall have judgment.

If the plaintiff make a title in his replication, but do not plead as he ought, especially in point of trial, the rejoinder admitting this, and tendering issue upon another matter, makes it good.

The order of pleading is, 1. To the jurisdiction of the court. 2. To the person of the plaintiff; and next of the defendant. 3. To the count or declaration. 4. To the writ. 5. To the action of the writ. 6. To the action itself in bar thereof.

This has been settled as the most natural order of pleading, because by this order each subsequent plea admits the former; as

8 Co. 155. b.

8 Co. 155. b.
9 Co. 110.
Hob. 14. 199.
Lev. 51.
5 Lev. 244.

Lev. 195.

Co. Lit. 305.

Co. Lit. 305.
Hob. 71, 72.
Litch, 178.
5 Mod. 146.

where the defendant pleads to the person of the plaintiff, he admits the jurisdiction of the court; for it would be nugatory to plead any thing in that court that has no jurisdiction in the case; when he pleads to the count, he allows that the plaintiff is able to come into that court to emplead him, and that he may there be properly empleaded: but in pleading to the count he does not admit the writ to be good, yet if the count be vitious, the writ is consequently destroyed; for though the writ in itself may be good, yet it is ill pursued: but in pleading to the writ he admits the count to be sufficient in form if the writ be good; since it is not to any purpose to object to the form of such writ if the form of the count be thereupon insufficient; but if the count be in substance variant the defendant may shew it at any time in arrest of judgment; because the court has no authority to proceed in a matter of substance different from the original writ.

If a man pleads to the action of the writ he allows both the form of the count and of the writ; for he admits, that if the form of the writ and count were adapted to the plaintiff's case, that such form is good and sufficient; since to object to the action not agreeing with the plaintiff's case does admit, that if it be ruled by the court that it does, the plaintiff has before the court a count in form sufficient.

||(a) As to the effect of these words see Gilb. C. P. 51. Vin. Abr. tit. *Modo et Formâ* Weathrell v. Howard, 5 Bing. R. 135 ||

If the defendant pleads in bar to the action, he admits the form of the writ and count, for he answers to the right in demand, and puts that right in issue, and thereby admits that there is a sufficient form to put it in issue, and therefore though a man pleads *non assumpsit modo et formâ*, yet the *modo et formâ* (a) does not traverse the form of the writ or count, but the substance of the promise; which is the true reason why another promise may be given in evidence different in time and place from that mentioned in the declaration though not different in substance.

(B) The Declaration : And herein,

1. *The Nature thereof; and therein of adding several Counts in the same Declaration.*

Plow. 84. Lil. Reg 414.

(b) In *English* it is called *declaration*, count from the *French*, and *narratio* in *Latin*. Co. Lit. 17. a 304.

Doct. pl. 85., — and is the same with what the civilians call a libel. Co. Lit. 17. a. (c) Must establish a title in the plaintiff, as well as destroy the defendant's; for the rule is, *melior est conditio possidentis*. Vaugh. 58. 60.

THE (b) declaration is an explanation of the plaintiff's writ, in which he expresses at large his complaint, setting forth the nature and quality of his case more fully than in the writ; and as it is the foundation of his suit, the law requires that it contain certainty and (c) truth, that the defendant may be able to make a proper answer thereto, and the court be enabled to give a right judgment thereon

(d) And from this it hath been said, the practice of annexing affida-

The plaintiff having set forth the causes of complaint particularly, the conclusion of his declaration is, *et inde producit sectam* which was proffering to the court the testimony of the witnesses or followers; for according to *Fleta* (d) ancient law was, *quod nullus*

nullus liber homo ponatur ad legem nec ad juramentum per simplicem loquelam sine testibus fidelibus ad hoc ductis, &c. vits to bills in Chancery hath been intro-

duced. — But this method in declarations is now disused. Doct. pl. 83. — And so is the practice of annexing affidavits to bills in Chancery, unless, perhaps, in a few very particular cases, required by statute.

An *audita querela* and a *scire facias* are in the nature of a declaration, for they set forth at large the cause of the plaintiff's action as a declaration doth. Lil. Reg. 411. 7 Co. 25.

The gist, and every thing that is of the essence of the plaintiff's action, must be set forth in the declaration; and herein we may lay it down as a general rule, that that seems properly to be the essence of the action without which the court could have no sufficient grounds to give judgment; and this is to be determined in every action according to its nature. Doct. pl. 85.

If the declaration be not a sufficient foundation to give judgment, this may be moved in arrest (a) of judgment after verdict, because judgment cannot be given when it appears, that, though the fact be found for the plaintiff, yet he has not sufficient cause of action. (a) But mistakes in the declaration cannot be taken advantage of on a plea in abatement, but the defendant must demur. Salk. 212. But if the declaration varies from the writ, the defendant may plead in abatement; for he has abated his own writ by prosecuting it in a different manner. Cro. Eliz. 722. Cro. Jac. 654. Jon. 304. || As oyer of the writ cannot now be craved, such a variance cannot be pleaded in abatement; but if the declaration be erroneous in respect of some extrinsic matter, as the nonjoinder of proper defendants, *misnomer*, &c. the declaration being presumed to correspond with the writ, the defendant may plead this matter in abatement of the writ. 1 Bos. & Pull. 645. 647. 3 Bos. & Pull. 399. ||

The declaration may be general or special; as, in debt upon an obligation, the plaintiff may declare on the penalty generally, or may set forth the condition, at his election. Doct. pl. 84.

If there are three in execution jointly at the suit of A. and all escape, in debt for the escape, the plaintiff may declare for the escape of all, and it will not be double, though the escape of any of them will be (b) sufficient to entitle him to the action. Keilw. 68. (b) If one declares for an escape in a cause of action to 40s., and proves 30s., this is sufficient; *per Hale*. But in the book there is a *quære de hoc*, being special. 2 Lev. 85.

If in an *indebitatus assumpsit* the plaintiff declares for 100*l.* received to the plaintiff's use, and also upon an *insimul computasset* for another 100*l.* the same day, and the defendant pleads that the said several sums of 100*l.* are for one and the same cause of action, and likewise that the sum demanded is satisfied, this on demurrer will be good; for though it is frequent to lay a declaration for a debt several ways in an *assumpsit*, and it is not a good plea to say that the several sums are but only for the sum first mentioned, and so go on no further; yet when the defendant pleads over, that the very sum demanded is satisfied, it is a good plea; and if the two several hundred pounds were two distinct sums, the plaintiff might have replied so, and taken issue thereupon. (c) Raym. 449. Sheldon v. Clipsham. (c) If the money was actually paid *non assumpsit* would have been the proper plea; for, having fulfilled the promise, it is as if it had never existed.

In an action for money won at play there were two counts; one setting forth a special agreement to play at such a game, and mutual promises of payment, which was right; the other was, that 6 Mod. 128. Smith v. Aiery, adjudged, 2 Ld. Raym.

1034. 5 Salk. 14. pl. 1. 175. pl. 1. Holt, 329. pl. 4. (a) That a judgment cannot be reversed as to one count and affirmed as to another, Salk. 24.; and *vide* 7 Mod. 148. 2 Ld. Raym. 841. (b) This was a case after verdict, for on a demurrer to the whole declaration, the court might have given judgment for plaintiff on one count, and for defendant on the other.

Salk. 213. pl. 5. West v. Troles. || See 2 Ld. Raym. 842. 7 Mod. 148. Com. Dig. Pleader (C) 33. || The plaintiff declared, that whereas the defendant 6 *Maii* 1695, for one hundred and twenty weeks' diet then past, had promised to pay him 7s. *per* week, and that the plaintiff *postea*, ss. 6 *Maii* 1695, having found the defendant diet one hundred and twenty weeks then past, the defendant promised to pay the worth, and that it was worth 7s. *per* week; upon *non assumpsit*, and verdict *pro querente*, it was moved in arrest of judgment, that the weeks in the *quantum meruit* are not said to be *alie* than those laid in the special promise, so that the defendant is twice charged with the same thing; *sed non allocatur*; for they do not appear necessarily to be the same, and without necessity the court will not intend them so.

Lil. Reg. 408. || But it is now the practice in K. B. to permit a new count to be added after the end of the second term, when the cause of action is substantially the same; though not for a different cause of action. Tidd's Prac. 698. (9th ed.) || The plaintiff after plea pleaded, or after the end of the second term, shall not add a new count to his declaration (as an *indebitatus assumpsit*, or the like) under pretence of amending his declaration.

2. Who may join or be joined in the same Declaration.

See upon this division, tit. "ACTIONS IN GENERAL (C)," Vol. I. p. 51.

3. What Matters may be joined in the same Declaration.

Brown v. Dixon, 1 Term R. 276. || (c) But this rule though true, as far as it extends, is not a sure test in all cases as to what counts may be joined, and what may not; for debt on bond or judgment may be joined with debt on simple contract, although the pleas are different, and debt may be joined with *detinue*, although the pleas, as well as the judgments, are different. 2 Saund. 117. b. || [The old opinions upon this subject may be found in the first volume of this work, under title "ACTIONS IN GENERAL (C)." It would be unnecessary to introduce them again here, especially as the rule is now settled, that any causes of action which can be comprised in counts that admit of the same general plea and are followed by the same judgment, may be joined in the same declaration. (c)]

Carth. 115. Drake v. Cooper, adjudged.

In trespass *quare vi et armis* the defendants entered his close, containing one hundred acres, &c. (in which a fair time out of mind had been kept on *Michaelmas Day*) *et ad tunc et ibidem fregerunt et divulgser.* divers booths, &c. *ibidem erect.* by the plaintiff for exposing wares and merchandizes to sale there, brought by persons thither

thither resorting, *nec non eo quod* (these defendants) *ad tunc et ibidem impediverunt et disturbaverunt* the plaintiff in erecting other new booths, &c. for the sale of merchandize; by reason whereof the plaintiff lost all the profits of piccage and stallage. Upon not guilty pleaded, the plaintiff had a verdict, and on a motion in arrest of judgment it was objected to the declaration, that the latter part thereof, *viz.* the disturbance in building new booths, founds altogether in case and not in trespass, and is therefore incompatible with the first part of the declaration, which is trespass *vi et armis*, and that these several matters require several judgments; the first a *capitur*, but the last a *misericordia* only, and therefore could not be joined in one declaration. *Sed per cur.* — The disturbance, &c. is laid only in consequence of the first trespass, &c., and it is of the same effect as a *per quod* in a declaration, which is often used in actions of trespass *vi et armis*, to let in the consequential damages, &c., and one plea goes to the whole; for if the defendant had pleaded a licence from the plaintiff to enter the close that would have been a good justification of the trespass.

4. *Of the Declaration's agreeing with the Writ.*

The count or declaration is an exposition of the plaintiff's writ, and must regularly agree therewith; and herein the general rule is, that every thing that comes within the compass of the writ may be comprehended within the declaration, but the declaration cannot be extended beyond the writ; for original writs, issuing out of *Chancery*, are the grounds and foundations of the proceedings of the courts into which they are returnable; and such proceedings must be conformable to the authority given them; whatever therefore may be comprised in the writ, however multifarious, may be comprised in one declaration; but whatever cannot be contained in one writ, cannot be comprehended in the declaration. Doct. pl. 84.
Lil. Leg. 411.

The writ may be general, according to law, but the declaration special; as where a statute gives an action but does not prescribe any form of the writ, the writ framed by the common law will serve, and the special matter may be set forth in the declaration. Doct. pl. 84.

So if lands are given to a woman *quamdiu sola fuerit*, or to a man *quamdiu se bene gesserit*, in waste, the writ shall be general *quod tenet pro termino vitæ*, and the count special. Doct. pl. 85.

[Upon general process (a) the plaintiff may declare *qui tam*, or as executor or administrator, &c. || or the defendant may be declared against in his representative character. (b) || But this rule will not hold *è converso*; for where the process was to answer the plaintiff *qui tam*, &c. (c), and the declaration was in his own name only, omitting the *qui tam* part, the court held the variance to be fatal, and set aside the proceedings. And the like was done, where the process was to answer the plaintiffs (d) as assignees of a bankrupt, and the declaration was in their own right; for the plaintiffs cannot declare generally, on process sued out (a) Weavers' Company v. Forrest, B. R. 2 Stra. 1232.
Lloyd v. Williams, C. B. 2 Black. R. 722.
3 Wils. 141.
|| (b) 6 Moo. 66. 3 Brod. & Bing. 4. S. C. ||

(c) *Canning v. Davis, B. R. 4 Burr. 2417.* out in a special character. || So where the writ was by the plaintiffs as *executors*, and the declaration was by them in their own right, it was deemed a sufficient variance for discharging the defendant out of custody on filing common bail. (e) || And as such variance between the original writ and declaration may be taken advantage of by plea in abatement, so where the action is by bill, the court will interfere upon motion. (g) ||

Imp. Pr. K. B. 172. || Tidd. 450. (9th ed.) (e) 8 Term R. 416; and see 3 Wils. 61. 1 Bos. & P. 383. || *Turing v. Jones*, 5 Term R. 402. — It appears, however, to have been the opinion of *Yates J.* in the case of *Canning v. Davis*, 4 Burr. 2417. that though the plaintiff style himself *executor*, or give himself any other superfluous description in the process, and declare otherwise, yet this will not hurt, for the demand is still the same.

(a) Pr. Reg. 157. || The plaintiff may declare in chief, upon common process by bill in the King's Bench, or on a common *capias quare clausum*

(b) R. E. *fregit* in the Common Pleas (a), for any cause of action whatever. (b) And where the process was in trespass and assault, and the declaration in trover, the variance was deemed immaterial. (c) But in bailable cases the declaration should regularly correspond with the *ac etiam* in the writ, as to the nature of the cause of action. Therefore where the plaintiffs, having held

(c) 2 Chit. the defendant to bail on an affidavit in *assumpsit*, delivered a declaration in trover, the Court of King's Bench ordered an *exoneretur* to be entered on the bail-piece. (d) But they will not permit a defendant to take advantage of a variance in the amount of debt, between the *ac etiam* part of the *latitat* and the declaration. (e) And though, where there is a material variance between the *ac etiam* in the writ and the declaration, the plaintiff will lose his bail (g) yet the court will not on that ground set aside the proceedings for irregularity. (h) It should also be remembered that, in the Common Pleas, a variance between the writ and count, the *ac etiam* being in case on promises but the declaration in debt, is not a ground for entering an *exoneretur* on the bail-piece, where the sum sworn to is under 40*l.* (i) By

(g) Tidd, 294. original the plaintiff must declare in chief, for the same cause of action as is expressed in the writ (k); and if there be a variance between the original writ and declaration the court will discharge the defendant on entering a common appearance. (l) But they will not on this ground set aside the proceedings; for that would be permitting the defendant to do indirectly what the practice of the court will not allow him to do directly, by cravingoyer of the original writ, and pleading the variance in abatement. (m) ||

(h) *Per Cur.* (i) 1 H. Black. 310. (k) R. Hil. Car. 1. K. B. 5 Term R. 402. (l) 6 Term R. 363.; but see 2 Moore, 301. 8 Taunt. 304. S. C. P. (m) *Id.* 2 Wils. 539. Durant v. Serocold, E. 24 G. 3. K. B.; but see 5 Term R. 722. 4 East, 89. 2 New R. C. P. 82. 5 Taunt. 649. 1 Marsh 274.

Comb. 260. If a man bring an original in trespass against one, and declare against him with a *simul cum*, he abates his own writ; but the defendant cannot take advantage of it without demanding *oyer*. If the writ be against two, the plaintiff may declare against one of them with a *simul cum*. (n)

(n) But now on trial, the court will expect some evidence of an attempt to serve with process, to take off his evidence.

Tidd's Prac. (7th edit.) 169. || Formerly the plaintiff was allowed to join several defendants for separate causes of action in one writ, and to declare against them

them separately; and this he may still do where the process is not bailable, but not where the process is bailable; for if the affidavit of debt and the process are joint against several, the declaration must be joint also. || 455, and authorities there cited.

If lands be demised for term of half a year or a quarter of a year, &c., and the lessee commit waste, the lessor shall have a writ of waste against him, and the writ shall say, *quod tenet ad terminum annorum*, but the declaration must be special, according to the case. Lit. § 67. Co. Lit. 54. b.

So if a clerk that is donative be disturbed in a *quare impedit* by the patron, for this disturbance to his church donative the writ shall say, *quod permittat eum præsentare ad ecclesiam*, &c. and the declaration shall be special. Co. Lit. 544. a.

Where the (a) title is of one sort of action, there the declaration can never change it to another; but it may make a fatal variance between the writ and the declaration. Cases Law and Eq. 210.

Queritur in placito transgressionis pro eo quod, &c. yet may it be a declaration in case, notwithstanding the recital of the bill be in *placito transgressionis*, for that will serve indifferently for trespass or case. Cro. Car. 325. Tyffin v. Wingfield. — But for this *vide* Hob. 180. Allen, 84. Cro. Car. 254. 2 Roll. R. 49. Vent. 19. || And it seems the statement of the cause of action in the *queritur*, is superfluous in proceedings by *bill*, and may be rejected. 11 East, 62. 65. || (a) If a declaration begins,

5. *Of the Sufficiency and Certainty required in the Declaration; and therein, of Matters of Inducement, and that which is the Gist of the Action: And herein,*

I. Where by the Declaration it must appear that the Plaintiff hath a Right.

It is a general rule in pleading that the declaration must shew a title in the plaintiff; and that it is regularly true that if the (b) plaintiff will himself discover to the court any thing whereby it may appear that he had no cause of action (c) when he commenced it, his writ shall abate. Hob. 109. Palm. 524. (b) Diversity where such matter is disclosed by the defendant. Cro. Eliz. 111. Leon. 87. 2 Leon. 20. (c) Where the *teste* of original was before the day of payment in the condition of the bond, upon which action was brought; and this though after verdict, was adjudged error. Cro. Eliz. 525. Moor, 598. Buckley v. Williamson; *et vide* Cro. Eliz. 565. — So in case for scandalous words, the day was alleged before the so words spoken. Roll. Abr. 792. * — *The day is not material if laid before suing out writ, if in C. P. or by original in B. R. or before the first day of the term, whereof the declaration is, if by bill || for the plaintiff may give in evidence any cause of action before the filing the bill, though after the issuing the *latitat*. Cowp. 455. || So, in *assumpsit*, where it appeared by the declaration, that the action was brought before the cause, the declaration was held ill. Cro. Car. 574, 575. — In ejectment by the declaration it appears that the defendant was ejected after the lease made it is sufficient, though no certain day is alleged in which he was ejected; for the day is not material, being before the action brought. Cro. Jac. 311. — In ejectment the plaintiff declared, upon a lease made 12 Jun. *habend. a dicto duodecimo die Jun., virtute cujus* he entered, and that *postea scilicet eod. 12^o die Jun.* the defendant ejected him; and because the plaintiff by his own shewing entered as a disseisor, and the defendant ejected him before he had title, after a verdict and judgment for the plaintiff in *Ireland*, upon a writ of error here it was reversed. 5 Mod. 198. Evans v. Croker. *Et vide* Comb. 85. Like point. — But the words subsequent to *postea* might have been rejected as surplusage. Adams v. Goose, Cro. Jac. 96. Bull. N. P. 106. — Where the declaration being of the term generally shall refer to the first day. — That some day must be alleged before the action brought.

brought. 5 Mod. 287. And *note*; if the cause of action arises on some day within the term of which the declaration is delivered, the declaration must be of some day in the term after the cause of action accrued. [And in such case, if the suit is by bill, there must be a special memorandum of the day subsequent to the cause of action. However, where the cause of action was stated to have accrued on the first day of term, the court, on demurrer, held, that the declaration might be entitled of the term generally; for the delivery of the declaration is the act of the party, and in ancient times it could not have been delivered before the sitting of the court; so that the cause of action might well have accrued before the actual delivery of the declaration. Pugh v. Robinson, 1 Term R. 116. — The declaration by bill should, regularly, be entitled of the day on which the writ is returnable; for the bill, of which it is a copy, cannot be filed till bail is put in, which cannot be till the return of the writ. Southouse v. Allen, Ca. temp. Hardw. 141. But *qu.* as to the time of putting in bail; and see Tidd's Pr. 187. — Where there are several defendants, who put in bail of different terms, the declaration should be entitled of the term when the last bail was put in. Stork v. Herbert, 1 Wils. 242. But in a later case it hath been holden that a declaration, though filed and delivered, cannot be entitled of a subsequent term to that in which the writ is returnable, ||so that the plaintiff cannot recover for any cause of action subsequent to the term when the writ is returnable, though before the actual filing of the declaration.|| Smith v. Muller, 3 Term R. 624: — Where a declaration is improperly entitled the plaintiff may have it corrected on an affidavit of the fact. Symonds v. Parmenter, 1 Wils. 78. It may be set right too at the instance of the defendant, if necessary for his defence. Southouse v. Allen, Ca. temp. Hardw. 141. Smith v. Key, 1 Str. 658. Smith v. Raydon, cited 1 Wils. 59. seems S. C. Thompson v. Marshal, 1 Wils. 304. Wilkes v. Earl of Halifax, 2 Wils. 256.] ||*Vide* Tidd's Prac. (7th edit.) 430, 431.||

2 Saund. 579.

Hence it hath been adjudged on the statute of hue and cry, that it is not sufficient for the plaintiff to declare that the goods were in his custody, but he must allege that they belonged to him; but that in the case of a carrier, he may maintain an action against the hundred setting forth the custom by which he is chargeable.

10 Co. 77. a.
But for this,
vide Hob. 5.
Godb. 186.
Cro. Jac. 207.

So in an action upon the case the plaintiff cannot declare *quod cum* the defendant was indebted to him such a sum, the defendant in consideration thereof *super se assumpsit* to pay, &c. without shewing the cause of the debt.

215. 642. Hob. 18. Moor, 854. pl. 1167. Hetl. 106. Roll. R. 391. Bulst. 67. 3 Bulst. 207. Cro. Jac. 397. Hard. 152. — But 171. *per Croke* and *Chamberlain*, there is a diversity where the promise is to pay at a day to come, and where not; for a promise to pay at a day to come implies a forbearance in the mean time; and *vide* Roll. R. 396. — And that such a declaration is not made good by verdict. Cro. Car. 631. Sid. 182. Brownl. 14. Poph. 51. Jenk. 295. — Where the plaintiff declared that the defendant was indebted to the testator of the plaintiff in 20*l.* *quas illi solvisse debuit secundum agreementum inter eos habit.*; the judgment was stayed after verdict, for that the agreement might be by deed. 2 Lev. 162.

Hob. 18.
Woolaston v.
Webb, adjudged
after verdict; *et vide*
like point, Cro.
Jac. 397. 548.
595. Moor,
855. pl. 1167.
3 Bulst. 206,
207. Roll. R. 379, 380. Godb. 15. Hob. 216. Roll. Abr. 19.

But if in an *assumpsit* the plaintiff declares that whereas the defendant was indebted to him in 30*l.*, the defendant, in consideration that the plaintiff had given day to the defendant until, &c. did assume and promise to pay, &c.; this is a good declaration, without shewing for what the defendant was indebted, for the debt is not in question; and though it be true, there must be a debt to make this a good consideration; yet that is allowed in the promise being actual.

Moor, 854.
pl. 1168.

So if in an *assumpsit* the plaintiff declares, that whereas the defendant had received 24*l.* of several persons to the use of the plaintiff, in consideration thereof the defendant did assume and promise to pay, &c.; this is a good declaration, without shewing

shewing of what persons in particular he received the money, because the consideration is executed, and not traversable.

If in an *assumpsit* the plaintiff declares that the defendant, in consideration of, &c. *inter alia* did assume to pay, &c.; this has been held no good declaration, because he ought to set forth the whole promise, which is entire.

¶ But it is now settled to be sufficient if the plaintiff states in his declaration so much of the contract as shews the particular promise for the breach of which he complains. Thus where the plaintiff declared that the defendant warranted bacon sold to plaintiff to be prime bacon and of good quality, this was held sufficient, although it was also part of the warranty that the bacon was *singed* and of *Strangeman's* manufacture; for the plaintiff complained only of the inferiority of the quality. But the whole of the *consideration* moving to the defendant must be stated; for the consideration is entire, and it must be shewn that it is entirely performed.¶

But in an *assumpsit* the plaintiff declares, *quod cum* there were several reckonings and accounts between the plaintiff and defendant, and at such a day, &c., *insimul computaverunt* for all debts, reckonings, and demands; and the defendant upon the said account was found to be in arrear the sum of 20*l.*, in consideration whereof the defendant promised to pay, &c.; this is a good declaration, without shewing it was *pro mercimoniis*, or otherwise, wherefore he should have an account; for an account may be for divers causes, and several matters and things may be included and comprised therein, which *in pede computi* are reduced to a sum certain; and thereupon being indebted to the plaintiff, it is sufficient to ground an action.

In *assumpsit* the plaintiff declared, that the defendant was indebted 20*l.*, *pro præmio* upon a policy of insurance upon such a ship, and the defendant demurred specially, because he did not shew the consideration certainly what the *præmium* was, or how it became due: *sed non allocatur*; for this is as good as an *indebitatus pro quodam salario*, which has been adjudged good.

In *assumpsit* the plaintiff declared *pro opere et labore* generally, without setting forth what sort or manner of work or labour it was; and though it was objected that it should be set forth particularly, so that it may appear to the court to be lawful work; yet the court held it well enough: and that the only reason why the plaintiff is obliged to shew wherein the defendant is indebted is, that it may appear to the court that it is not a debt on (a) record or specialty, but only upon simple contract; and any general words by which that may be made to appear are sufficient. (b)

on a record or specialty. Cro. Car. 6. Leon. 155. Cro. Eliz. 242. ¶(b) Lord Holt used to say he was a bold man who first ventured on these general counts, though now they are of every day's experience. 2 Stra. 953. Carth. 276. They may be resorted in all cases where the special contract is executed, and nothing remains to be done but payment of money. 12 East, 1. 1 Bos. & Pull. 397.; and see 1 Will. Saund. 269. b. And all the common counts in a declaration may properly be included in one count, see 2 Will. Saund. 121. c.¶

Allen, 5.; *et vide* March, 100.

Cotterill v. Cuff, 4 Taunt. 285.; and see Ward v. Smith, 11 Price, 19. Tempest v. Rawling, 15 East, 18. Squier v. Hunt, 5 Price, 68. Clarke v. Gray, 6 East, 564.

Cro. Car. 116. Hetl. 106. 883. S.C. and Poph. 177. Latch, 141. Palm. 442. Yelv. 70. Roll. R. 396. S. P.

2 Lev. 153. Fawk v. Pin-sack.

Carth. 276. adjudged, Vent. 44. S. P. Sid. 425. S. P. 2 Keb. 552. S. P. Mod. 8. S. P. (a) For damages recovered in an *assumpsit* will be no bar to an action of debt grounded

Show. 17. If the bailiff of a liberty declares, that the franchise and liberty
 Caryv. Bachus. of returning and executing all writs, bills, and receipts out of the
 king's courts belongs to him; and that the defendant, without
 his licence, and against his consent, executed a *feri facias* within
 the said liberty, this is a good declaration, without setting forth
 any title, or that he enjoyed the said liberty by grant or prescription.
 Adjudged upon demurrer to such a declaration; for the
 court held, that if the defendant had taken issue, it would have
 been incumbent on the plaintiff to prove a title.

2 Jon. 157. So in an action for stopping an usual and convenient way to
 Hart v. Basset, his (the plaintiff's) lands, the declaration was held good without
 Carth. 85. shewing a title.
 S. C. cited.

Carth. 84. So in an action on the case for diverting a watercourse, the
 Show. 64. plaintiff declared, that the defendant *malitiosè*, &c. *infregit* a cer-
 3 Mod. 41. tain mill-dam, *et perindè* did divert the watercourse *ab antiquo et*
 3 Lev. 153. *solito cursu erga* the corn mill of the plaintiff, by reason whereof
 S. C. Skin. 65. he lost the profits of his said mill; but did not set forth that that
 pl. 10. 175. water used to turn his mill, or that he had any other profit
 pl. 5. Heble- thereof, or that the watercourse was *antiquus aquæ cursus*, &c.
 thwaite v. yet the declaration was held good; the court being of opinion,
 Palms. that the (c) possession alone was sufficient to maintain an action
 (c) Where in against a wrong doer, and that this was of the same nature with
 several cases an action of trespass. But *Holt C. J.* said, that if the cause had
 possession been tried before him, the plaintiff should have proved his mill
 without prop- to be an ancient mill, otherwise he should have been nonsuit.
 erty is suffi-
 cient to main-
 tain an action,
vide Palm. 200.

4 Co. Lutterell's case, and tit. *Trespas*. ||It is clearly now sufficient in
 declaring for not grinding at plaintiff's mill, or for disturbance of his common, way, water-
 course, or other incorporeal hereditament or easement, to state only a possessory title in the
 declaration; see *Willes R. 654. 2 Will. Saund. 115. 1 id. 346. a.* and cases there collected.||

Lev. 179. In *assumpsit* it was, in consideration he permitted the defendant
 Sid. 279. to take the profits of such lands for seven years last past, at his
 2 Keb. 8. S. C. instance and request, the defendant promised to pay him as much
 and Cro. Eliz. as they were worth; and it was moved in arrest, &c. that the
 859. S. P. plaintiff had not set forth a title here as he should have done; but
per cur. it is well enough; and to maintain such an action as this
 upon evidence, an actual promise must be proved.

Noy, 86. An action upon the case was brought for stopping a way which
 the defendant had from such a place over *Black Acre*, where the
 nuisance is, unto such a field by name; and it was ruled to be
 good, without shewing what interest he had in that field, for it
 shall be intended to be a common field; but otherwise, had it
 been *usque ad talem clausum*, there he ought to shew what in-
 terest he has in the close.

In an action upon the case, supposing that he was seised in
 fee of the manor of *H.*, and of a fair to be held there every As-
 cension-day, and that the defendant disturbed him to take toll,
 &c. the defendant pleaded not guilty, and found against him: it
 was moved in arrest of judgment, that the declaration was not
 good, because he does not shew a title to the fair by grant or
 prescription, and therefore no cause of action; but *per cur.* not
 necessary, because only a conveyance to the action, and is not
 any

Cro. Jac. 43.
 123. Dent v.
 Oliver, ad-
 judged. [Ben-
 nington v.
 Taylor,
 2 Lutw. 1517.
 Chafin v.
 Betsworth,
 3 Lev. 190.
 S. P.]

any claim thereof as to the right, as in a *quo warranto*, and the declaration, without special title therein comprised, is good.

[An action on the case was brought, setting forth that the plaintiff was possessed of a tenement, and a close of pasture, and a rood of land, &c. in *S. M.*, and that he had right of common in *Mendip* forest for his cattle, &c., as thereunto belonging; that the defendant digged and made coney-boroughs in the said forest, and set nets and gins there, by which his sheep were damnified; and he was deprived of common, &c. It was objected that the declaration was not good, for that it rested merely upon possession, and did not shew any title to the common, either by grant or prescription. But the declaration was adjudged to be proper. 1. Because it is an action grounded upon the possession against a wrong-doer; to which a title would be only an inducement. 2. Title to the common need not be alleged, because it did not appear whether the defendant was owner of the soil, or a stranger. It is true, if it had been upon special pleading, as in trespass for distraining his cattle, and the defendant had pleaded that he was owner of the soil, and so justified the taking, the plaintiff in such case must have replied (*a*), and shewn a title by grant, or prescription, or some conveyance. And lastly, This matter is not traversable; for upon the general issue a right of common must be proved and given in evidence, otherwise the plaintiff cannot maintain his action, but *what right* is not material.]

So in an action for disturbing the plaintiff in the enjoyment of a pew in a church, possession and laying it to be appurtenant to a messuage (*b*) are sufficient against a mere stranger, without laying or proving the plaintiff repaired the pew, or shewing any title or consideration whatever. As against the ordinary indeed, who hath *primâ facie* the disposal of all the seats in the church, a title must shewn in the declaration, and proved.

appurtenant to a messuage. *Stocks v. Booth*, 1 Term R. 428. || *Griffith v. Matthews*, 5 Term R. 296. *Mainwaring v. Giles*, 5 Barn. & A. 356. 2 Saund. 175, c. d.]

If a plaintiff have a prescriptive right of burial in a church, he need not against a wrong-doer set forth the whole of it: it hath indeed been doubted whether he may not in such case rely merely upon his possession.

But where a person claims a servitude upon another's property, it is said in several cases that he must, against the owner of such property, set forth and prove the whole of his title. However, later cases seem to have gone otherwise.

The plaintiff declared, that he was seised in fee of a mill, and had a watercourse running in the defendant's land to the said mill, and that the defendant had stopped it. This was holden well upon demurrer, without shewing any title to the watercourse.

The plaintiff declared, that he was for four years last past seised in fee of a parcel of land adjoining to the defendant's meadow,

Strode v. Byrt,
4 Mod. 418.
Comp. R. 7.
Skin. 621.
S. C. *Dorney*
v. Cashford,
1 Ld. Raym.
266. S. P.
Bean v.
Bloom, 5 Wils.
456. S. P.
|| *Vide* 15 East,
108. 1 Taunt.
205. 1 Saund.
346. n. (2).
2 Will. Saund.
113.]

(*a*) *So*, *Vernon*
v. Goodrich,
1 Stra. 6.

Kenrick v.
Taylor, 1 Wils.
326.
(*b*) In all cases
it seems ne-
cessary to
claim the pew
in the decla-
ration as

Waring v.
Griffiths,
1 Burr. 440.
|| *See Spooner*
v. Brewster,
5 Bing. 136.]

Vide the cases
suprà.

Sands v.
Trefusis, Cro.
Car. 575.

Winford v.
Wollaston,
3 Lev. 266.

Warren v.
Sainthill,
2 Ventr. 180.
S. P. Blockley
v. Slater,
1 Lutw. 119.
S. P.

meadow, *et sic inde seisitus per totum tempus prædictum habere, frui et uti debuit quandam viam per quandam januam* of the defendant in the meadow of the defendant *usque* a close of the plaintiff, and that the defendant stopped the gate *cum serâ et catenâ*; and upon motion in arrest of judgment, the declaration was holden to be good, though no title was shewn to the way, though the defendant was terre-tenant, and though the charge was against common right, and such a charge as could not commence but by grant.

2 Ld. Raym.
204.

In the case of the King v. *Bucknall*, Lord *Holt* said, "Where a man is obliged to make fences against another, it is enough to say *omnes occupatores* ought to repair, &c., because that lays a charge upon the right of another, which, it may be, he cannot particularly know."

Anon. 1 Ventr.
264. || *Vide*
2 Saund. 114.
b. ||

In an action for not repairing a fence, the allegation was, that the tenants and occupiers of such a parcel of land adjoining the plaintiff's had time out of mind maintained it, &c. It was moved in arrest of judgment, that the prescription is laid in occupiers, and yet their estates are not shewn; and that hath been judged naught in 1 Cro. 155. and 2 Cro. 665. But the court said, "It is true there have been opinions both ways, but it is good thus laid, for the plaintiff is a stranger, and presumed ignorant of the estate; but otherwise it is if the defendant had prescribed."

Tenant v.
Goldwin,
1 Salk. 360.

So in an action on the case for not repairing a wall, "*debuit reparare*" hath been adjudged sufficient.

2 Ld. Raym. 1089. 6 Mod. 311.

Riderv. Smith,
3 Term R. 766.

So in an action for not repairing a private road leading through the defendant's close, that the defendant as occupier is bound to repair.]

Drake v.
Wiglesworth,
Wilkes R. 654.
2 Saund. 113.
b. n.

|| So also in a declaration for not grinding corn at the plaintiff's mill, it is no longer necessary either to state the plaintiff's estate in the mill, or that there was custom for the defendant or inhabitants to grind there. But the plaintiff may declare generally on his possession, by reason whereof he is entitled to the toll of the corn ground, and that defendant occupied a messuage, &c., and by reason thereof *ought* to grind, &c. at the mill.

But it is to be observed, that all the above cases, as to declaring generally without setting out a title, establish merely a rule of *pleading*: for the plaintiff's *evidence* remains the same; and he must still prove his title at the trial, or he cannot recover.

Doug. 223.

Thus, in an action for not grinding at the plaintiff's mill, the plaintiff is bound to prove the custom, that the defendant is subject to it, and the breach of it. And the defendant does enough if he disprove any of them.

2 Saund. 114.
a. n. 3 Term
R. 767.

And the distinction between declaring against the owner of the soil and a wrong-doer is now done away; and in both cases the plaintiff may declare generally on his possession. ||

In

In debt upon a lease, the defendant may declare *quod dimisit*, and need not allege a seisin in himself when he made the lease. Yelv. 48.

[In covenant on a lease, the plaintiff in stating his title set forth, that one S., who was seised in fee, made the lease in question, and that on his death the reversion descended to the wife of the plaintiff, as the heir-at-law of S., whereupon he (the plaintiff) became seised *of the reversion, as of freehold, in right of his said wife*. On demurrer, the declaration was holden to be ill; for, from his own shewing, there was a seisin in fee *in both* in right of the wife. Polyblank v. Hawkins, Dougl. 329.

In general, however, in covenant, the plaintiff need not set out any title, but begin generally *quod cum dimisisset*; and therefore where a plaintiff had merely set out his title imperfectly, as by omitting the person under whom he claimed, it was holden that this was surplusage, and could be rejected.] Aleberry v. Walby, 1 Stra. 229.

In debt against lessee for years for the arrearages of rent reserved upon the lease, he need not declare that the lessee entered, for the contract is the ground of the action. 4 Leon. 18.

[In an action against a person who farms the post-horse duties under the statute of 27 G. 3. c. 26. for neglect of duty, the plaintiff must aver specifically that the defendant is the person appointed under and by virtue of the act of parliament upon whom the duty is thrown. It is not a sufficient title to state that the defendant is a collector of the rates and duties *recited* in a certain act, &c.] Short v. Pruett, 6 Term R. 163.

2. Where the Plaintiff must shew that he hath performed what was requisite on his Part: ||And herein, of Conditions precedent, and dependent, and independent Covenants.||

1. It is laid down as a general rule, that in all cases where an interest or estate commences upon condition, be the condition or act to be performed by the plaintiff, defendant, or any other, and be it in the affirmative or negative, there the plaintiff ought to shew it in his declaration, and aver the performance of it; for the interest or estate commences in him upon the performance of the condition and not before. But when the interest or the estate passes presently, and vests in the grantee, and is to be defeated by matter *ex post facto*, or condition subsequent to be performed in the affirmative or negative, or to be performed by the defendant or any other; there the plaintiff may count generally without shewing any performance; and this shall be pleaded by him who is to take advantage of it. 7 Co. 10. Lil. Reg. 418.

||There are not any precise technical words necessary to constitute a condition precedent, or a dependent or independent covenant. Whether a condition be precedent or subsequent, or a covenant dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties as far as can be collected from the instrument; and however transposed the covenants may be, Per Lord Mansfield in Kingston v. Preston, Dougl. 690; et vide Willes R. 496. 5 Term R. 371.

be, their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence that an action cannot be maintained, unless performance, or that which the law considers as equivalent to performance, be averred and proved. ||

Co. 10. Doct.
pl. 85.

If an annuity of 10*l.* per annum be granted to a man when he shall be promoted to a benefice, in his demand of it he must shew that he is promoted; but if it be granted until he be promoted there he shall have a writ of annuity; and he need not say that he is not yet promoted, because the annuity precedes, and the promotion is subsequent.

Thomas v.
Cadwallader,
Willes R. 496.

|| In an action by lessor on a covenant by defendant to repair "the lessor finding timber, &c.," it is necessary in the declaration to aver that the lessor found timber; for it is a condition precedent to the defendant's covenant.

Glazebrook v.
Woodrow,
8 Term R.
366.; *vide*
Heard v.
Wadham,
1 East, 619.

So where the declaration stated that by articles of agreement the plaintiff covenanted that he would on or before 1st *August* 1797 convey to defendant a school-house, and would on or before the 24th *June* 1796 surrender up the premises to defendant, and deliver over, as far as he could, all the pupils, &c.; and in *consideration thereof* the defendant covenanted to pay the plaintiff on or before the 1st *August* 1797 a sum of money, and then averred that plaintiff surrendered up the premises, &c, but did not aver that he made any conveyance, the court on demurrer gave judgment for the defendant on the ground that the conveyance was the consideration of the defendant's covenant, and that it was necessary to aver that a conveyance was made, or at least tendered.

Worsley v.
Wood,
6 Term R.
710

So where the plaintiff declared on a policy against fire, by which it was stipulated that the assured sustaining a loss should procure a certificate from the minister, churchwardens, &c., that they believed the loss to be without fraud, it was held that the procuring this certificate was a condition precedent to the plaintiff's claim, and that he could not recover without averring that it was procured; and it made no difference that the minister, churchwardens, &c., refused to sign it.

Davis v.
Mure, 1 Term
R. 642.

So where in a charter-party the defendant, the freighter, covenanted that if the ship should be taken, and it should appear to a court-martial that the master and company had made the best defence they were able, the value of the ship should be paid by defendant, it was held a condition precedent that it should appear to a court-martial, &c., and the plaintiff was bound to shew that it had appeared, &c., or that it arose from the fault of the defendant that it had not.

Cook v.
Jennings,
7 Term R. 581.
vide Smith v.
Wilson,

So where the plaintiff had let his ship by charter-party to the defendant to freight from *Liverpool* to *W.*, and back to *Liverpool*, in consideration of which the defendant agreed to pay freight at so much per hundred for deals *delivered at Liverpool*, it was held that

that the delivery at *Liverpool* was a condition precedent to the plaintiff's right to freight, and that the plaintiff was bound to aver and prove it; and consequently the vessel having been wrecked before her arrival at *Liverpool*, and obliged to unload the deals elsewhere, the plaintiff could not recover on the charter-party; and this notwithstanding the defendant had accepted the deals so unladen.

8 East, 437.
Storer v.
Gordon,
5 Maul. & S.
308. Gibson
v. Mendez,
2 Barn. & A.
17.

2. And where the agreement is by *deed* the plaintiff cannot excuse himself from performance of a condition precedent by showing a parol dispensation, or a substitution of some other act by the defendant; for an obligation by deed cannot be altered but by deed. Therefore, where the plaintiff covenanted by charter-party to sail with his ship from *London* to *Gibraltar*, and there, or at certain other places, to take in a homeward cargo, and return and deliver the same at the port of *London*, and the agent of the defendant at *Cadiz* directed by *parol* that the plaintiff should deliver the homeward cargo at *Liverpool* instead of *London*, and the plaintiff did so — it was held, that he could not recover freight in an action on the charter-party, since he could not shew a performance according to the deed; and the substitution by parol of *Liverpool* for *London* could not do away with the covenant in the deed.

Thomson v.
Brown, 1 Moo.
358.; *et vide*
11 East, 585.
3 Term R. 592.

3. If the plaintiff shews a *substantial* performance of the condition on his part it is sufficient. As where the plaintiff declared on an agreement by which the defendant agreed "to pay the plaintiff 5*l.* if he would procure him a tenant for defendant's house, and get him 350*l.* for the lease." The plaintiff procured one S., who offered to take the house at 350*l.*, and an agreement was signed between S. and defendant, and 50*l.* was paid as a deposit, but S. was unable to complete his contract, and defendant consented to release him, detaining the 50*l.* as a forfeit; it was held that this was a sufficient *substantial* performance of the condition, on the part of the plaintiff, to entitle him to recover the 5*l.*||

Horford v.
Wilson,
1 Taunt. 12.

4. If by the same deed each party is to do something advantageous to the other, and on such deed there is not a mutual remedy, the plaintiff in his declaration must aver, that he hath performed what was to have been done by him.

Saund. 519,
520.

|| As where the plaintiff declared that the defendant agreed by *deed poll* that he would accept S. S. stock of the plaintiff as soon as the receipts should be delivered out by the company, and would pay for the same on the 5th of *November* next after the date of the writing, and then averred that the defendant did not pay for them at the day. On demurrer the declaration was held bad for not averring an assignment of the stock or a tender of it; for the intent of the parties appeared to be that one should have the money, and the other the stock; and this was not a covenant entered into by both parties upon which each would have his mutual remedy, but a *deed-poll* of defendant only; and therefore, though on delivery or tender of the stock the plaintiff would

Lock v.
Wright, Stra.
569.

would have his remedy for the money, yet the defendant on payment of the money would not have any remedy to compel the delivery of the stock.||

5. [So where two acts are to be done at the same time, neither party can maintain an action, without shewing a performance, or an offer to perform on his part; for where the performance of the plaintiff is prevented by the neglect or default of the defendant, that is equal to a performance.]

Kingston v. Preston, Dougl. 688. note. Jones v. Barclay, Dougl. 684.

Blackwell v. Nash, 1 Stra. 535. Goodisson v. Nunn, 4 Term R. 761. Hotham v. East India Company, 1 Term R. 638. 645. ||Porter v. Shephard, 6 Term R. 665.||

Where, however, the act to be done by the plaintiff is the payment of money, as the price of that to be done by the defendant, (as in actions for not delivering purchased goods, &c.) the plaintiff is bound to aver a readiness and willingness to pay, but he need not aver a tender and refusal, for a tender and refusal being in all cases equivalent to performance, of course need only be averred where a performance is requisite; but a plaintiff is not bound to perform his part by paying the price till the defendant has done the act for which it is payable. The averment of readiness, &c. seems to import an ability as well as will, and the plaintiff in proof of it would probably be bound to shew that he had the money about him ready to pay.

But where the plaintiff sues for the price, and the act on his part is the consideration for which the money is payable, there the plaintiff must shew a performance, or that which is tantamount to it; for in these cases, although the doing the act by one party, and the paying the price by the other, are according to the terms of the contract to be concurrent, yet it is in the nature of such contracts that the money is not to be paid till the act is performed. Thus, in contracts for the sale of goods, it is not sufficient for the vendor in suing for the price to aver a readiness to deliver, but he must aver a delivery or an offer and refusal which are equivalent to it, although we have seen that the vendee may sue for the non-delivery with an averment merely of readiness to pay the money.

So where the defendant agreed to purchase a copyhold estate, and pay the purchase money on having a good title and a proper surrender, in an action for the purchase money by the vendor, it was held not sufficient for him to aver a general readiness and offer to make a good title and surrender on payment of the money, but the plaintiff ought to have averred that he had actually made a good title and surrendered the estate to the purchaser, or a tender and refusal, and also to have shewn what title he had.

So in an action for not accepting and paying for stock, the plaintiff must shew either an actual tender and refusal of the stock, or that which is equivalent to it; viz. an attendance at the place of transfer until the last moment at which transfers are made, on the day appointed, and a neglect of defendant to attend on notice.

Morton v. Lamb, 7 Term R. 125. Rawson v. Johnson, 1 East, 203. Levy v. Herbert, 7 Taunt. 514. S. C. 1 Moo. 56. Waterhouse v. Skinner, 2 Bos. & Pul. 447.

Bristow v. Waddington, 2 New R. 355. *ibid.* 233.

Phillips v. Fielding, 2 H. Black. 123.; *sed vide* Martin v. Smith, 6 East, 255. and 1 Moo. 498.

Bordenave v. Gregory, 5 East, 107.; *vide* Archb. on Plead. 86.

In the above cases it is necessary for the plaintiff to shew either a performance, or a tender and refusal, or a readiness to perform. In the following cases it is unnecessary: —

1st. Where a day is named for doing the act of the defendant (whether payment of money, or any other act) which must or may arrive before the act on the plaintiff's part is to be performed, In such case an action may be brought for the money, or for not doing any other act, before performance by plaintiff; for it appears that the defendant relied on his remedy, and did not intend to make the performance by plaintiff a condition precedent.

Ughtred's case, 7 Rep. 10. b. 1 Will. Saunders, 520. a. Terry v. Duntze, 2 H. Black. 589.

As where a man agrees to serve another in war, and the other agrees to pay him so much money for his service before the war begins, the service is clearly not a condition precedent to the payment of the money, and therefore the party may sue for the money without averring performance of the service.

48 Ed. 5. 2, 5. 7 Rep. 10. b.

So if a man covenant to pay another 500*l.* for teaching him a business, 250*l.* to be paid down, and 250*l.* on the 25th *February* following, an action may be maintained for the second 250*l.* after the 25th *February*, without averring that the plaintiff taught the defendant the business.||

Campbell v. Jones, 6 Term R. 571.

[2d. Where mutual covenants go to the whole of the consideration on both sides, they are in that case mutual conditions, and a performance must be averred. But it is otherwise where they go only to a part, and where recompence may be had in damages.]

Duke of St. Albans v. Shore, 1 H. Bl. 270. Campbell v. Jones, 6 Term R. 572.

||In other words, where the consideration for the defendant's promise is in its nature divisible, and the plaintiff has performed the *substantial* part of the consideration, the defendant shall not be allowed to defend himself from an action for not performing his agreement, by shewing that the plaintiff has not performed some subordinate stipulation on his part; but such stipulation shall be considered an independent covenant, on which the defendant may have his remedy by a separate action.

Thus where the plaintiff had sold to the defendant an estate in *Dominica*, with the negroes, under the usual covenants for a good title, &c. in consideration of a sum in gross, and a certain annuity which the defendant covenanted to pay, "he, the plaintiff, well and truly performing all and singular the covenants and agreements in the said indenture of sale contained;" and in bar to an action for arrears of the annuity the defendant pleaded that the plaintiff had not a title to bargain, sell, &c. the said plantation and negroes, &c. in manner and form as in the indictment mentioned; the court said it would be strange if such a defence were allowed, when if any one negro on the plantation were proved not to have been the property of the plaintiff it would bar his action for the annuity. And *Lawrence J.* observing on the case said, that the judgment of the court went on the ground that the plea did not necessarily go to the whole

Boone v. Eyre, 8 Term R. 575. 1 H. Black. 275.

the

the consideration, but if the plea had been that the plaintiff had not any title to the *plantation*, he did not know that it would not have been held sufficient; and *Le Blanc J.* said — The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity to say that the plaintiff had not a good title in some of the negroes which were on the plantation, because all the *material part of the covenant had been performed*, and the defendant had a remedy upon the covenant for any special damage sustained by the nonperformance of the rest.

Ritchie v.
Atkinson,
10 East, 295.
et vide
Havelock v.
Geddes,
10 East, 555.
Davidson v.
Gwynne,
12 East, 389.
1 Saund.
320. c.
Archb. on
Pleading. 88.

So also where the master and freighter of a vessel of 500 tons burden, mutually agreed that the ship being every way fitted for the voyage, should proceed to *Petersburgh*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same on being paid freight at so much *per ton*; it was held that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo at the stipulated rate *per ton*, the freighter having his remedy in damages for the short delivery. And Lord *Ellenborough* said — that all the cases of conditions precedent had been where the thing to be done was a strict *indivisible* condition, but that here the condition was *divisible*.||

2 Mod. 309.
5 Co. 10.
Cro. Jac. 645.
2 Lev. 41.
Show, 391.
Comb. 265.
Vide tit. Covenant.

3d. Where there are reciprocal covenants, on which each party may bring his action, it is held, that in assigning a breach the plaintiff need not shew a performance on his part; and on this reason, that each hath a remedy, it is held, that reciprocal covenants cannot be pleaded one in bar of another.

Sand. 519.
Portage v.
Cole,
2 Lev. 74.
Sid. 425.
Raym. 185.
2 Keb. 542.
S.C. [Trench
v. Trewin,
1 Ld. Raym.
125. S.P.]

Thus, a writing was drawn in these words: *It is agreed that A. shall pay to B. 770l. for his land and house, &c., the money to be paid before Midsummer; in witness, &c.* It was sealed by both parties: the money not being paid at the day, *B.*, without making or tendering any conveyance of his land, brings an action of debt upon the bill; and resolved, that it was well brought; and in this case it was said, that *A.* might have an action of covenant against *B.* for not conveying the land.

Hob. 88.
Nicholls v.
Rainbred,
and Hob. 106.
S.P. That
where there

J. S. brought an *assumpsit* against *J. D.*, declaring, that in consideration *J. S.* promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50s. Adjudged, that the plaintiff need not aver the delivery of the cow, because it was (*a*) promise for promise.

are mutual promises, the plaintiff need not aver a performance on his part. *Yelv.* 154. *Mod.* 62. *Roll. R.* 356. *Vent.* 41. *Hard.* 102. *March.* 75. *Cro. Eliz.* 705. *Lev.* 20. 295. *Cro. Eliz.* 157. *Leon.* 186. (*a*) That both promises ought to be made at the same time, otherwise they will be *nuda pacta*. *Hob.* 88. *Cro. Eliz.* 137. *Leon.* 186.

Martindale v.
Fisher,
1 Wils. 88.

[If the plaintiff declares, that in consideration he had agreed to deliver cloth to the defendant, the defendant agreed to pay him

him so much in case *A.*'s horse beat *B.*'s, which he avers he did, he need not aver the delivery of the cloth. *Secus*, if it were in consideration that plaintiff would deliver cloth, defendant would pay; for in that case the delivery must be averred.

In *assumpsit* on an agreement to forfeit a deposit of five guineas, and also to pay another sum of 10*l.* if the defendant did not accept possession of certain premises from the plaintiff, and also pay for certain fixtures therein, at a fair appraisement by two appraisers; it was adjudged on a special demurrer, that the declaration was ill, because the plaintiff had not shewn his right to the premises, so that he could have delivered possession according to the agreement. As each was to name an appraiser, he ought also to have shewn that he had done so.]

Luxton v. Robinson, Dougl. 620.

In debt on an obligation for payment of money, so soon as several bills of costs are settled, it ought to appear by the declaration that the bills were settled, or that there was some default in the defendant by which means they could not.

2 Saund. 107.

3. Where general Allegations in the Declaration are sufficient; and therein, of Misrecitals, Omissions, ||and Variances||.

Although the plaintiff must set forth in his declaration every material thing, without which he could not be entitled to his action, yet herein the law requires no greater certainty than the nature of the thing is capable of, and therefore, if a contract be made in general terms, the declaration upon such contract may be in the same terms: as, if the plaintiff declare, that whereas the defendant was possessed of the sixth part of a ship, and it was agreed the defendant should by writing sell his interest to the plaintiff for 600*l.*, and that the plaintiff should pay 20*l.* in hand, and the residue *super executionem* of the said writing; and that in consideration the plaintiff had paid the 20*l.*, and assumed to perform the agreement on his part, the defendant did assume to perform it on his part; *præd. tamen* the defendant had not performed the agreement on his part: this being on a mutual promise, the breach is well assigned in the words of the promise.

3 Lev. 319.
Keech v. Knight.

So if in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessaries as he should want, the defendant assumed and promised to pay, &c., and avers, that he found him necessaries amounting to such a sum, &c.; this is a good declaration, without shewing in particular what those necessaries were, being in the words of the contract; and the adding the particulars would make the record too prolix.

3 Bulst. 31.
Crips v. Bainton, Roll. R. 173. S. C.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, &c. who pleaded *infra ætatem viginti et unius annorum*; the plaintiff replied, it was for necessaries generally; and upon demurrer to his replication it was objected, that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good.

Carth. 110,
111. Huggins v. Wiseman,
3 Lev. 170.
S. P. 3 Mod. 69, 70. *et vide* Cro. Jac. 486. *cont.*

Lev. 94. French
v. Pierce.

(a) In an action
of covenant
several
breaches may
be assigned;
otherwise,
in debt upon
an obligation
conditioned to
perform covenants.

In debt upon an obligation, conditioned to satisfy for all goods that an apprentice shall waste; in his replication the plaintiff assigned for breach, that he had wasted *diversa bona ad valentiam* 100*l*. And adjudged upon demurrer that it was good, without shewing what the goods were, for the penalty of the obligation is to be recovered upon any breach; but *per cur.* — It would be otherwise in (a) covenant where there is to be a recompence for the damages.

Lev. 78.

Keb. 371. 468.
490. Conyers
v. Smith.

In an action of covenant, the agreement was to pay rents at several days during the term; plaintiff assigns breach, that he did not pay the several rents at the several days during the term; this was urged to be double, uncertain, and naught: but the court held, that in covenant the plaintiff may assign the breach as general as the covenant, though it includes twenty matters; and that here it might be intended that no one rent was paid upon any one day during the term.

Salk 139. pl. 5.
Ld. Raym. 478.
Farrow v.
Chevalier.

In covenant by a master against his servant, on a covenant not to buy or sell without the master's leave within two years; the breach assigned was, that he had *diversis diebus et vicibus*, between such a day and such a day, sold to *H.* and to several other persons unknown, goods to the value of 100*l*. After verdict for the plaintiff, it was moved in arrest of judgment, that the breach was uncertain as to the time and persons; but the court held it certain enough, and that in covenant it is sufficient to assign a general breach.

Cro. Jac. 298.

If a breach of covenant is sufficiently alleged, the plaintiff need not conclude *et sic non tenuit conventionem in hac*, &c., for that is but repetition.

9 Co. 60. be-
tween Brad-
shaw v. Sal-
mon. Cro. Jac.
304. S. C. ad-
judged; and
that the defen-
dant must
shew that he
was seised
in fee, and then
the plaintiff must
shew a special title
in somebody else;
but the covenant
being general, the
general assignment
of a breach *prima facie*
is good. (b) That
he was not lawfully
seised in fee of an
indefeasible estate.

If *A.* leases to *B.* for years, and covenants that he hath full power and lawful authority to lease, &c. and in an action upon this covenant *B.* says, he had (b) not full power and lawful authority to lease, &c., the breach is well assigned, for he hath well pursued the words of the covenant *negative*; and what estate he had lies more in the notice of the lessor than of the lessee; and therefore he ought to shew what estate he had at the time of making the lease, that it may appear that he had full power.

Jon. 218.

Symons v.
Smith. Cro.
Car. 176. S. C.
adjudged; *et*
vide Hard. 132,
133.

If *A.* covenants to permit *B.*, his heirs and assigns, to take and enjoy the rents, issues and profits of certain lands, and in an action upon this covenant the plaintiff assigns for breach, that *A.* took the profits, *et* (a) *non permisit B.* to enjoy, &c. This breach is well assigned; for the taking the profits by *A.* is a special disturbance.

(a) But *non*

permisit only is too general. 8 Co. 89. b. 91. b.; *et vide* And. 137. 2 Vent 278.

¶ Where the plaintiff sues for a mere duty payable on request, it is not necessary to aver a request, for in such case the bringing of the action is a sufficient request; but where a collateral sum is promised to be paid on request, then the plaintiff in suing for it must aver a request with time and place; for the request is parcel of the contract, and no action arises until the request is made, and the omission of averring a special request, where by law it is necessary, is matter of substance, and bad on demurrer, and even after verdict; though if the declaration contain the general averment *licet sæpius requisitus*, it will be good unless specially demurred to.

And where the defendant has, by his own act, put it out of his power to fulfil his agreement, there an averment of request is unnecessary.¶

[Where the defendant covenanted, that he would not take wood without the assent or assignment of the lessor or his assigns, it was holden not to be sufficient to allege in the declaration that the defendant took wood *without the assignment* of the lessor or his assigns; for it might be with *their assent*, and so no breach.

But where the covenant was "to pay or cause to be paid," that the defendant had not paid, was holden to be a sufficient assignment of the breach, without adding "or caused to be paid," for if the defendant had caused to be paid he had paid.]

¶ But in assigning a breach on a recognizance conditioned that *J. B.* and *G. K.* should pay, &c., or render themselves, on special demurrer, it was held not sufficient to allege that *J. B.* and *G. K.* had not paid, &c., or rendered themselves according to the form and effect of the recognizance, without averring that *neither* of them had done so.¶

In assigning a breach of covenant for quiet enjoyment the plaintiff alleged, that at the time of the demise to him, *A. B.* had lawful right and title to the premises, and having such lawful right and title entered, &c., and evicted him, &c., and adjudged sufficient, though he did not shew what title *A. B.* had, or that he evicted the plaintiff by legal process.]

If *A.* grants a rent to *B.* and his heirs for the life of *C.*, to the use of *C.*, and covenants with *B.* to pay the rent *ad opus et usum* of *C.*, and in an action upon this covenant *B.* assigns the breach in not paying the rent to him, *ad opus et usum* of *C.* this breach is well assigned in the words of the covenant, though a negative pregnant.

138. S. C. adjudged, and said, that if it was paid to *C.*, which is a performance in substance, the defendant ought to have pleaded it; otherwise it shall not be intended. ¶ *Vide* as to nega-

¶ No inconvenience can arise from assigning a breach as largely as the contract, for the plaintiff may recover *pro tanto*, though he only prove a part of the breach as laid.

Birks v. Trip-
pet, 1 Saund.
35. a.; and
cases *ibid.*
note 2.;
and see
2 Barn. & C.
682.
Bach v. Owen,
5 Term R.
409. Doug.
679.

Bowdell v.
Parsons,
10 East, 359.
Amory v.

Brodrick, 5 Barn. & A. 712.

Sherwood v.
Noone,
1 Leon. 250.

Aleberry v.
Walby, 1 Stra.
229. ¶ *Vide*
1 Saund. 235.¶

Wilkinson v.
Thorley, 4 M.
& S. 33.

Foster v. Pier-
son, 4 Term
R. 617.

¶ 1 Term R.
671. Hodgson
v. E. I. Com-
pany,

8 Term R. 278. 2 Saund. 181. a.

Mod. 225.
Boscawin v.
Cook, ad-
judged upon
a special de-
murrer 2 Mod.

in substance,
as to nega-

Barnard v.
Duthy,
5 Taunt. 27.

Forty v. Timber, 6 East, 434.

Harris v.
Mantle,
3 Term R. 307.

And on the other hand the plaintiff may be prejudiced by *narrowing* the breach unnecessarily. As where a breach was assigned on a covenant to use premises in an husbandlike manner, that the defendant did not use the premises in an husbandlike manner, but on the contrary committed waste; it was held that the plaintiff could not shew in evidence any breaches of good husbandry not amounting to waste; although had he assigned a breach merely in the words of the covenant, such evidence would have been admissible.||

Cro. Car.
262. Wilson
v. Chambers,
adjudged,

In trover for a bond the plaintiff need not shew the date; for the bond being lost or converted, he may not know the date; and if he should mistake it, it would be a failure of his suit. after a verdict for the plaintiff, and affirmed upon a writ of error. Cro. Jac. 638. S. P. adjudged upon demurrer. Hard. 111. Like point in trover for letters patent. Brown Ent. 356. a like precedent. *Vide* Ent. 265. a like precedent.

Palm. 532.
Symons v.
Darknell.

If in action upon the case against a lighterman, the plaintiff declares the defendant so negligently governed his lighter, that it took water, and spoiled the goods of the plaintiff *ad damnum &c.*, the declaration is good, without a more special allegation how they were spoiled.

Palm 525.
Sid. 245.
S. P. yet said
to be the
best way to
recite it.

So it hath been held, that a declaration against a lighterman is good, though not alleged in the declaration that he is a common lighterman; as also against a carrier, without alleging that he is a common carrier.

A statute which does not give the action, but is only in affirmance of the common law, need not be recited; as on the statute of *Marlbridge* (52 H. 3.) the plaintiff may declare, that his father was seised in fee of certain lands, and died seised; and that the lands descended to him; and the defendant had occupied them as guardian in socage, without any recital of the statute.

Rann v.
Green, Cowp.
472.; ||*et*
vide 6 Term
R. 771.||

[If a plaintiff in his declaration undertake to recite a statute, which statute is the ground of his action, and he misrecite it, as by stating it to be made in the 4th of Ph. & M. instead of the 4th and 5th, the variance is fatal.

Dougl. 667.
Cowp. 665.
727.

In an action of covenant it is not only unnecessary, but likewise improper to set forth the whole of the deed. So much only as is necessary to entitle the plaintiff to his action ought to be shewn; nor need that part be recited literally, but may be set forth according to its substance and effect; though it is usual and advisable to deviate as little as may be from the expressions in the instrument.

||Every instrument, whether a statute, record, deed, bill of exchange, or any other writing, which the plaintiff undertakes to state, must be stated truly, either according to the language, or the legal effect; for a variance between the statement and the evidence is fatal as a ground of nonsuit.

Rastall v.
Stratton,
1 H. Bl. 49.

Thus, if a declaration state a judgment to be against one defendant only, when it is against more than one, or of a term different

different from that which appears on record, the variance is fatal. Readshaw v. Sheriff of Middlesex, 4 Taunt. 13.

So an allegation that the plaintiffs "by the judgment of the court recovered against bail," is not proved by production of the recognizance of bail, and the *scire facias* roll with the award "that the plaintiffs have their execution," &c. for that is not a judgment to recover. Philipson v. Mangles, 11 East, 516. Vide Archb. on Plead. 116.

But a distinction is established between allegations of substance, and allegations of matters of description; the former may be substantially proved, the latter require to be *literally* proved. Thus where in a declaration for a false return to a *fiery facias*, the declaration alleged that the plaintiff in *Easter Term*, 2 Geo. 4. recovered, &c. "as appears by the record," and the proof was of a judgment in *Easter Term*, 3 Geo. 4.; it was held that the variance was not fatal, not being in matter of *description*; for the *prout patet*, &c. might be rejected as surplusage, and the judgment was only inducement to the action. Stoddart v. Palmer, 5 Barn. & C. 2.; and see 9 East, 157. 4 Barn. & A. 435. 4 Barn. & C. 403. 2 Barn. & C. 2. Moo. & Malk. 118.

So in an indictment for perjury, in an answer to a bill in Chancery, the bill was said to be exhibited against three persons only, *A.*, *B.* and *C.*, and when it was produced there appeared to be a fourth defendant; this was held no variance, though if the indictment had professed to set forth the title of the bill, it would have been otherwise. Rex v. Powell, Ry. & Moo. Ca. 101.; and see Rex v. Benson, 2 Campb. 508. and Ry. & Moo. Ca. 291.

But where in an action against the sheriff, on the 8 Ann. c. 14. the declaration alleged that the sheriff, by virtue of a writ of our lord the king, before the king himself, &c. took the goods, &c. and the writ appeared to have issued from the Common Pleas, the variance was held fatal. Sheldon v. Whittaker, Ry. & Moo. Ca. 266. In a late case where a judgment was stated to be recovered in K. B., and it appeared to be in C. B., Lord Tenterden allowed an amendment at the trial, under 9 G. 4. c. 15. Briant v. Eicke, Moo. & Malk. Ca. 360.

However, where in a similar action it was stated that the plaintiff recovered judgment for his damages, &c. for nonperformance of certain *promises and undertakings*, and it appeared by the judgment produced, that a *remittitur* was entered as to all the counts but one, and the damages were assessed on that count only, this was held fatal. Edwards v. Lucas, 5 Barn. & C. 339.

Where in an action on a bail-bond, the condition set out was to answer the plaintiff in a plea of trespass, and also to a bill to be exhibited against defendant, for 60*l.* on *promises*, and the bond did not contain the words "*on promises*," the variance was held fatal. Baker v. Newbegin, Ry. & Moo. Ca. 93.

So where the plaintiff stated a covenant in a lease, that the defendant would under-ground-gutter the *Cellar-beer-field*, and on production of the lease the name appeared to be the *Aller-beer-field*, the variance was held fatal. Pitt v. Green, 9 East, 188.; et vide 1 Marsh, 355.

So a demise was stated of lands in the *parish* of *B.* and *M.*, and the deed demised lands in the *parishes* of *B.* and *M.*, the variance was fatal. Morgan v. Edwards, 6 Taunt. 394.

Hoar v. Mill, 4 Maul. & S. 470.; and see Ry. & Moo. Ca. 98.; *sed vide* 4 Maul. & S. 474. n. 1 Barn. & A. 57.

Cockell v. Gray, 3 Bro. & B. 186. 6 Moo. 483.

But where a covenant was to pay (among other instalments) an instalment within twelve *calendar* months, from, &c. and on the record the word "calendar" was omitted, but the record stated correctly the time of payment of other previous and subsequent instalments, without omitting the word *calendar*, it was held that this was no variance.

Whitwell v. Bennett, 5 Bos. & P. 559.

Where a bill drawn by *J. Couch*, was declared on as a bill drawn by *J. Crouch*, the plaintiff was nonsuited.

Hutchinson v. Piper, 4 Taunt. 810.; *et vide* 3 Moo. 79. 1 Camp. 195. 1 Brod. & B. 445. Moo. & Malk. 6.; *sed vide* 2 Camp. 305, 306.

So where in an action for usury in discounting two bills of exchange, one of which was described as drawn by *B.*, on a certain person, to wit, *John K.*, and the bill appeared to be drawn on *Abraham K.*, the variance was fatal.

Ry. & Moo. Ca. 190.

The above were variances in *description* of written instruments. But where the plaintiffs sued by name of "The National Bank of *St. Charles*," and their real name was "The Bank of *St. Charles*," it was held no variance, the bank being a national one.

Swallow v. Beaumont, 2 Barn. & A. 765. *Vide* the cases in Archb. Plead. 114.; *et vide* 6 Term R. 363.; *sed vide* 1 Barn. & A. 224. 6 Taunt. 594.

Where the declaration stated that by a certain indenture, it was witnessed, amongst other things, that as well in consideration of the sums expended by the plaintiff in erecting furnaces, &c. the defendant did demise, &c. and on production of the deed the consideration was stated, that as well in consideration of the sums expended by plaintiff in erecting furnaces, &c. *as also in erecting dwelling-houses, and in consideration of the yearly rents, reservations, &c.* the defendant did demise, it was held a fatal variance.

Gully v. Bishop of Exeter, 4 Bing. 290.

Where the declaration stated that *J. S.* by deed conveyed the purparty of an advowson to *A.*, and by the deed it appeared that *J. S.* conveyed the *whole*, but he possessed only a purparty, this was held no variance.

Routledge v. Grant, 4 Bing. 655.

Where in *assumpsit* the plaintiff averred that he was entitled to a term of thirty-two years in certain premises, under a contract with *A.*, and that defendant having agreed to take the premises, plaintiff was ready to grant him a lease of thirty-one years, and it appeared that the plaintiff had only twelve years in the premises, and had no written contract with *A.* for a term of thirty-two years, the variance was held fatal.

And where the contract is not in writing the same rule holds, that a variance between the proof and the statement, in any material particular, is fatal.

Bordenave v. Bartlett, 5 East, 111.; *et vide* 2 Barn. & A. 355. 13 East, 410.

As where the declaration stated that stock was to be transferred on *request*, and the evidence appeared to be that it was contracted to be transferred on a *certain day*, the variance was held fatal.

So where the declaration stated that the defendant contracted to use the lands in a husband-like manner, and the contract proved was to farm the land in a husband-like manner, to be kept constantly in grass, the variance was held fatal.

So a contract in the *alternative* cannot be described as an *absolute* contract; as where it was agreed to deliver forty or fifty sacks of wheat on the first market-day; and one count stated it as an absolute contract to deliver forty sacks, and the other count as an absolute contract to deliver fifty, the variance was fatal.

Nor must a qualified contract be stated as unqualified. As where the declaration stated that defendant warranted a horse sound, and the proof was that he warranted the horse sound, except a kick, the variance was fatal.

20. 6 Barn. & C. 450.

In setting out a bill of exchange, or any written instrument, a variance in the *sum of money*, or in the number or quantity of goods, is in general fatal. And so also in parol contracts, where the sum or quantity is not laid under a *videlicet*.

As where the declaration stated, that in consideration that the plaintiff would buy forty-five sheep for 54l. 11s. 6d., the defendant undertook that they were sound; and the plaintiff proved the price to be 54l. 12s. 6d. the variance was fatal for want of a *videlicet*.

But where the plaintiffs declared that the defendant agreed to buy certain goods, &c. *to wit*, three hundred and twenty-eight chests, and thirty half-chests of oranges and lemons, at and for a certain price, *to wit*, the price of 623l. 3s., and the contract proved was for three hundred and eight chests, and thirty half-chests of *China* oranges, and twenty chests of lemons, without specifying price, it was held no material variance, since the quantity, description, and price, were stated under a *videlicet*.

In debt on the statute of *Anne* to recover penalties for usury, the declaration averred that the defendant afterwards, *to wit*, on the 3d day of *July* 1824, did lend, &c. to *T. D.*, and did forbear and give day of payment for the same to the said *T. D.* from the lending and advancing thereof, until, &c. The money was proved to have been lent on the 5th *July*, and this was held a fatal variance by *Abbott* C. J., though the day was under a *videlicet*.

The general rule as to the use of the *videlicet* appears to be, that although a material and necessary averment or description cannot be rendered immaterial by being laid under a *videlicet*, yet the *videlicet* may save an immaterial averment or description from becoming material, and requiring proof as laid.

Ry. & Moo. Ca. 155.

With regard to variances as to *place*, we have before seen that a variance in stating the name of a place, which occurs in setting out a deed or written instrument, is fatal, since the name forms part of the instrument, which the plaintiff has undertaken to

Saunderson v. Griffiths, 5 Barn. & C. 909.

Penny v. Porter, 2 East, 2.; *et vide* 2 East, 4. note. 3 Term R. 551.; *sed vide* 6 Taunt. 108.

Jones v. Cowley, 4 Barn. & C. 445.; and see 2 Barn. & C. 3 Bing. 472.

Durston v. Tutham, 3 Term R. 67. n. acc.

Arnfield v. Bate, 3 Maul. & S. 173.

Crispin v. Williamson, 1 Moo. 547.; *et vide* 2 Moo. 114. 1 Barn. & A. 9.

Partridge v. Coates, Ry. & Moo. Ca. 155.

Vide, on this subject, 2 Saund. 291. a. n. (1) Archb. on Plead. 97. 118. Ry. & Moo. Ca. 155.

4 Taunt. 700.

describe: but where this is not the case, and where locality is immaterial to the question at issue, a variance as to place is immaterial.

Thus in an action on an agreement for not procuring plaintiff a booth at races on *Barnet* common, the common was alleged to be in the county of *Middlesex*, and it appeared that the whole of it was in *Herts*, the variance was not fatal; for the action was transitory, and the county immaterial, and the variance did not occur in the *statement of the contract*.

Frith v. Grey,
4 Term R.
561. n.; and
see Wood-
ward v. Booth,
7 Barn. & C.
301. Ditcham
v. Chivis, 4 Bing. 706.

So in *assumpsit* for use and occupation it is not necessary to state the parish where the premises are situate, and therefore advisable not to do so; but if the parish is described by a wrong name, it is immaterial, provided that it is described by the *name commonly used*, as, *Chelsea*, for *St. Luke's Chelsea*; *Lambeth*, for *St. Mary, Lambeth*.

Kirtland v.
Pounsett,
1 Taunt. 570.
5 Taunt. 139.;
et vide 4 Term
R. 558.
1 Bos. & Pull.
225. 5 Maul. & S. 169. 1 Barn. & A. 94. 699. 15 East, 9.

The parish, however, must not be an entirely different one; as *St. Mary-le-Bow* in the ward of *Cheap*, instead of *St. Bride* in the ward of *Farringdon Without*.

3 Camp. 235.;
et vide 1 Moo.
161. 4 Barn.
& A. 616.

Where a fact is unnecessarily stated to be at a certain place, and the statement is erroneous, if it can be referred to *venue* and not to a local description, the variance will not be fatal: as where the declaration stated that on the 1st of *January*, 1796, to wit, at *Preston*, in the county of *Lancaster*, the plaintiffs were proprietors of the navigation of a river *there* called the *Irwell*, and there appeared to be no such river at *Preston*, the variance was held immaterial; for the word "*there*" might be referred to *venue*; and as it was not necessary in an action on the case for diverting the water, to give a local description to the nuisance, it was sufficient to prove it at any place in the county.

Mersey and
Irwell Navi-
gation v.
Douglas,
2 East, 497.;
et vide
11 East, 226.
5 Taunt. 791.

In setting out contracts, it is to be observed that a different rule prevails with respect to the *consideration* and to the *promise*; the whole of the former must be stated, and the omission of any part is fatal, since it must appear to the court that the plaintiff has performed every thing to be done on his part; but in stating the defendant's promise, only so much need be set out for the breach of which the plaintiff brings his action. As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse which had been sold by the defendant to the plaintiff, the defendant promised to deliver him another horse, which should be worth 80*l.*, and also a young horse; and on the trial it appeared that the promise was not merely as stated, but also that the defendant should *warrant the horse to be sound*, and that he *had never been in harness*; held that the contract was sufficiently stated: for as the plaintiff had stated those parts of the defendant's promise of the breach of which he complained, that was sufficient without stating other parts of the promise, irrelevant to the breach complained of.

Miles v.
Sheward,
8 East, 7.;
et vide Hands
v. Burton,
9 East, 349.
13 East, 20.
1 Camp. 561.
6 East, 564.
4 Barn. & A.
387. 2 Brod.
& B. 359.

Farewell v.
Dickinson, ,

Where a declaration in debt for rent stated a demise of a messuage,

message, land, &c. and the proof was of a message and land, together with the furniture, utensils, and implements, it was held, that as the rent issued only out of the real property, and not out of the furniture, it was sufficient to allege and prove a demise of real property, and there was no variance. 6 Barn. & C. 251.

Customs and prescriptions require to be stated accurately; for they, as well as contracts, are entire, and a slight variance in the proof shews the custom to be a different one from that alleged. 5 Rep. 78. b.

As where a custom was stated, that the lord should have the best beast on the tenant's death, and the custom proved was, that the lord should have the best beast, *or good*, the variance was fatal. 1 Bos. & Pull. 594. n.

The rules as to variance are much less strict in actions *ex delicto* than in actions *ex contractu*; for tortious acts are divisible, while contracts are entire. The rule in cases of tort appears to be, that the plaintiff is not bound to prove the whole of his allegations as laid, provided he proves sufficient to shew a ground of action, and that his proof, as far as it goes, is consistent with the declaration. Thus where the plaintiff, in declaring for a disturbance of common, stated that he was possessed of a message and land, and by reason thereof he was entitled to common of pasture; and the proof was that he was possessed of land only, and entitled to common in respect of it, the allegation was held divisible, and the proof sufficient to entitle him to damages *pro tanto*. Ricketts v. Salwey, 2 Barn. & A. 560.

So where plaintiff declared against the sheriff for a false return of *nulla bonū* to a *fi. fa.* against the goods of *R. and J. Stone*, and alleged that *R. and J. Stone* had goods in his bailiwick, and the plaintiff did not prove that *R. Stone* had any goods there, the proof was held to sustain the allegation, for it was severable, and meant that both or either of them had goods, &c. Jones v. Clayton, 4 Maul. & S. 349.; *et vide* 1 Stark. 48.

So where the plaintiff in declaring for slander, averred by way of inducement, that he was a carpenter and appraiser. and that the defendant intending to injure him in his several trades, spoke the words of and concerning the plaintiff in his trade of a *carpenter*, and the plaintiff failed in proving himself an *appraiser*; it was held that the allegation was divisible, and that the plaintiff might recover on proof of his being a carpenter only. Figgins v. Cogswell, 5 Maul. & S. 569.; and see, as to variances in stating slanderous words, 6 Bing. 48. and tit. *Slander, post*.

In the above cases the evidence was consistent with the declaration as far as it went, only that the whole allegations in the declaration were not proved. Where, however, the evidence is *inconsistent* with the declaration, so as not to establish any ground of action set forth, there the variance is fatal in actions of tort, as well as in actions of contract.

As where the declaration alleged that the defendant's dogs were accustomed to worry and bite sheep and lambs, and the evidence was, that the dogs were ferocious, and had frequently attacked men; the court held, that the evidence did not support the declaration, although it would have been sufficient to have alleged Hartley v. Harriman, 1 Barn. & A. 620.

Tempest v.
Chambers,
1 Stark. 67.
et vide 2 Barn.
& A. 756.
6 Taunt. 464.

alleged generally, that the dogs were of a mischievous disposition and unfit to be at large.

Sowhere in case the declaration alleged that the defendant maliciously charged the plaintiff with a felony before a magistrate, and it appeared in evidence that the charge only amounted to a tortious conversion of goods, the variance was fatal.

A great number of the variances between the pleadings and records, and written instruments, which were holden fatal in the above cases, would now be amended at the trial, under the authority of a late salutary act.

9 G. 4. c. 15.

By that act, intituled, *An Act to prevent a failure of justice by reason of variances between records and writings produced in evidence in support thereof*, reciting "That great expense is often incurred, and delay or failure of justice takes place at trials, by reason of variances between writings produced in evidence and the recital and setting forth thereof upon the record upon which the trial is had, in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time; it is enacted, That it shall and may be lawful for every court of record holding pleas in civil actions, and judge sitting in *nisi prius*, and any court of oyer and terminer and general gaol delivery in *England, Wales, the town of Berwick upon Tweed, and Ireland*, if such court or judge shall see fit so to do, to cause the record upon which any trial may be pending before any such judge or court in any civil action, or in any indictment or information for any misdemeanor, when any variance shall appear between any matter in writing or print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs (if any) to the other party, as such judge or court shall think reasonable; and hereupon the trial shall proceed as if no such variance had appeared; and in case such trial shall be had at *nisi prius*, the order for the amendment shall be endorsed on the postea, and returned together with the record; and thereupon the papers, rolls, and other records of the court from which such record issued, shall be amended accordingly."

Webb v. Hill,
Moo. & Malk.
Co. 255. See
Briant v.
Eicke, where
an amendment
was allowed,
id. 360.

Where, in case for a malicious arrest, the declaration alleged that the defendants did not prosecute the suit complained of, *but therein made default, and their pledges were in mercy, &c.* and the proof was that the action was discontinued, this was adjudged a fatal variance; and it was held not amendable under the above act, not being a mere mistake in setting out a written instrument, but an allegation of something totally differently from the proof. ||

Sand. 38,
59. Jones
v. Pope, Lev.
191. 2 Keb.
93. Sid. 305.
S. C. —

In an action of debt for an escape of one in execution, it is not sufficient to shew only that a *capias ad satisfaciendum* issued, by virtue of which he was taken, &c., but the plaintiff must shew how he recovered judgment, and thereupon a *capias ad satisfaciendum* issued, &c.; for as to the judgment the defendant may plead

plead *nul tiel record*: and though, if there was no judgment, the sheriff was bound to execute the writ, and perhaps might be fined for the escape, yet, if there was no judgment, there was no debt or duty to the plaintiff.

That the cause for which arrested must be shewn and

proved. Lev. 85. 2 — But for what is necessary to be shewn in the declaration, *vide* Carth. 149. Lutw. 110, 111. 2 Show. 17. pl. 10. Salk. 272. pl. 3. 5 Mod. 414.

If in an action for the escape of *B.*, against the warden of the *Fleet*, the plaintiff declares that *B.* was committed in execution to him, he must conclude *prout patet per recordum*; for that is triable by the record, though said to be helped by the defendant's pleading that he suffered him to escape with the leave of the plaintiff.

5 Lev. 393.
Norden v.
Fox, *et vide*
1 Lut. 111.
and 6 Mod.
8, 9, that
where a

matter of record is the foundation or ground of the suit of the plaintiff, or of the substance of the plea, there, it ought to be certainly and truly alleged; *aliter*, where it is but conveyance; as in escape, the not concluding *prout patet per recordum*, not being the gist of the action, is aided.

In an action for an escape on mesne process, the plaintiff must not only shew that *ad largum ire permisit*, but also that *non compervit ad diem*; because the party being bailable, the sheriff might lawfully suffer him to go at large; though in such action upon an escape after execution, it is sufficient to shew that *ad largum ire permisit*.

Noy, 72.
Vide tit.
Escape.

In action for the escape of one committed by commissioners of bankrupt for refusing to answer interrogatories, the plaintiff set forth, that upon the petition of him and other creditors the Lord Chancellor by commission *dedit potestatem plenam* to the commissioners *vigore statuti* to examine, &c., and that the commissioners offered him interrogatories, &c. And though it was objected that the office of the chancellor is ministerial only, and that it is the statutes which give the power, and it was not shewn what the interrogatories were, yet the declaration was adjudged good; for it is *per commissionem dedit* &c. *vigore statuti*; and it shall be intended that the interrogatories are lawful till the contrary appear.

Moor, 854.
2 Bulst. 256.
Roll. R.
47.

In debt upon an assignment of a bail-bond taken by the sheriff, who had arrested the defendant on a *capias*, it was objected that the plaintiff had not in his declaration set forth the *capias*, or the *teste*, or return of any *capias*; and this on special demurrer was held fatal, it being the *capias* that gives life to the bond.

Mod. Cases,
78. Tucker
v. Goldburne.

If in an action of debt upon an award the plaintiff declares that the arbitrators did make an award that the defendant should pay unto the plaintiff 10*l.*, &c., this is a good declaration, though nothing is shewn to have been awarded on the other side; for it is sufficient (a) for the plaintiff to set forth that part of the award that entitles him to his action.

Leon. 72.
(a) The
plaintiff
may declare,
&c. that *inter alia* it was
awarded;
per lit.

Rep. 512. But 1 Mod. 36 per *Twisden, cont.*; but for this *vide tit. Award.*

If in an *assumpsit* the plaintiff declare that the defendant, in consideration that the plaintiff would forbear him one week, assumed, &c., and aver that he did forbear him one week, but say not

Cro. Eliz. 272
Tenacy v.
Brown.

one week following; yet this is a good declaration, for it must necessarily be intended so.

Yelv. 49.
Allen v.
Randall.

If in an *assumpsit* the plaintiff declare, that whereas there was a certain bargain between the plaintiff and the defendant for certain woods for which the plaintiff was to pay 20*l.* at a day after; and that the defendant, in consideration that the plaintiff *asportaret sufficiens hominem fore obligat.* to the defendant for the payment of the said 20*l.*, did assume and promise that the plaintiff should enjoy the said wood, &c., and the plaintiff aver *quoad asportavit B. sufficientem hominem fore obligat.* to the defendant, &c. yet this is no good declaration: 1st, Because it is not shewn (a) how he was sufficient, so that it may appear to the court to be according to the agreement; 2dly, Because it is not in fact shewn that B. (b) did become bound, or that *obtulit se obligari*, and perhaps he came to be bound, but being there refused.

(a) *Vide* Hob.
69, 70, 77.
1 Mod. (b) In
an action upon
promise to
repay money
laid out, or to
be laid out, for
goods for the use
of the defendant,
the plaintiff need
not aver that the
goods came to the
hand of the
defendant. Bulst.
169. adjudged.

Yelv. 110.
Lord Mordant
v. Walden, ad-
judged.

If in an *assumpsit* the plaintiff declare that his father was seised of the manor of D., and of divers lands, &c. in D. in fee, and in consideration that the plaintiff, together with his father, *sigillaret quandam indenturam per quam* his father *barganizaret*, &c. the said manor and lands, the defendant did assume, &c., and allege, that the plaintiff such a day *sigillavit indenturam prædict.*; yet the defendant, &c.; this is no good declaration; for *diversa terras et tenementa in D.* are uncertain, and comprehend not all his lands in D., and therefore the plaintiff ought to have shewn in certain and particularly what lands were comprised within the indenture.

Yelv. 111.
adjudged.
(c) The plain-
tiff declared,
that whereas
quædam pars
domus, &c. was
out of repair,
the defendant,
in consideration
that the plaintiff
would repair
eandem partem
of the said house,
assumed and
promised, &c. and
avers, that he
did repair
eandem partem;
and though it
was objected
the plaintiff
should have
shewed which
part of the
house was
out of repair,
yet after a
verdict it was
adjudged for
the plaintiff. 2
Leon. 53. 3
Leon. 91.

Also, in the above case it was held, that the allegation that he had sealed *indenturam prædict.* was not good; for *prædict.* ought to refer to some certainty before, but (c) *quandam indenturam* is altogether uncertain: and the plaintiff should have shewed in certain that he sealed such an indenture *per quam* the plaintiff and his father *barganizaverunt*, &c. *de verbo in verbum*, as laid in the premises of the declaration.

Yelv. 111.
per cur.

But if a perfect indenture in date, in the nomination of the parties and limitation of the land had been mentioned before, it had been sufficient to say, that they sealed *indenturam prædict.*, because by the premises it appears there was *in facto* a true and perfect indenture.

Raym. 203,
204.

The plaintiff declares, whereas he and the defendant were joint executors, and the defendant had received all the estate of the testator, and the plaintiff threatened to sue the defendant for one moiety, the defendant, in consideration the plaintiff would forbear, &c. and would shew an account concerning the testator's estate, did assume &c.; and the plaintiff avers, that he did shew *quoddam*

quoddam compotum; and though not said *compotum prædict.*, yet after a verdict for the plaintiff it was adjudged for him.

If in an *assumpsit* the plaintiff declare, that the defendant, in consideration that the plaintiff would lease certain lands to the defendant, rendering 10*l.* *per ann.*, the defendant did assume and promise to, &c., and aver, that he did make a lease of the said lands, but do not say that it was rendering 10*l.* *per ann.*; this is no good declaration.

If in an *assumpsit* the plaintiff declare, that whereas the defendant had committed a felony, and thereupon had requested the plaintiff to do his endeavour (*a*) to procure a pardon for the defendant; and thereupon the plaintiff by all the means he could, and many days' labour, did his endeavour to obtain a pardon for the said felony, *viz.* in riding and journeying, at his own charge, from *London* to *N.* where the king was, and so to and from *Newmarket* to obtain a pardon, &c.; this is a good declaration (*b*), though nothing in particular is laid to be done, but only riding up and down, and nothing done when he came there; for an endeavour in general is expressly laid, and particulars ought to be set forth for form's sake only; for though upon the trial he could have proved no riding nor journeying, yet any other effectual endeavour, according to the promise, would have served.

reconcile differences, &c. (*b*) But if the plaintiff declare that the defendant, in consideration the plaintiff had done him *multa beneficia*, assumed and promised, &c. this is not good. Vent. 27. Sid. 413. adjudged, after verdict for the plaintiff; *et vide* 2 Keb 552.

In *assumpsit* the plaintiff declared, that in consideration the plaintiff would deliver all the corn in a certain barn, the defendant did assume and promise, &c., and avers, that he did deliver all the corn in the barn, but does not shew that there was any corn there; and it was agreed *per curiam*, that had this been on a demurrer, the declaration would not be good; but that being after a verdict, upon *non assumpsit* pleaded, by which issue it was admitted there was corn there, it was adjudged for the plaintiff, and afterwards affirmed upon a writ of error.

¶ And where in debt on bond conditioned that *A. B.* should account for all monies received by him, the defendant pleaded performance generally; the plaintiff in his replication assigned for breach, that *A. B.* was requested to account, and refused; it was held, on special demurrer, that this assignment of the breach was bad, in not alleging that *A. B.* had received monies. ||

If in an *assumpsit* the plaintiff declare, that whereas *J. S.* had acknowledged himself to be indebted to the plaintiff in 10*l.* for divers trespasses, which 10*l.* the plaintiff at the defendant's request had accepted; and that the defendant, in consideration the plaintiff would acquit and discharge the said *J. S.* of the said debt, and would permit the said *J. S.* to carry out of the plaintiff's house certain goods, did assume and promise to pay the said 10*l.* to the plaintiff; and allege *in facto*, that he did acquit and discharge the said *J. S.*, and did permit the said *J. S.* to carry away the said goods; this is no good declaration, because he doth not shew how

3 Bulst. 35.
Lee v. Adams,
adjudged after
verdict for the
plaintiff.

Hob. 105, 106.
Lamphleugh v.
Blaithwait, ad-
judged *per*
totam cur.
præter War-
burton; and
the rather,
because it was
after verdict.
Moor, 866.

Brownl. 7.
S. C.
(*a*) Stile, 465.
Like point,
where the de-
fendant did his
endeavour to

Roll. R. 382.

Serra v.
Wright,
6 Taunt. 45.

Cro. Jac. 503.
Lenerett v.
Rivett, ad-
judged.
|| Gregory
v. Nevill,
Cro. Eliz.
292. ||

he did acquit the said *J. S.*, for it could not be without deed, which ought to have been particularly shewn; and though the performance of the other part of the consideration is sufficiently averred, yet that will not help it.

Raym. 400.
Aglionby v.
Towerson,
adjudged,
after verdict
for the plain-
tiff. Moor 595.
Like point
adjudged.

If in an *assumpsit*, the plaintiff declare, that whereas there was a certain discourse between the plaintiff and defendant concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant; and thereupon the defendant, in consideration the plaintiff would do his endeavour and labour to persuade his nephew to marry the niece of the defendant, did assume and promise to pay the plaintiff, &c., and aver, that such a day, and divers other days and times *omnibus modis quibus poterat conatus suit et elaboravit suadere* his said nephew to marry the defendant's said niece, &c. this is a good declaration, without shewing in particular how he did his endeavour; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c. the record would be too long.

4. Where the Averments must be positive and express in the Declaration; ||and herein of Certainty.||

Co. Lit. 303.
Plow. 128.
Cro. Jac. 361,
362. 2 Bulst.
214. Yelv.
121. Cro. Eliz.
53. 441. Co.
Ent. 161.
2 Sand. 319.
(a) 2 Lev. 206.
||This was held
ill in arrest of
judgment in
1 Stra. 621.,
but now it is
only an objec-
tion on special
demurrer, and
this only
where the pro-
ceedings are
by bill; for on
original in
K. B., or in
C. B. where the writ is set out, the count is helped by it and the mistake aided even on special demurrer. 1 Wils. 99. 2 Wills. 203. 1 Chitt. Plead. 376. note (c.) ||

The declaration must contain such certain affirmation that it may be traversed; for if there be no certain affirmation to make the declaration itself traversable, it will not be cured after a verdict, because it is a defect in substance: as, if the declaration be *quod cum* the defendant (a) assaulted him, and the defendant plead not guilty, here is nothing put in issue, for the pleadings have affirmed nothing; and though the defendant be found guilty, yet cannot the plaintiff have judgment, because nothing is positively affirmed: but, if the plaintiff declare *quod cum* the defendant *concessit se teneri*, or *quod cum mutuatus fuisset et non solvit*, or *quod cum dimisit*, the defendant *ejecit*, in these cases there is a positive charge upon the defendant; and the *quod cum* being a breach of the whole period, and making one sentence with the latter part of it, it is a positive affirmation, and therefore being equally positive it is equally traversable with the latter part, and therefore a man may plead *non est factum*, *non mutuatus*, *non dimisit*; because, though these come under the *quod cum*, yet, taken together with the rest of the sentence, being positive, they make substantive issues of themselves.

Lutw. 535:
877. et vide
Lev. 12. 75.
Saund. 275.

If on a demise the plaintiff declare, *quod cum per quandam indenturam testat. existit quod dimisit*, this hath been held ill after a verdict; because there is no positive affirmation that there was a demise; and so he hath not set forth a demise in a manner that it might be traversed, for the traverse must be of the demise, and not of the indenture; but if in covenant he declare *quod cum per quandam indenturam testat. existit*, that the defendant did covenant, this, with a *profert*, is good; because when he says the

the

the indenture attests that he did covenant, this is a certain allegation there was such an indenture, and the indenture only is traversable on the issue of *non est factum*. (a)

pleas, &c. in the former it is sufficient to say *testatum existit*, &c.; for it is only the action; but in pleas, &c. it is the substance of the answer, and therefore the operation of the deed must be expressly averred. 1 Saund. 274. note (1).||

So it hath been held, that *licet* is an affirmation; for what is contained under it as *licet ad hoc faciendū sapius requisit.*, is a positive affirmation that there was a request.

In debt on the statute 12 Car. 2. c. 25. for selling wine without a license, the plaintiff began his declaration by way of recital, *pro co*, viz. *quod cum* the defendant at several times, between such a day and such a day, had sold wines by retail by the pint, &c.; on the general issue pleaded, and verdict for the plaintiff, it was moved in arrest, that the declaration was not positive, but by way of recital only, and so doth not directly charge the defendant with the crime intended: *sed per curiam*, The plaintiff shall have judgment; for all the precedents in the like cases are after this manner; as, in debt upon the statute of tithes, &c. Moreover, this is an action of debt, wherein the offence is only an inducement to the action; for it is the nonpayment of the penalty which is the original cause.

In trespass the plaintiff declared, *quare (b) vi et armis clausum fregit*, and after verdict for the plaintiff judgment was arrested; for *quare* is not positive but interrogatory, and much worse than *quod cum*.

writ, but the count must contain a positive allegation.

It hath been held a good declaration to say *quod defendens quendam canem ad mordendum oves consuetum scienter retinuit*, without saying, *quod retinuit quendam canem sciens canem prædict. ad mordendum oves consuetum*, for this is tantamount, for the word *scienter* goes to all the precedent matter; and the court said the *sciens* was not (c) traversable, but ought to be proved in evidence, and that otherwise the action did not lie.

Sid. 21. Roll. R. 43. 193. — In case for selling two oxen, affirming they were his, the defendant's, whereas in truth they were the property of *J. S.*, without alleging, that he *sciens* they were the property of *J. S.*, yet the declaration was held good. Carth. 90. — (c) The general issue is in fact a traverse of the *sciens*, for unless the plaintiff on the trial prove the defendant knew his dog was accustomed to bite sheep, his cause of action falls to the ground, as in such case the defendant is not guilty of any thing which can entitle the plaintiff to an action. || See *Ld. Raym.* 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

In debt upon an obligation, the condition whereof was to perform all covenants comprised within certain indentures, bearing even date with the said obligation, and, in truth, both obligation and indentures were without date; it was held, that the plaintiff ought to have averred a date of obligation, and that the indentures bore equal date therewith.

If in an *assumpsit* the plaintiff declare, that whereas it was agreed between the plaintiff and one *A.*, that the said *A.* should lease a certain house to one *B.* for seven years; and it was also agreed, that *B.*, during the said term, should repair the house with tile

|| (a) The difference is between declarations and

inducement to the operation

Sand. 116.

Lev. 194.

2 Vent. 278.

Dyer, 257.

Carth. 216.

Show. 337.

Mullacke

qui tam v.

Speering.

2 Salk. 636.

pl. 2. Hore v.

Chapman.

(b) This is the

form in the

writ, but the count must contain a positive allegation.

For this *vide*

Roll. Abr. 4.

Cro. Car. 254.

487. 2 Sid.

127. 4 Co. 18.

Dyer, 25. 286.

Allen, 92.

2 Bulst. 291.

3 Bulst. 76.

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Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

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Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

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Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

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Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

|| See

Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

|| See

Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

|| See

Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

|| See

Ld. Raym. 608. 1 *Barn. & A.* 620. 1 *Stark. Ca.* 285.||

and

and slate only, and thereupon an indenture was drawn; but because there was a covenant therein, that *B.* should be bound to all manner of reparations, *B.* refused to seal the said indenture, and the plaintiff refused to seal a bond for performance, &c.; and further shew, that in the said house there was a great wall, part whereof was ruinous, and likely to fall during the said term; and that the defendant, in consideration of the said *B.* would seal the said indenture, and the plaintiff would seal the said bond, did assume and promise, that he the said defendant would maintain and uphold the said wall *durante prædict. termino 7 annorum*; and aver that the said *B.* the said indenture, and the plaintiff the said bond, did thereupon seal; and in fact say, that the said wall, during the said term, did fall, &c.; this is no good declaration, because not expressly averred that *A.* did demise the said house; and if there was no demise it was not possible for the defendant to repair it during the term; and, for any thing that appears, the indenture was sealed only on the part of the lessee, and not on the part of the lessor.

Yelv. 58.
Heyford v.
Reeve, ad-
judged.

If in an *assumpsit* the plaintiff declare, that whereas the defendant had distrained six oxen of the plaintiff's for a quit-rent due to the bailiffs of *B.*, and thereupon the defendant, in consideration that the plaintiff would pay the money for the redemption of his said cattle, did assume and promise, upon request, to shew to the plaintiff, or to such other person or persons as he should name, a sufficient record to charge the said lands with the said quit-rents; and allege, that he appointed *B.* to see the said record, and requested the defendant to shew it *B.* accordingly; but that the defendant had not shewn to the said *B.* any sufficient record to charge the said lands, this is a good declaration; for though the sufficiency of the said record is not triable *per pais*, and the plaintiff might have averred a breach generally, *scilicet*, that he did not shew any record, yet this is sufficient and most proper for the plaintiff to lay the breach according to the promise; and in this case the defendant may plead that he did shew *tale recordum* reciting it, and conclude, which was sufficient; and thereupon the plaintiff may demur, and put the sufficiency thereof to the judgment of the court.

Cro. Jac. 406.
3 Bulst. 221.
Roll. R. 414.
Talker v.
Wrigg.

If in an *assumpsit* the plaintiff declare that the defendant in consideration of, &c. assumed and promised to take the son of the plaintiff to be his apprentice for seven years, and to find him meat, drink, and apparel, &c. during the term, but aver that he did not find him meat, drink, and apparel, &c., but do not aver that he did put him, or that the defendant did accept him as his apprentice, this is no good declaration; for it ought to appear that he was his apprentice, else the defendant was not bound to provide for him.

Mod. 169.
agreed *per*
cur., but being
after a verdict
adjudged for
the plaintiff.

If in an *assumpsit* the plaintiff declare upon a promise made by the defendant to pay 50s. to the plaintiff when the defendant should have received the money, and aver that the defendant hath received the money, but yet hath not paid, &c.; this is no good declaration, because it doth not appear how much money the defendant

defendant hath received, and perhaps he hath not received so much as 50s., and though the promise is general, yet the breach ought to be laid so as to be adequate to the consideration. (a) The best method would have been to have declared generally, that the defendant was indebted to him 50s. for money had and received by defendant to the plaintiff's use, and being so indebted he promised to pay; and then, on proving any part received, the plaintiff would have been entitled to his verdict, and the declaration would not be liable to any exception.

If in an *assumpsit* against an executor the plaintiff declare that the testator of the defendant, in consideration of, &c. did assume and promise that he would leave the wife of the plaintiff as good a portion as he should give to any of his children; and aver, that the testator to such a daughter *dedit* such a portion, but did not leave, &c.; this is no good declaration, because it does not appear when he did give this portion, and perhaps it might be before the promise. Latch, 205. by the Judges against one, after verdict.

¶ The rules as to certainty in pleading have been laid down by Lord Coke thus — There are three kinds of certainty: 1st, To a common intent, and that is sufficient in a bar which is to defend the party and to excuse him; 2dly, A certain intent *in general* as in counts, replications, and other pleadings of the plaintiff; that is to convince the defendant, and so in indictments, &c.; 3dly, A certain intent in every particular, as in estoppels. *De Grey* C. J. lays down the following rule as to the certainty requisite in indictments and criminal informations — “The charge must contain such a description of the crime that the defendant may know what crime it is that he is called on to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty, and that the court may see such a definite crime, that they may apply the punishment which the law prescribes;” and this rule seems applicable to the declaration in civil cases. Co. Lit. 503. a. Rex v. Horne, Cowp. 682.; vide also 2 H. Black. 550. Doug. 159.

With respect to the last and highest degree of certainty mentioned by Lord Coke, he himself has said elsewhere, that it is rejected by the law; for *nimia subtilitas in jure reprobat, et talis certitudo certitudinem confundit*. It appears, however, to be requisite in case of estoppels, and in pleas not favoured by the court, as the plea of alien enemy, which must negative every presumption that could arise in favour of the plaintiff's right to sue. Long's Ca. 5 Rep. 121. Casseres v. Bell, 8 Term R. 166.

Notwithstanding Lord Coke's rule, that certainty to a common intent is sufficient in a bar, it must be observed, that in many instances greater certainty is requisite in a plea than in a declaration; thus in stating a contract to pay the debt of a third person, it is necessary in a plea to state it to be in writing according to the statute of frauds, but it is otherwise in a declaration. 1 Saund. 276. a. n. 2.

So we have seen, that in a plea the statement of a deed by “*testatum existit*” is insufficient, but it is otherwise in a declaration. *Ibid.* 274. n. 1.

Less certainty is requisite where the subject lies peculiarly in the notice of the opposite party; therefore where a party lays a charge Com. Dig. Plead. (C) 26. 3 Term R. 768.

charge upon another (as a liability to repair) by reason of his estate, it is not necessary to shew by what right the charge attaches on him, but it is enough to state that he was bound as occupier, &c.; but a party prescribing in right of his *own estate*, must shew what estate he has.

Com. Dig. Plead. (C) 43. So also a less degree of certainty is requisite in stating what is only inducement to the action, than in stating the *gist* of it.

1 Keb. 825. So also in stating the special damage, except in cases where the special damage is the *gist* of the action.||
Vide, on the subject of certainty in pleading, 13 East, 102. 14 East, 291. Archb. on Plead. 106, 107, 108, 109. 1 Chitt. on Plead. 236, 237, 238. Stephen on Pleading, 379.

5. Of the Certainty required in the Description of the Thing declared for.

The law requires no greater certainty than the (a) nature of the thing will admit of; as where an action is brought for things not subject to distinction by number, weight, or measure; as, in trespass for breaking his close with beasts, and eating his peas, without saying how much; yet this declaration hath been held good, because nobody can number or measure the peas that beasts can eat.
 For this *vide* tit. *Trespass*. (a) That where the thing is well described, the court ought not to be too strict in scanning the words; and that if the thing is so described that the jury may know what is meant thereby, it is well enough. Stile. 136. 235.

Andrews v. Whitehead, 15 East. 102. *Sed Vide* Wildman v. Glossop. 1 Barn. & A. 12. Ward v. Harris, 2 Bos. & Pull. 265.
 || But where the declaration stated whereas heretofore, &c., the plaintiffs had agreed to purchase, and the defendants to sell, and deliver to the plaintiffs *at a certain rate or price per pound to be paid in manner stipulated*, forty bags of wool, to be delivered at a time which before the making of the promise of the defendants after mentioned had elapsed, but which wool was not delivered; and thereupon, in consideration of the premises, and that the said plaintiffs would still receive and pay for the said wool *at the rate or price last aforesaid*, the defendants promised to deliver the wool within a reasonable time, and then averred that the plaintiff was ready, &c. to receive and pay for the wool *at the rate or price and in manner last aforesaid*, yet the defendants would not deliver; it was held, on special demurrer, that the declaration was too general, since no price and manner of payment were specified, although referred to and incorporated with the consideration and promise.||

So where there are several parts which compose an aggregate body, there it is sufficient to mention the body, and it is not necessary to ascertain the several parts; as trover for a ship and sails is good, because the sails go to make up the aggregate body; but if it had been for sails only, it would not have been good without specifying the number and quality: so trover lies for a library of books. (b)

(b) *Sed qu.?*
 || See 1 Vent. 114.||
 Raym 2. If in trover the plaintiff declare for two pair of pothooks, &c. and hangers; this declaration is not good, because of the uncertainty

tainty of the word hangers; and they cannot be intended such upon which the pothooks used to hang, because they do not immediately follow the word pothooks; but there are several other words between them.

Seaman v. Barnes, adjudged.

So trover for a beam, and scales, and weights, is not good for the weights, because there may be more or less of the weights used with the scales, and therefore altogether uncertain as to the quantities or weights of them.

Vide tit. Trover, sed vide 2 Will. Saund. 74. a.

If in trover the plaintiff declare *pro decem paribus velorum et tegulorum, Anglicé* curtains and vallance; this is a good declaration, and certain enough, and shall be intended for ten pair of curtains, and ten of vallance; and in such artificial things there needs no other description than to name them by their usual names by which they are commonly called, without shewing the quantity of yards or stuff of which they are made.

2 Saund. 74. Taylor v. Wells, adjudged.

Where a thing is laid in the declaration by way of aggravation, though such allegation is uncertain, or that circumstance is not proved to the jury, yet this shall not arrest the judgment; because the gift of the action is the thing itself in demand, and the aggravation is only the manner of doing it; and though this may increase the damage something, yet it is not to be out of proportion to the thing in demand; as, if trover be brought for a box of writings (a), and charters or vestments, this is good, because the trover is for the trunk, and for the detention of the goods therein, which are withheld by the detention of the trunk, but not for the value of the goods; and therefore anciently they held that trover lay only for a trunk locked, but now they admit it though the trunk be not locked, because the detaining is still the same.

Vide tit. Trover, and the several authorities there cited.

(a) If for writings the plaintiff perhaps had better sue in detinue, as on recovery in that action he will be entitled to a return of the thing in specie besides damages for the detention.

ges for

In an action upon the case for setting an house on fire *per quod* (amongst divers other goods) *ornatus et equis aratris et carucis amisit* was held certain enough: so if he had mentioned only *diversa bona*; for when a man's house is burnt, he cannot set forth the certainty of the goods he lost.

Keb. 825. Prior v. Dawkes.

But, where in an action on the statute of *hue and cry*, the plaintiff declared that he was robbed of a certain sum of money, *ac diversa bona et catalla in custodia ipsius*, to the value of 30*l.*, and because he had not set forth the goods particularly, and that he had not likewise alleged that they were his goods, it was held that as to this part he could not have judgment.

2 Saund. 379.

Declaration in trespass for breaking his close and taking away his fish, without expressing either the number or nature of them, was held insufficient: but in an indictment for taking fish out of a pond, the number need not be expressed, for damages are not to be recovered; but the party is to be fined according to the circumstances of the fact, and not according to the number of the fish.

5 Co. 34. Playter's case, Vent. 272.; *et vide* 1 Vent. 329. || But this omission would now, it seems, be

cured by verdict either at common law, Cro. Jac. 435.; or by the statute of jeofails, 16 & 17 Car. 2. c. 8., and after a general demurrer, or judgment by default, by 4 Ann. c. 16. § 1, 2. and see 2 W. Saund. 74. ||

So,

Vent. 53.

So, trespass *quare arbores succidit ad valentiam*, &c., was held insufficient for not expressing the kind of trees.

2 Will. Saund.
74. a.; and
cases there
collected.

¶ The law does not now require the same precision and certainty as formerly in describing the goods taken, whether in trespass or trover: if they are described according to common acceptance it is sufficient.

Lord Raym.
1410. 1007.
1 Stra. 637.
Burr. 2455.

But it is bad, even after verdict, to say merely "divers goods and chattels of the plaintiff," and judgment will be arrested.

Pope v.

And so it has been held in replevin after judgment by default.

Tiliman, 7 Taunt. 642. 1 Moo. 586. S.C.

Holmes v.
Hodgson,
8 Moo. 379.

And where the declaration was for seizing *one hundred articles* of furniture, and *one hundred articles* of wearing apparel, without describing them, it was held bad on general demurrer.¶

6. Of the Declaration's being good in Part, and void in Part.

Roll. Abr.
784, 785.
10 Co. 115.
Yelv. 45.
2 Show. 105.
(a) *Vide*

1 Vent. 27.
Hob. 178.
189. —

That if one

brings an action for two things, and of his own shewing it appears that he cannot have an action for one of them, or a better writ, there the writ shall be well for that part for which it is good. 11 Co. 45. Godfrey's case. (b) Where the plaintiff may release damages for part, and take judgment for the rest, *vide* F.N.B. 107. Moor, 281. Leon. 92. 2 Bulst. 280. Brown, 255. Stile, 564. Hard. 58.

Hob. 153.
Howell v.
Sambeck.

As, where the party avowed for 5*l.* rent, and a *nomine pænæ* for nonpayment at the day, but laid no actual demand of the rent, the avowry was held naught as to the *nomine pænæ*, because it could not be forfeited without a demand of the rent; yet he had judgment for the return of the cattle, because he had a lawful cause to distrain for rent arrear, and the demands were several.

Cro. Jac. 104.
Woody's case.
1 Saund. 286.

So, where the plaintiff brought an action of debt upon the statute of usury, and declared that the defendant *corruptivè* did lend 40*l.* *cont. formam statuti*, and such a day did also lend 20*l.* *contra formam*, &c., but did not say *corruptivè*; upon *nil debet* pleaded the plaintiff had a verdict, and it was moved in arrest of judgment that the declaration was not good for the last 20*l.* because it wanted the word *corruptivè*; but, notwithstanding, the court gave judgment for what the plaintiff had well declared, and a *nil capiat per billam* was entered as to the residue.

Raym. 395.
Cutworthy v.
Taylor.

So, if in trespass the plaintiff declare for taking the mare of the plaintiff, and several goods, but do not say of the plaintiff, and thereupon the defendant demur, the plaintiff may have judgment for the mare, and release the action for the rest.

Hob. 178.
Saund. 286.

So, if an action of debt be brought upon several bonds, and it appear that one is not due, the plaintiff may recover the rest.

In

In ejectment if (a) part of the things be well demanded and others not, and a verdict be given for the plaintiff for the whole, and entire damages, the plaintiff may release all the damages in that which is not well demanded and pray judgment for the residue.

Roll. Abr. 785.
Cro. Car. 458.
(a) As, in
ejectment of
land and a
free fishery,

because an ejectment does not lie of a free fishery. Cro. Jac. 144. 146. 1 Roll. Abr. 784. — So, in an *ejectione custodiæ et hæredis*, where it does not lie of the custody of the heir, but of the land only. Dyer, 569. 10 Co. 150. 5 Co. 108. 2 Bulst. 28. — So, in an ejectment of a messuage, cottage, and tenement, if it be found for the plaintiff, and one entire penny damages given to the plaintiff for the whole, because an ejectment does not lie of a tenement, the plaintiff may release all the damages, for that it is entire, and have judgment for all the land, saving the tenement. Cro. Eliz. 186. 3 Leon. 128. 2 Bulst. 28. Stile, 30. || And the court will allow the verdict to be entered for the messuage, omitting the tenement, *without* releasing the damages. 8 East, 357.; and see 1 East, 441. ||

In a writ of debt for 100*l.* against an executor, if the plaintiff count upon an obligation for 99*l.*, and upon a *mutuatus* by the testator for 20*s.*, and upon the issue the jury find for the plaintiff in the whole, and assess damages entire, where it appeared no action lay against the executor upon the *mutuatus* of the testator; yet, if the plaintiff release the 20*s.* and all the damages, he may have judgment for the residue.

Roll. Abr. 784.
Ashford's case.
2 Sand. 286.
Like point.

In debt for rent the plaintiff declared for more than was due upon his own shewing, and upon *nil debet* pleaded, the plaintiff had judgment, and damages and costs; and it was moved in arrest of judgment, that the plaintiff had made an (b) entire demand for rent to a certain sum, when it appeared that he could not have an action for so much; yet the court held, that he might release the surplus and damages, and take judgment for the residue.

Roll. Abr. 785
Barber v.
Pomeroy,
Stile, 175.;
et vide
Allen, 29.
(b) In all
actions of debt
the plaintiff is
privity to the

sum in demand, and therefore ought at his peril to declare for the true debt; and the reason why he ought to demand the very sum is, because if he should do otherwise, and recover, he might afterwards bring an action for the true sum, and so the defendant would be doubly charged; and therefore in debt on a bond, if the plaintiff declares for less than is due, he shall never have judgment. 2 Roll. R. 54, 55. 5 Mod. 213. cited. [It is not true, that in debt the plaintiff should demand the very exact sum due, that he cannot recover any other sum than that which he demands. Many instances might be given where this action lies, and yet where it is impossible to state the demand with precision, as, in debt against a tenant who holds over, under the stat of 4 G. 2. c. 28. for *double the value of the land*; or in debt for *treble the value* for not setting out tithes, under the stat. of 2 & 3 Ed. 6. c. 13.; or, for the *value of foreign money*. In all these cases the extent of the demand is uncertain at the commencement of the suit; the *value* is to be found by a jury. But if the declaration import a title to a fixed, gross sum, to a duty numerically certain, there, the evidence must shew a right to that very sum, else the very gist and foundation of the action fails. But this is not peculiar to this species of action: in *assumpsit* as well as debt the case proved must be consistent with the declaration; the proof must be commensurate with the allegation. Walker v. Whitter, Dougl. 6. Aylett v. Lowe, 2 Black. R. 1221. Rudder v. Price, 1 H. Black. 249. 550. Grant v. Astle, Dougl. 731.] || These cases last cited, and 11 East, 62., entirely establish that, in debt on simple contract, the plaintiff may prove and recover less than the sum mentioned in the declaration. But, if debt is brought upon a covenant to pay a sum certain, a variance in the statement of the sum in the deed will be fatal. See 2 Ld. Raym. 816. ||

If there be a certain stated sum specified in the deed itself, that shall not be abridged by any *remittitur* or release of the plaintiff, if he declare upon that deed: as, if a man bring debt upon a bond of 30*s.*, and declare upon a bond of 20*l.* this will be bad; because he has brought his action for more than is due, and

7 Mod. 87.
per Holt C. J.
2 Salk. 658.
pl. 3. S. C.
2 Ld. Raym.
814. S. C.

(a) As in debt for the arrears of rent, in which the plaintiff declared for more rent, and for a longer time than upon his own shewing appeared to be

and this rests upon the deed only, and the sum in it does not amount to his demand. But if the action be brought upon a deed which refers to a matter of fact, that makes the duty more or less; if then the fact which is referred to will entitle him to a less sum only, and he demand more than the fact which the deed refers to upon (a) computation will entitle him to; there, let him remit so much of his demand as the facts does not make out, and it will be well, and he shall have judgment for the rest; for that fact which is not made out is not contradicted by the deed.

due to him. Sand. 282. Dupper v. Baskervill. — So, where the plaintiff declared for 100*l.* due for so many years, and it appeared upon the record in casting up the sums, that he had declared for 8*l.* too much. 5 Mod. 212. Thwaite *et ux.* v. Lady Ashfield, Comb. 565. S. C.

Salk. 24. pl. 8. Cutting v. Williams, 7 Mod. 155. S. C. 2 Ld. Raym. 825. S. C. 11 Mod. 24. S. C.

Assumpsit, and two several counts laid; one was a promissory note, and the plaintiff counted thereon as on a bill of exchange, upon the custom of merchants; on *non assumpsit* entire damages were given, and judgment accordingly; and upon a writ of error brought in *B. R.*, it was held, 1st, That the plaintiff could not declare upon the promissory note as upon a bill of exchange; and as there could be no such count or action, so there could be no such damages. 2dly, That they could not reverse the judgment in part, *viz.* as to the one count, and affirm it as to the other; and denied *Jacob* and *Mill's* case, Hob. 6. and took this difference, *viz.* where the judgment is partly by the common law and partly by statute it may be reversed in part, for that which was a judgment at common law will remain a judgment and be complete without the other.

Doug. 750. 1 Term R. 151. 3 Term R. 435. 6 Term R. 691. 1 Bos. & P. 529. 2 Saund. 171. b.

¶ And it is a settled rule, that where there are several counts, and a verdict is entered generally on all the counts, and entire damages are given, and one count is bad, it is fatal, and judgment shall be arrested: but if it appears that no evidence at all was given on the bad count, or that the jury calculated the damages on evidence applicable only to the good counts, there the verdict may be amended by the judge's notes.

Ibid.

So, also, where it is expressly averred in the declaration, that the plaintiff has sustained damage from a cause subsequent to the commencement of the action, or to the plaintiff's having any right of action, and the jury give entire damages, judgment will be arrested.

1 Vent. 105.

As where the plaintiff declared for taking away his wife, and keeping her till a day which was subsequent to the exhibiting of his bill after verdict, judgment was arrested, because the jury must be intended to have given damages for the *whole time* mentioned.

vide 2 Will. Saund. 171. a. b. c. d. and the cases there collected.

But if the time be laid under a *scilicet*, or if an impossible time is stated, there the judgment will not be arrested, although the time be partly subsequent to the commencement of the action. ¶

(C) Of Impar lance: And herein,

1. Of the Nature thereof, and the several Kinds.

IMPAR LANCE (*a*) is, when one, who is to answer to the action of another, desireth some time to advise what he shall answer; and (*b*) it is nothing else but the continuance of the cause till a further day.

2 Lil. Reg. 41.
2 Show. 310.
pl. 321.
(*a*) This

loquendi has been thought to arise from a notion of religion, which is mentioned in St. Matthew, chapter v. verse 25. *Agree with thine adversary quickly, whilst thou art in the way with him*: they looked upon the plaintiff at the time of declaring to be in his way towards judgment; and that therefore, since the defendant was ordered by the precepts of religion to agree with him, that there was a necessity to give him time for that purpose, and therefore *libertas loquendi* was entered on the roll. Gilb. Hist. C. P. 42, 43. (*b*) When the defendant appears, and the parties by consent obtain a day before the declaration, this is called *dies datus prece partium*. Gilb. Hist. C. P. 41. — A day given before the count is called *dies datus*; but when after, it is called an impar lance. Hard. 365, 366. But for this diversity between an impar lance and the *dies datus*, vide Moor, 79. pl. 209. 5 Leon, 14. N. Bendl. 153. pl. 214. Cro. Eliz. 740.

libertas interlo-

In the Common Pleas they anciently proceeded by original writs, which were warrants out of Chancery for them to proceed; those always gave the defendant notice of the cause of action; and as he had a view of the writ before he appeared, if he had any dilatory plea he was to put it in immediately; but when he pleaded in chief, and came in towards the end of the term, they gave him time to make his defence, which was called impar lance.

2 Show. 444.
Skin. 2. pl. 2.
Yelv. 211.
Lev. 197.
Gilb. Hist.
C. P. 182.

But in the King's Bench, when the defendant comes in by *latitat*, he does not know, till after his appearance, for what the plaintiff declares; and as he had not sight of the bill beforehand, he had time allowed him to plead any plea in abatement, which is called a special impar lance.

12 Mod. 529.

When the Common Pleas proceeded on *clausum fregit*, as the defendant was under the same disadvantages as when he was arrested on a *latitat*, he had the same privilege as to time to make his objections to the declaration.

2 Show. 310.
pl. 321.

This begot the distinction between a general and special impar lances, which latter is again distinguished into the general special impar lance, and that which is still more special.

12 Mod. 529.

The general impar lance is entered on the impar lance roll in the words following, *petit licentiam interloquendi*, which, in the King's Bench, and on *clausum fregit* in the C. B., is entered of course, and is (*c*) all that is done the first term; but in special originals, returnable in an issuable term, the courts have denied the defendant leave to imparl in order to put off a trial. Also, after this general impar lance, the defendant cannot regularly plead any dilatory plea.

Gilb. Hist.
C. P. 183.
(*c*) Impar lances are now much discouraged, as tending to delay plaintiffs in their just demands.

declaration be *not* delivered or filed, and also notice of the filing given before the last four days of term, the defendant is entitled to an impar lance of course.

Note: If a

The general special impar lance is entered thus, *salvis sibi omnibus et omnimodis advantagiis et exceptionibus*; that which is more special is, *salvis sibi omnibus advantagiis, ad breve billam*

Gilb. Hist.
C. P. 183.

(a) Mr. Justice *sive narrationem* (a); the general imparlance is of course, but the special must be obtained from the court.

Powell thus lays down the different kinds of imparlances: there are two sorts of imparlances; the one general, after which one cannot plead in abatement at all; the other special, with a *salvis sibi omnibus exceptionibus tam ad breve quam ad narr.*, after which one may plead in abatement of the writ and count; and this sort of special imparlance may be granted by the prothonotary: there is another sort of imparlance more special, with a *salvis sibi omnibus exceptionibus et advantagiis quibuscunque* which cannot be granted without leave of the court, and is discretionary, after which one may plead to the jurisdiction of the court. 12 Mod. 529. 1 Lutw. 46. 2 Bl. R. 1094. — In *B. R.* on a declaration of Hilary, there may be an imparlance to Trinity Term; for it is the course of that court to give imparlance on declaration till the day of pleading. *Fletcher v. Richardson*, Ca. temp. Hardw. 522. Time to plead is the same as an imparlance. *Barnes*, 545.

2. What the Defendant must do before any Imparlance.

Dyer, 210. If a defendant pleads to the jurisdiction of the court, he must do it *instante* on his appearance; for if he imparls he owns the jurisdiction of the court by craving leave of the court for time to plead in.

1 H. 6. 39.
22 H. 6. 7. a.
Palm. 406.
Latch. 83.
Cro. Car. 9. Stile, 90. Hard. 563. Gilb. Hist. C. P. 183, 184. [But after a general special imparlance, he may plead to the jurisdiction of the court. 2 Black. R. 1096.]

Sid. 518. But the plea of ancient demesne may be pleaded after imparlance; because the lord may reverse the judgment by writ of deceit, and it goes in bar of the action itself in that court.

Cro. Car. 9.;
et vide tit.
Ancient Demesne. [But see 1 Ventr. 235.]
Raym. 34. The defendant after imparlance pleaded to the jurisdiction of the court of *B. R.*, that he was a member of the Privy Chamber, and ought not to be sued in any other court without the special licence of the lord chamberlain of the household for the time being; this was held an ill plea, and the court offended thereat.

Gilb. Hist. C. P. 184. If the defendant in a plea of land would have view, he must demand it before imparlance; for by imparling he undertakes to defend the lands mentioned in the plaintiff's count, and it would be absurd in him to defend not what he does know.

Dyer, 210. If in (b) dower the defendant pleads *semper paratus*, this must be before imparlance.

Hob. 62.
(b) Error on a judgment in dower in *Durham*, where after imparlance the defendant pleaded detinue of charters and judgment on demurrer for the plaintiff, and that judgment affirmed in *B. R.* Show. 271. *Burdon v. Burdon*.

Dyer, 300. So tender and *uncore prist* must be pleaded before imparlance; for by craving time he admits he is not ready, and therefore falsifies his plea.

Hob. 62.
Sid. 365.
Lutw. 238.
2 Mod. 62.
Carth. 413. In *assumpsit* for goods sold the defendant imparled specially with a *salvis sibi*, &c. in common form, and afterwards he pleaded in bar to the action, that he tendered the money demanded to the plaintiff on the very day on which he had laid his request in the

the declaration, and from that day forward *semper paratus fuit* to pay it, *et profert hic in cur.*; and on demurrer to this plea, one objection was, that this tender could not be pleaded after an imparlanee, being contradictory to that part of his plea, viz. *semper paratus*, and after several debates, the plea was for this adjudged ill; and in this case the court held, that the special imparlanee made no difference, as it appeared thereby that he was not *semper paratus*.

3 Salk. 553.
Ld. Raym.
254. S. C.

¶ But it is now settled that a tender may be pleaded after imparlanee, as well as before; though, for avoiding the inconsistency above stated, it must always be entitled of the same term with the declaration; and where it is pleaded after an imparlanee, a judge's order must be obtained in the K. B., or a treasury rule in C. B., for leave to plead it as of the preceding term.¶

Tidd's Prac.
475. (7th edit.)
and the cases
there cited.
Vide 1 Saund.
55. note.

3. What he is to plead after a general Imparlanee.

After a general imparlanee the defendant can only plead in bar to the action, and cannot regularly plead any dilatory plea in abatement; as outlawry, excommunication, joint-tenancy, misnomer, or non-tenure.

2 Roll. R. 59.
Jenk. 150.
[A plea in
abatement
after a general
imparlanee.]
¶ Lloyd v. Wil-
liams, 2 Maul. & S. 484.¶ [It has been considered too so far as a nullity, that the plaintiff may sign judgment as for want of a plea. Doughty v. Lascelles, 4 Term R. 520. ¶ Blackmore v. Fleming, 7 Term R. 447. Vide 2 Saund. 2. notā.¶]

imparlanee is bad on a general demurrer. *Buddle v. Wilson*, 6 Term R. 569.]

But though outlawry after imparlanee cannot be pleaded in abatement, yet if the ground or cause of action be forfeited, as it is in felony, it may be pleaded in bar after imparlanee; so, of a debt certain and due to the outlaw, which vests in the king by the forfeiture, outlawry in the plaintiff may be pleaded after imparlanee, and the turning the remedy from an action of debt to an action on the case (according to the modern practice to avoid the law-wager), whereby it becomes uncertain and founds only in damages, shall not divest the king of what he was once lawfully possessed of.

Bro. Non-
ability, 56.
2 Roll. R. 59.
Cro. Eliz. 203.
2 Vent. 282.
3 Lev. 29.

So if one be excommunicated after the term to which the imparlanee is, such excommunication may be pleaded after imparlanee.

Doct. pl. 224.
Lutw. 1117.

That the demandant is an alien may in a real action be pleaded in bar after imparlanee, as well as to the writ before imparlanee.

Jenk. 130. ;

After a general imparlanee (a) a feme cannot plead coverture in abatement, but may plead it in bar (b): but note, that if the marriage was after the cause of action accrued, it must be pleaded in abatement.

Lutw. 25.
1178. (a) In
an assize
against baron
and feme, the

feme tenant *per receipt* not allowed to imparl. *Dyer*, 298. pl. 28.——(b) It hath been a common practice so to plead; *sed qu.* if it can be a good bar, as plaintiff may maintain another action against husband and wife?

So in an action against an executor, he may plead that he is not executor in bar after imparlanee, but not in abatement.

2 Lev. 190.
Lutw. 1178.

In an action of debt, the defendant pleaded an attachment made in *London* after imparlanee, and adjudged ill.

3 Leon. 232.

4. *What may be pleaded after a special Imparlanee.*

Vide the authorities *ante*.

It is clearly agreed that all pleas in abatement, unless to the jurisdiction, may be pleaded after a special imparlanee. [Where the defendant pleaded a misnomer in abatement after an imparlanee, which was entered thus: "And *A. B.*, who was arrested by the name of *A. C.*, comes, &c." the court held this to be tantamount to a special imparlanee. *Brewster v. Capper*, 1 Wils. 261. 1 Black. R. 51. *S. C.* But this resolution hath been over-ruled in a later case. See *Doughty v. Lascelles*, 4 Term R. 520.]

2 Roll. R. 244.
Sid. 29.
2 Show. 145.
pl. 124.
(a) Hard. 365.

But it hath been doubted whether privilege could be pleaded after a special imparlanee, because it is neither an objection to the writ, bill, or count; but it seems to be now settled (a) that it may be pleaded after a special imparlanee, inasmuch as it does not oust the court of their jurisdiction, but is a privilege which each court allows to the officers of another to be sued in their own court.

Lutw. 46.
Gilb. Hist.
C. P. 185.
10 Mod. 125.
Case of the
University of
Cambridge.
2 Wils. 406.
S. P.

An action of assault and battery was brought against one of the members of the university of *Cambridge*, and a general imparlanee given from one term to another. The chancellor of the university comes and claims cognizance of pleas by virtue of a charter in Queen *Elizabeth's* time, whereby *cognitio placitorum*, with exclusive words *non alibi*, &c. was given to the court of the vice-chancellor to proceed *secundum legem et consuetudinem universitatis*, in all cases where any of the body of that university should be defendant, which charter was confirmed by act of parliament, of which they produced a copy; and whether this claim, being made after imparlanee, should be received, was the question? and adjudged that it should not: and herein the court held, that, though the crown might grant conusances, yet it could not grant them with power to proceed by any other law than the common law; that as it was necessary to plead this privilege, so there was the like necessity to plead it according to the rules of law, which must be before a general imparlanee.

Comb. 68.

On a plea to the jurisdiction on special privileges it is usual to grant a special imparlanee; as in the common case of conusance, &c., for *Oxford*, &c., but they cannot imparl generally.

5. *In what Cases the Courts exercise a discretionary Power in granting or refusing an Imparlanee.*

Skin. 2. pl. 2.
vide supra.

It is said, that where the cause is by original, it is a favour of the court whether they shall have an imparlanee or not.

2 Show. 145.
pl. 124. Lil.
Reg. 43.

Also it is said, that on a special *capias* in C. B., the defendant shall plead the same term (especially if it be an issuable term) the writ is returnable, without any imparlanee, because the whole case is set forth in the writ; and an imparlanee being only the better to inform himself of the cause of action in order to his defence, there is no occasion for it when he is sufficiently informed thereof by the special *capias*.

Comb. 15.

Want of an imparlanee where allowable, if prayed, is error: *Secus*, if not prayed.

A second

A second imparlanee was moved for in a *quo warranto*, and said to have been granted in the case of the city of *London*, but the court denied it; for *Astry* said, that by the course of the court they were to have but the common imparlanee; and the court said, that being *ex gratia* they may grant or deny it as they please. Comb. 12.

If a man plead by force of an indenture which is lost, and affidavit made thereof, the party shall be compelled by the court to shew his counterpart, and he to plead thereto, otherwise the court (a) may grant an imparlanee. Cro. Jac. 429. (a) The court would not grant the defendant an

imparlanee, though he was sued upon a bond of twenty-eight years old, and could not see the bond, but bid him pray oyer of it, and plead, for the antiquity of the bond is no cause of imparlanee. 2 Lil. Reg. 42.

It is said that no imparlanee is allowed in a *homine replegiando*, or in an assize, unless upon good cause shewn; because it is *festinum remedium*. 5 Salk. 186. Ld. Raym. 285

A. bound by recognizance to appear and answer to an information, appeared and prayed an imparlanee; the Attorney-General said an imparlanee is not to be denied, but asked how long he shall be allowed: and *per cur.* an imparlanee is a reasonable time to advise; and these have been from one return-day to another, but now they are always from one term to another in the Crown-office; but by *Holt C. J.* — It seems reasonable that the defendant should have the same time on such appearance as if he had stood out, and come in upon attachment or *capias*, viz. the same time that the length of the process would take up, and no more; for when he had come in upon that, he must plead *instante*. Salk. 397. pl. 3. 6 Mod. 243. S. C. The Queen v. Rawlins; et vide 3 Mod. 315. Comb. 3.

Heretofore when one came in upon a recognizance or *habeas corpus* he was put to plead *instante*, which was thought hard, and is therefore now redressed. 6 Mod. 243. per Northey arguendo.

In an appeal of murder the appellant cannot imparl, but the court may adjourn it by a *dies datus* till such a day. Sid. 325. On an amendment defend-

ant shall have an imparlanee or costs, at his election. *Lechill v. Reynell*, 2 Stra. 950. — In action for words defendant shall have imparlanee on affidavit of plaintiff's being under prosecution for the offence. *Barnes*, 224. — If defendant is lunatic there shall be imparlanee. *Barnes*, 225. — It shall be granted, though writ returnable on first return, if declaration was not delivered with notice to plead. *Barnes*, 225. — If plaintiff has a rule to file a bill to warrant proceedings he may enter imparlanee on roll; but if not entered in time he pays costs. *Barnes*, 227. — If notice of declaration is served on *Sunday*, imparlanee shall be granted. *Barnes*, 309. — If *habeas corpus* removes a cause from sheriff's court to *B. R.* *November 6*, and declaration is delivered *November 12*, and rule to plead given, the court will not grant imparlanee. *Wood v. Wenman*, 1 Wils. 154. — On process returnable the first, second, or third return of any term, if declaration is delivered within four days before the end of the term, defendant shall plead without imparlanee. *General Rule C. B.* *Trin.* 8 G. 3. 2 Wils. 581. ||which is now extended to the fourth return of *Easter* term. *Tidd*, 478. (7th ed.)|| — Not in real actions. *Barnes*, 2. — Not after a peremptory rule to plead. *Barnes*, 225. — Nor if notice to plead has been served, though not indorsed on the declaration. *Barnes*, 226, 227. ||In *K. B.* it is now settled, that in all cases where the defendant has appeared and filed common bail, or perfected special bail, or plaintiff has appeared and filed bail for him, and the declaration is delivered or filed, and notice given four days *exclusive* before the end of the term in which the writ is returnable, the defendant must plead without an imparlanee. *Tidd's Prac.* 476. (7th ed.) But where the process is returnable on or after the last return, or where the plaintiff has neglected to deliver or file and give notice of declaration four days before the end of the term whereof the writ is returnable, defendant has an imparlanee to the next term.

But if a writ be returnable the last day of one term, and the defendant do not justify bail until the fourth day of the next, he is not entitled to an imparlance to the third term; for there is no laches in the plaintiff's not declaring until the defendant is fully in court. So also where a writ is sued out against two defendants jointly, and one of them cannot be met with before the return, so that it is necessary to sue out another, neither of the defendants are entitled to an imparlance, by reason of the plaintiff's not declaring till the term in which the latter defendant is arrested or served; for he could not declare till both defendants were in court. Tidd's Prac. 479. (7th ed.) and the cases there cited. So where the defendant occasions the plaintiff's delay in declaring, he is not entitled to an imparlance, as by unnecessarily obtaining an order for particulars with a stay of proceedings until they have been delivered. 2 Barn. & A. 320.; *et vide* Tidd, 479.]]

(D) Of making Defence: And herein, of the Difference between full and half Defence.

Co. Lit. 127. b. **D**EFENCE cometh from the word *defendo*, so called from the manner of pleading, viz. *venit et defendit*, and is twofold; 1st, Half defence, which is *venit et defendit vim et injuriam*. 2dly, Full defence, viz. *venit et defendit vim et injur. quando*, &c.

Defence, says my Lord Coke, is what the defendant ought to make immediately after the count or declaration; and in real actions is thus, *Et prædict. B. venit et defendit jus suum*, &c. In personal actions it is thus, *Et prædict. B. venit et defendit vim et injuriam, quando*, &c. *Et damna et quicquid quod ipse defendere debet*. By the second part of the defence, *et damna*, &c. he affirms the plaintiff is able to sue and recover damages on just cause. If the defendant pleads in disability of the person, he must not make this part of the defence; as by the last part, viz. "and all that which he ought to defend, when and where he "ought," &c. he affirms the jurisdiction of the court; and therefore this part must be omitted when he pleads to the jurisdiction. (a)

opposing or denial (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians: A general assertion that the plaintiff hath no ground of action; which assertion is afterwards extended and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next. *Vide* Black. Com. 3 V. 296., &c.

Alexander v.
Newman,
Wilkes, 41.
Wilkes v.
Williams,
8 Term R. 651.
2 Saund. 209. c.

|| But it is proper to commence a plea to the jurisdiction by *venit et defendit vim et injuriam quando*, &c.; and the &c. shall imply half defence in cases where half defence is necessary, and full defence where there ought to be full defence. But if the defendant goes on to state at length *et damna et quicquid quod ipse defendere debet*, in that case he cannot afterwards plead in abatement.]]

Co. Lit. 127. b.

Defence also, says Lord Coke, is so necessary in all cases, that though the defendant appear and plead a sufficient bar without making defence, judgment shall be given against him.

5 Lev. 240.
Hampson v.
Bill.

And therefore, where in debt on an obligation the defendant *venit et dicit*, that the plaintiff was excommunicated, &c. without making defence, &c., it was adjudged ill, and a *respondeas ouster* awarded.

But

But though this be a general rule, and though the *venit* is the record of the defendant's coming into court, and is necessary to make him a party, yet it hath been held, that the *defend. vim et injur.* were not (a) used in *clausum fregit* and assaults, and that therefore the want of them in those cases is not fatal, though shewn for special cause.

Lutw. 9.
(a) As appears in the old Book of Entries, fol. 5. 15. 30.

Also, where a plea to the jurisdiction was offered in an inferior court, without making defence, it was resolved not to be necessary where the court have no jurisdiction of the *matter*; otherwise, where not of the *person*.

Vent. 334.

So where an attorney of C. B. was sued in *B. R.* in action *qui tam*, for exercising the office of under-sheriff longer than one year, and he *venit et dicit* and pleaded his privilege, and held good without defence.

Salk. 30.
Comb. 319.
S. C. Kirkham v. Wheeler, Ld. Raym. 27.

In ejectment the defendant *venit et dicit* that the land is ancient demesne, without making defence; the plaintiff demurred specially; and it was resolved that the plaintiff may refuse the plea for want of defence; but that if he receives the plea, he admits a defence; as, if one pleads outlawry, he ought to plead it *sub pede sigilli*, and if he does not so plead it, the plaintiff may refuse it; but if he accept the plea he shall not demur for that cause, for it is well enough if he allow it.

Salk. 217.
Ferrers v. Miller. Carth. 220, 221. S. C. adjudged; and that being a plea to the jurisdiction, it is good without *defendit vim et*

injuriam, and that most of the precedents were so. 3 Lev. 182. North v. Hoyle, S. P. resolved, and said, that the precedents were both ways.

Defence is never made in a *scire facias*.

3 Lev. 182.

(E) The several Kinds of Pleas: And herein,

1. Of Pleas to the Jurisdiction; and therein,

1. To what Courts to be pleaded, and of the Difference between a Plea to the Jurisdiction, and a Claim of Conusance.

HERE it will be necessary to observe, that the courts of *Westminster* are the superior courts of the kingdom, and have a superintendency over all the other courts by prohibitions, if they exceed their jurisdiction, or writs of error and false judgment, if their proceedings are erroneous, and have conusance of all transitory actions, except between the scholars of *Oxford* and *Cambridge*; and every thing is supposed to be done within their jurisdiction, unless the contrary appears; but, on the other hand, nothing shall be intended within the jurisdiction of an inferior court but what is expressly alleged to be so. Also, such inferior courts being bounded in their original creation to causes arising within the limits of their jurisdiction, if a debtor, who has contracted a debt out of such limited jurisdiction, comes within it, yet they cannot sue for such debt; and if any such action be brought, the defendant may plead to the jurisdiction.

Gilb. Hist. C. P. 188, 189. See tit. Courts, Letter (D).

But there is a distinction, which is now fully established, between the counties palatine and other inferior courts, in this

Sand. 74. Sid. 531. Peacock v. Bell.

Gilb. Hist. C. P.
189, 190.

last respect; for a county palatine is a general court for all the subjects of the palatinate, and not merely for the causes arising within that palatinate; so that if a debtor goes from a foreign country into a palatinate, his obligations go along with him as much as if he went from one kingdom into another; and if it were otherwise, a palatinate jurisdiction would be a shelter and *asylum* to debtors, for no process but the supreme prerogative process runs there; and therefore it hath been determined, that though the cause of action be out of the palatinate, yet if the party be a subject of that palatinate, as he is by coming into that dominion, that the action may be brought against him there.

4 Co. 213.

Sid. 103.

||As to claims
of conusance,
*vide tit. Uni-
versities.*||

In all actions transitory the superior courts have a jurisdiction, unless the plaintiff by his declaration shews that the action accrued within a county palatine; or, if it be between the scholars of *Oxford* and *Cambridge*, in which case the university shall have conusance; because by their charter, confirmed by act of parliament, they have jurisdiction over the persons of their scholars. But, though an inferior court might have determined it, yet the superior court, being once possessed of the action, cannot be hindered from proceeding.

4 Inst. 224.

Roll. Abr. 489.

Hard. 509.

(a) So, ancient
demesne, or
held of the
king's manor,
may be plead-
ed. Herne's
Pleader, 7. 351.
Hans. 103.

Tho. 2. Rast.

419. — So
may the juris-
diction of the
cinque ports.

4 Inst. 224.

But *vide* Carth.

109. *et quære*;

for it is there
said to be such
a franchise as
Ely, and there
resolved, that
Ely, being no

county palatine, but only a royal franchise, the defendant cannot plead to the jurisdiction of a superior court, but must demand conusance. — But in what cases, in what manner, conusance is to be made, *vide* Vol. II. 102.

Carth. 11. 354.

If the plaintiff in his declaration shews that the action accrued in a county palatine, the defendant cannot take advantage of it in arrest of judgment, nor can he take advantage of it by way of demurrer, but must plead to the jurisdiction of the court. And here note, that wherever the defendant can plead to the jurisdiction of the courts at *Westminster*, there the franchise may demand conusance, but not *vice versâ*.

Also

Also in such cases, as the defendant may plead to the jurisdiction of the courts of *Westminster*, leave must be obtained from the court for that purpose (a); as was done in an ejectment brought in *B. R.* for lands in the county palatine of *Lancaster*. 3 & 4 G. 2. in *B. R.* *Trustant v. Brocklehurst*, on the demise of Lady Lawley, leave was given to plead to the jurisdiction for lands lying in *Cheshire*. *Barnard*. K. B. 352. 365.

Pasch. 5 G. 2. in *B. R.* *Jones v. Hammond*. Andr. 368. (a) So, Trin.

As to pleading to the jurisdiction of an inferior court, herein we must again take notice, that inferior courts are bounded in their original creation to causes arising within such limited jurisdiction; so that if an action is brought on a promise in a court below, not only the promise but the consideration must be alleged to arise within its jurisdiction; for a debtor who has contracted a debt does not, by coming into the limits of such jurisdiction, give such court authority to hold plea thereof; nor is it sufficient to allege the cause of action within the jurisdiction of the court, but it must be proved on the trial; and if the plaintiff proves a consideration out of the jurisdiction, it cannot be given in evidence; and if it is, the defendant's counsel may tender a bill of exceptions; and upon such bill of exceptions the judgment will appear to be erroneous.

2 Inst. 251. Roll. Abr. 545, 546.

Gilb. Hist. C. P. 188, 189. || 1 Term R. 151.||

As in an action in an inferior court for calling the plaintiff whore, by which she lost her marriage, it was adjudged that the loss of the marriage should be laid within the jurisdiction, the words not being actionable without special damage.

Raym. 63. Lev. 69. Sid. 85. — And Salk. 404. pl. 1 S. P.

adjudged, the loss of the marriage being held to be the gist of the action.

So if in the marshal's court the plaintiff declares, that in consideration the plaintiff, at the request of the defendant, had taken pains to procure him a lease of an house in *Holborn*, the defendant *apud S. infra jur.*, &c. promised to pay him 10*l.*, &c. this is not sufficient to entitle the court to a jurisdiction, inasmuch as it does not appear that *Holborn*, where the house stands, is within the jurisdiction; and the jury are not only to try the promise, but the consideration also.

Lev. 50. Sid. 65. Ramsey v. Atkinson.

So in an *indebitatus assumpsit* for money for a cow sold, it must appear that the sale was within the jurisdiction; for the being indebted there does not necessarily imply that the sale was there, for he that is indebted in one place is so in every place.

Sid. 87. Lev. 96.

So in debt for rent upon a lease made *infra jur.* of an inferior court, it must appear also that the lands lie within the jurisdiction; for if part of the cause arises within the inferior jurisdiction, and part without, the inferior court ought not to hold plea.

Lev. 104. Sid. 151. Vent. 2. S. C. Drake v. Beare.

But if that which is only inducement, or matter of aggravation, be alleged to be out of the inferior jurisdiction, this will not oust such inferior court of its jurisdiction; as if in the court of *H.* the plaintiff declares that he lent his horse at *H.* for the defendant to ride to *B.*, and that the defendant assumed at *H.* to re-deliver him, this is well enough; for it is not the riding but the re-delivery which is the cause of the action.

Sid. 151. 189. Vent. 72.

Cro. Car. 570.
Jon. 450.
Roll. Abr.
546. S. C.
Howell v.
Ireland.

So where in case the plaintiff declared in the court of *Bath in com. Somerset*, that he was a tailor, and that he used the said art for several persons inhabiting *tam infra civitat. predict. quam alibi infra regnum Angliæ*, and the defendant, to scandalize him in his said art, said these words of him, *Thou hast stole as much cloth out of my suit and cloak which thou madest for me as did make thy wife a waistcoat*, by which he lost his customers; it was holden, that the action lies in that court, notwithstanding the allegation, *quam alibi infra regnum Angliæ*, for that is only matter in aggravation of damages.

Salk. 404. pl. 1.
6 Mod. 225.
S. C. Stannion
v. Davies.
2 Ld. Raym.
795.

So in a writ of error of a judgment in the palace-court in an action on the case, wherein the plaintiff declared, that such a day, in such a parish in the county of *Middlesex*, he delivered to the defendant (being an innkeeper) a gelding safely to be kept in his inn, and that he suffered him to be taken out of his stable, and rid so immoderately that the gelding was spoiled: it was objected in error, that the riding did not appear to be within the jurisdiction of the marshal's court. But *per cur.* — In actions in inferior courts it is necessary that every part of that which is the gist of the action should appear to be within their jurisdiction; otherwise, of such matters as are inserted only for aggravation of damages, and might be omitted, and yet the action remain, as in this case; and therefore the judgment was affirmed.

Moravia v.
Sloper, Willes,
30. Evans v.
Munkley,
4 Taunt. 48.

¶ If a defendant justify as plaintiff in an inferior court, under process issued out of that court, it is necessary for him to allege that the cause of action arose within the jurisdiction of the inferior court, or the plaintiff may demur.

Bentley v.
Donnelly,
8 Term R. 127.
1 Wils. 255.

But in an action on the case for rescuing a party taken on mesne process, out of an inferior Court, it is no ground for arresting the judgment, that the declaration does not state that the cause of action in the inferior court arose within the jurisdiction. ¶

2 Inst. 229.
230. Raym.
189. Mod. 81.

The defendant, when sued in an inferior court for a matter not arising within its jurisdiction, must plead to the jurisdiction; and if such plea be refused, the courts above will grant an attachment.

(a) F. N. B.
45, 46. 2 Roll.
Abr. 517.

(b) Where
upon the
statute Westm.

1. c. 35. a pro-
hibition will
be granted,
vide Salk. 201.
pl. 5. 202.

(c) 2 Mod. 271,
272.

Also, it hath been (a) held, that if the defendant admits the jurisdiction of such inferior court, the courts above may grant (b) a prohibition; but in the case of (c) *Mendyke v. Stint* it hath been adjudged, that after verdict and judgment no prohibition lies; but in this case it was said, that if any matter appears in the declaration which sheweth that the cause of action did not arise *infra jurisdictionem*, a prohibition may be granted at any time: so if the subject-matter of the declaration be not proper for the judgment and determination of that court; or if the defendant, who intended to plead to the jurisdiction, be prevented by any artifice, or by the attorney's refusing to plead it, or if his plea be not accepted, or be over-ruled; in all these cases a prohibition will lie at any time.

2 Inst. 512.

If in the county-court, or other inferior court, they shall divide a debt of 20*l.* into several plaints, under 40*s.*, in such case the defendant may plead the same to the jurisdiction of the court, or may have a prohibition to stay that indirect suit.

But it hath been held, that no action will lie for suing in a court that hath no jurisdiction of the matter. [But *quare*.] Carth. 189, 190.

2. The Manner and Time of pleading to the Jurisdiction.

A plea to the jurisdiction is not properly a plea in abatement, though in its consequence it be so; and therefore is to have its proper conclusion; as, *respondere non debet*, or, *si curia cognoscere velit*, and not *quod billa cassetur*. 5 Mod. 145, 146. Carth. 563. Salk. 298. pl. 9.

According to the order of pleading, the defendant must first plead to the jurisdiction of the court, and this he must regularly do before imparlance; for by craving leave to imparl, he submits to the jurisdiction, except where ancient demesne is pleaded, which may be done after imparlance, because the lord might reverse the judgment by writ of disceit; and it goes in bar of the action itself in that court, because it is *coram non judice*. 2 H. 6. 30. 22 H. 6. 7. Doct. pl. 234. Hard. 365. Lutw. 46. Dyer, 210. Stile, 30. Latch. 83.

The defendant must make (a) but half defence, for if he makes the full defence *quando*, &c., he submits to the jurisdiction, the &c. being *quando et ubi cur. consideraverit*. Co. Lit. 197. b. Lutw. 9. Show. R. 386. (a) Where an

inferior court hath no jurisdiction of the matter, it is not necessary to make any defence at all. Vent. 334.

The defendant must plead *in propria persona* (b), for he cannot plead by attorney without leave of the court first had, which leave acknowledges their jurisdiction; for the attorney is an officer of the court, and if they put in a plea by an officer of the court, that plea must be supposed to be put in by leave of the court. 6 Mod. 146. that such plea must be put in *propria persona*, and whilst the

court is sitting, and oath must be made of the truth thereof; but in Carth. 402. it is held, that a plea to the jurisdiction need not be on oath, as a foreign plea must. — No dilatory plea without affidavit. 4 Ann. c. 16. § 11. [(b) In these two points, viz. that they must be pleaded in person, and that in pleading them the defendant must make but *half* defence, pleas to the jurisdiction differ from pleas in abatement; for these may be pleaded by attorney, and with *full* defence. Lutw. 7. Wheatley v. Cudmerson, Mich. 15 G. 2. C. P. Thompson v. Stockdale, Hil. 23 G. 3. K. B.]

He who pleads to the jurisdiction ought by his plea to give jurisdiction to some other court. Rex v. Johnson, 6 East R. 583.

¶ Therefore, where the defendant, a judge of the C. B. in *Ireland*, pleaded to an indictment for publishing a libel in *Middlesex*, that *Ireland* before and since the union was governed by its own laws, and not those of *Great Britain*, and that there always had been, and were courts and jurisdictions in *Ireland* distinct from those of *Great Britain*, and sufficient for the trial of all offences committed by the natives of *Ireland*, and that defendant was a native of *Ireland* and resident there at the time of the offence, and that the subject matter related to things in *Ireland*, the plea was held ill on general demurrer, for the plea gave no jurisdiction where the trial of this offence could be had, and if the defence were at all available it was a complete bar to the charge of unlawfully publishing a libel in *Middlesex*, and ought to have been pleaded in bar or given in evidence on not guilty.¶

See farther on this subject, Vol. I. 2. ¶ *tit.* "ABATEMENT." Vol. II. (D) 3. *tit.* "COURTS."¶

(F) Of

(F) Of Pleas in Abatement.

See *tit. "ABATEMENT,"* Vol. I.

(G) Of Pleas in Bar and in Chief: And herein,

1. *Of the General Issue, and how formed.*

Co. Lit. 126.

ISSUE is thus defined by my Lord *Coke*, a single, certain, and material point issuing out of the allegations and pleas of the plaintiff and defendant, consisting regularly of an affirmative and negative, to be tried by twelve men; and is either general or special.

(a) That not guilty is a good plea to any misfeasance whatsoever, Cro. Eliz. 257. 3 Mod. 324. Skin. 280.

[*Riens in ar-*

rere is a good plea to an action of debt for rent; it is the general issue. *Secus*, to an action of *covenant*, because it confesses the covenant to be broken, and tends but in mitigation of damages. *Warner v. Theobald*, Cowp. 588. *Hare v. Saville*, 1 Brownl. 19. *Nil debet* is also a good plea to debt for rent. *Hardr. 332. 2 Ld. Raym. 1503. Bull. N.P. 170.* (b) Cro. Jac. 377. 551. to an usurious bond or sheriff's bond *non est factum* cannot be pleaded, but must be avoided by special pleading. *Hob. 72; et vide titles Sheriff and Usury.*

Co. Lit. 126. a.

An issue being taken generally referreth to the count, and not to the writ; as, in account, the writ chargeth him generally to be his receiver, the count chargeth him specially to be his receiver by the hands of *T.* The defendant pleadeth, that he was never his receiver in manner and form, &c.; this shall refer to the count, so as he cannot be charged but by the receipt by the hands of *T.*

Co. Lit. 126. a.

An issue shall not be taken on a negative pregnant, which implieth another sufficient matter; but upon that which is single and simple, as *ne dona pas per le fait* implies a gift by parol, and therefore the issue must be *ne dona pas modo et forma.*

Co. Lit. 126. a.

(c) Of necessity, an issue may be joined on two affirmatives.

Co. Lit. 126.

a. Bro. Issue, 28. So, if issue be tendered by an affirmative, and the other join, it is good, though there was not a negative. As, if an executor plead, *no assets*, and the plaintiff reply that he purchased another writ, and then he had assets, and tender an issue thereon, and the defendant join, it is good. *Aldrich v. Welthal*, Cro. Jac. 580. 589. So, to debt upon bond, the defendant pleaded, duress of imprisonment; to which the plaintiff replied, that the defendant was at large, and at his own disposal, and executed the bond of his free will, and not for fear of imprisonment, and concluded to the country. To this there was a demurrer, and judgment given for the plaintiff, which judgment was affirmed in error. For *per curiam* — This is such an affirmative as implies a negative; like the case of pleading in a writ

of right, where the demandant counts that he has more right than the tenant, and the plea of the tenant is, that he hath more right than the demandant. The ancient rule of requiring an affirmative and negative hath been long broken into, as, in the common case of infancy, where formerly they not only replied full age but also traversed the infancy, which is not now required. Sir T. Jones, 6. It is enough, if the second affirmative is so contrary to the first, that the first cannot in any degree be true. *Tomlin v. Purdis*, 2 Stra. 1177. 1 Wils. 6. S. C. However, in Sav. 86. it is said, that where there are two affirmatives, one of which implies a negative of the other, the issue cannot be properly joined upon them without a traverse:] || *et vide* 6 East, 557. Arch. Plead. 174, 175. 1 Saund. 22. n. 2. 208, 209. ||

Where the issue is joined of the part of the defendant, the entry is *et de hoc ponit se super patriam*; but if it be of the part of the plaintiff, the entry is *et hoc petit quod inquiretur per patriam*. Co. Lit. 126. a. 53 H. 6. 21.

There be some negative pleas which be issues of themselves, whereunto the demandant or plaintiff cannot (a) reply, any more than to a general issue, which is *et prædictus A. similiter*; as if the tenant do vouch, and the demandant counterplead, that the vouchee or any of his ancestors had any thing, &c. whereof he might make a feoffment, he shall conclude, *et hoc petit quod inquiretur per patriam et prædictus tenens similiter*; so in a fine pleaded by the tenant, &c., the demandant may say, *quod partes finis nihil habuerunt*, and *hoc petit quod inquiretur et prædict. tenens similiter*: and so in a writ of dower, the tenant pleads, *ne unques seisi que dower*, he shall conclude, *et de hoc ponit se super patriam et prædict. petens similiter*. Co. Lit. 126. a. (a) The reason is, that it would be inconvenient to go on to a replication, because to reply generally would leave it too large and comprehensive, and to reply any particular kind of

estate would be too narrow, and consequently immaterial. 1 P. Wms. 259.

Every issue consists of an (b) affirmative and negative; and an issue being once well tendered must be accepted, and closes the pleadings. Co. Lit. 126. Sand. 538. Lutw. 623. 1130..

Comb. 86. (b) A distinction was thus taken by counsel, viz. that where an affirmative came after a negative, there, issue ought not to be joined, but ought to be left on the other side; but, where the affirmative was first and the negative came after, there it ought to be joined. But Holt C. J. said he had never heard of this distinction, and therefore gave but little regard to it. Carth. 88.

In an *audita querela*, to avoid the execution of a recognizance, the plaintiff set forth, that it was defeasanced upon payment of divers sums of money at certain days, and that he was at the place appointed and tendered the money, and that the defendant was not there to receive it: the defendant pleaded (c) *protestando*, that the plaintiff was not there to pay it, and that he was there ready to receive it, *absque hoc*, that the plaintiff was ready to pay it; which being specially demurred to, the court held the plea naught; and that there being an express affirmative and negative, there should have been no traverse; for so they may traverse one upon another *ad infinitum*. Cro. Eliz. 754. 755. Huish v. Phillips. (c) A protestation avoweth not the party that taketh it if the issue be found against him; and therefore, if the issue be found for a villein, he is

enfranchised for ever; and yet in some special cases, albeit the issue be found against him that maketh the protestation, yet he shall take benefit of his protestation; as, if a man entereth into warranty, and taketh by protestation the value of the land, albeit the plea be found against him, yet the protestation shall serve him for the value. Co. Lit. 126. a. || Where the matter cannot be pleaded, it shall be saved to the party protesting, though the issue be found against him; as, where an infant sues his guardian for waste, and appears by attorney, and the guardian takes the nonage by *protestando*, it shall save him the wardship, for he cannot plead it. 2 Saund. 104. note. ||

The reason of joining issue is, that the party may come prepared Lucas's Rep.

299., *vide tit. Barratry.*

Raym. 50.
Keb. 125. 164.
Beesly v.
Walker.
||As to the replication *de injuriâ*, &c. *vide tit. Trespass* (1).||

Lev. 193. Sid. 302. 2 Keb. 107. 122.
S. C. Dring v. Repass.

(a) Where *modo et formâ* are of the substance of the issue, and where but words of form, this diversity is to be observed; where the issue taken goeth to the point of the writ or action, there *modo et formâ* are but words of form; but otherwise it is where a collateral point in pleading traversed, as if a feoffment be alleged by two, and this be traversed *modo et formâ*, and it be found the feoffment of one, there *modo et formâ* is material; so if a feoffment be pleaded by deed, and it be traversed, *absque hoc, quod feoffavit modo et formâ*, upon this collateral issue *modo et formâ* are so essential, that a jury cannot find a feoffment without deed. Co. Lit. 281. b.

Crokatt v. Jones, 2 Stra. 754. 2 Ld. Raym. 1441.

pared to defend one single point; which holds in all cases, except in barratry; and even in that, notice must be given of the point the prosecutor intends to proceed on.

In an action of false imprisonment, the defendant justifies by force of a *latitat* out of *B. R.* by force of which he took him; the plaintiff replies, that he did it *de injuriâ suâ propriâ*, &c. It was moved that this was naught after a verdict, and not helped; but the court held it well after a verdict; but that upon demurrer it would be naught, as being multifarious, jumbling matters of record and matters of fact together.

An action of debt was brought upon a recovery in the court of *Norwich*; the defendant shews that the court is holden by custom before other persons, *absque hoc*, that the plaintiff such a day recovered *secundum consuetudinem*, &c., upon which it was demurred; and in defence of the plea it was said, that it is not the record that is put in issue, but the custom only, and that may well be traversed; for which were cited Hob. 244. Hutt. 20. 1 R. 3. 9. But the whole court held the plea pregnant and insufficient; for he has made the day parcel of the issue, which he ought not to have done, but have said only (a) *modo et formâ*; and they held clearly, that the custom to hold courts might well have been traversed, if that point had been singly brought into issue; but here matter of record is mixed with matter of fact, which is ill on a general demurrer; and therefore judgment was given for the plaintiff.

[The plaintiff declared upon two bills of exchange, and several other promises: the defendant, as to the two first counts upon the bills of exchange, pleaded, *quod actio non accrevit infra sex annos*, and as to the other counts *non assumpsit* generally. The plaintiff replied, that upon such a day he sued out a *latitat*, which he continued down to the present declaration, and averred, that the cause of action arose within six years before the suing out of the *latitat*. The defendant in his rejoinder *protesting* that there was no such writ issued as set out by the plaintiff, for plea said, that after the six years were expired, viz. such a day, the plaintiff first sued out a *latitat*, which he set forth, and that he appeared to it; and that the plaintiff declared upon it, as above, and traversed that he appeared and put in bail to the writ mentioned in the replication, and concluded with an averment. The plaintiff demurred, and shewed for cause that the rejoinder is contrary to the record of appearance, and a negative pregnant. The plaintiff had judgment.

Co. Lit. 126. a. An issue ought to be upon a point, which may be well tried. Thus, if it be alleged that a woman was *enseint* by her husband at the time of his death, the issue must be, if she was *enseint*, not if *enseint* by her husband, for *filiatio non potest probari*.]

2. *Imma-*

2. *Immaterial and informal Issues, and where aided.*

Here the general rule is that where the issue is immaterial a verdict will not aid it; but where it is only informal, it is helped. *Videtit. Amend- ment; ¶ et vide post, Re- pleader, (M).¶*

An immaterial issue is, where what is immaterially alleged by the pleadings is not traversed, but an issue taken upon such a point as will not determine the merits of the cause: an informal issue is, where it is not traversed in a right manner. *Carth. 571. Lev. 52.*

A verdict cannot help an immaterial issue, because what is alleged in the pleadings is not put in issue; or, if it be, it is not decisive between the parties, and so the verdict is no good foundation for the judgment; and if what is material in the pleadings be not put in issue, it is not made necessary to be proved on what trial; but if it be not decisive, then what is necessary to be proved on the trial will not in all cases be a foundation for the judgment: for the courts in these cases are judges on what point they ought to go to issue, so as to be a legal charge by the plaintiff, or discharge by the defendant; since it is the province of the judges to settle the matter of law, and the jury the matter of fact. *Cro. Eliz. 227. Brownl. 229. Carth. 571. 2 Roll. R. 117. Cro. Jac. 580.*

If the plaintiff declares upon a promise to find the plaintiff, his wife and two servants, with meat and drink for three years, upon request; and the defendant pleads, that he promised to find the plaintiff and his wife with meat, &c. *absque hoc*, that he promised to find, &c. for two servants, &c., and the plaintiff replies, that he did promise to find, &c. for three years next following, *et hoc petit*, &c., and thereupon a verdict is found for the plaintiff; yet he shall not have judgment; for the promise in the replication is not the same as that in the declaration, which was traversed by the defendant; and so there is no issue joined, and therefore is not helped by the statute. *5 Leon. 66. Kirbee v. Leirs. 2 Leon. 195. S. C. cited Godb. 56. S. C. cited.*

If in debt on a bond conditioned for the payment of 105*l.* at a certain day and place, the defendant pleads, that at the day and place he paid *prædict.* 100*l.* *quas solvisse debuit secundum formam et effectum conditionis*; and the plaintiff replies, *Quod non solvit prædict.* 105*l.* &c., and a verdict is found *quod non solvit* the said 105*l.*; yet the plaintiff shall not have judgment; for *prædict.* 100*l.* shall not be intended the 105*l.*, and so they meet not, and there is no issue. *Cro. Jac. 525. Sandbank v. Turvy. Hob. 113. Cro. Car. 593. S. P. adjudged.*

¶ So in debt on bond conditioned for performance of several covenants, the defendant pleaded first a general performance, and then a separate performance of each of the covenants, and the plaintiff took issue only on the general performance, and then suggested various breaches, and the defendant joined in this issue; the issue was held immaterial and a replender awarded; for the plaintiff ought, in his replication, to have assigned specific breaches in answer to the defendant's plea of special performance, and the defendant should have demurred to the replication for not doing so; but as the defendant had joined in the issue the issue was immaterial.¶ *Plomer v. Ross, 5 Taunt. 368.*

If in a *sci. fa.* upon a judgment against the administratrix of *J. S.*, the defendant pleads, that the said *J. S.* made *B.* within age *Cro. Car. 79. 93. Oxford v. Rivit, adjudg-*

ed by three judges against two, who held there was no issue, and so the verdict void and not aided by the statute of jeofails. Hetl. 55. Lit. Rep. 52. S. C.

Roll. R. 86.

age his executor, and that administration *durante minore ætate* of the said *B.* was committed to the defendant, and that such a day the said *B.* attained the age of seventeen, and then refused to be executor, &c., and that when the said *B.* attained his said age the defendant had fully administered, &c. and the plaintiff replies, that at the time the said *B.* came to his said age *devastavit diversa bona*, &c. and the defendant rejoins, *Quod ipse non devastavit*, &c., and thereupon issue be joined, and found for the defendant; she shall have judgment; for the devastation must be intended by the administratrix, and the plaintiff shall not avoid the verdict by an exception to his own replication.

In trespass the defendant pleads an accord between the plaintiff and *J. S.* of the one part, and the defendant of the other part; the plaintiff replies, *Quod non habetur talis concordia* between the plaintiff and defendant *qualis* the defendant had alleged; and on issue joined a verdict for the plaintiff, yet he shall not have judgment; because the plaintiff does not traverse the same concord that is set out in the defendant's bar, but puts another concord in issue not alleged in the defendant's bar, between the plaintiff and defendant only, and the court cannot be certain which is proved on the trial; and though it may be said in this case, that either may bar the action, yet only one thing is to be put in issue; and if it should be otherwise, there would be no correspondence between the *probata* and *allegata*.

Cro. Car. 516, 517.
Parker
v. Taylor, Sid.
290. S. C.
cited.

In debt on a bond conditioned for the payment of 8*l.* on a certain day, the defendant pleads payment on the day in the condition, *et de hoc ponit se super patriam, et prædict*, the plaintiff *similiter*; and found for the plaintiff: here, the defendant has closed the issue on the plaintiff by the *hoc ponit se super patriam*; yet the defendant cannot take advantage of the informality of his own plea, and it is waived on both sides when they go to issue on the substance of it.

Sid. 541. Cro.
Jac. 599. S. P.
adjudged.
Roll. R. 47.
S. P. adjudged.
Stile, 150.
198. *Vide*
Hard. 40. S. P.
cited Vent. 70.
S. P. said to
have been
adjudged.

But, if in trespass the defendant pleads a special justification, and the plaintiff replies *de injuriâ suâ propriâ absque tali causâ*, there, though the issue is found for the plaintiff, it is wrong after verdict, because the *injuriâ suâ propriâ* does no more than affirm the declaration, and does not confess or deny the bar; and therefore the gist of the bar is not put in issue at all, but rather stands confessed by the replication since the cause is not traversed; for saying it was *de injuriâ suâ propriâ* is no more than saying, that withstanding the cause mentioned in the bar the defendant committed the injury, which the bar being a sufficient excuse cannot be; but it does not in the least put the bar in issue.

8 Co. 66. — The position in this paragraph is too general. — There are many cases where the general replication with the general traverse is sufficient. Many where it is not. *¶ Vide tit. Trespass. ¶*

Sid. 541, 542.
Burton v.
Chapman.

If in an *assumpsit* for wares sold the defendant pleads *quod tempore quo*, &c. he was an infant, and the plaintiff replies they were for necessaries, *et hoc petit quod inquitratu per patriam* &c., and thereupon issue is joined, and a verdict found for the plaintiff; though this traverse is informal, because the plaintiff ought not to have closed the issue, but to have given the defendant an opportunity

opportunity of rejoining, that there might have been a proper negative to his affirmative; yet since the matter of the replication is put in issue, *viz.* whether they were necessities or not, the defendant has waived all objections to the form, and by such waiver it appears that he is not any ways injured by not rejoining, and it being found that they were necessities, the plaintiff ought to prevail.

In debt on a bond conditioned for the payment of 60*l.* on the 25th of *June*, the defendant pleads payment on the 20th of *June secundum formam et effectum conditionis, et sur ceo* issue is joined, and the verdict finds *quod non solvit* 60*l.* at the 20th; the plaintiff shall not have judgment, for the issue is *dehors* the matter of the condition, and so void, and it might have been paid the 25th, though it was not paid the 20th, so that it does not appear the condition was broken. But where the issue is decisive between the parties, though it be not so apt, yet this shall be cured after a verdict.

As in replevin the defendant avows that *Ellen Enderby* was seised in fee, and took *Pigott* to husband, and had issue by him *Thomas*; that *Ellen* and *Thomas* granted a rent-charge for which he distrains: the plaintiff replies, that one *Fisher* being seised in fee gave the land to *J. Enderby* in tail, who had issue *Ellen*; that *J. Enderby* died, and *Ellen* entered, and being seised in tail took *Pigott* to husband, and had issue *Thomas*, who is dead who granted, &c. *absque hoc*, that *Ellen* was seised in fee; though this was an informal issue, for the plaintiff ought to have traversed that *Thomas* the grantor was seised in fee; yet it is a decisive issue, for it is allowed on both sides that *Thomas* was in by descent from *Ellen*; and if *Ellen* was seised in fee *Thomas* was so too, and consequently had good right to make the grant.

If in debt upon a single bill the defendant pleads payment, without an acquittance, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for the payment without an acquittance is no plea to a single bill; yet, because issue was joined upon an affirmative and negative, and verdict for the plaintiff, he shall have judgment: adjudged upon a writ of error in *Camera Scaccarii*, and the first judgment affirmed accordingly.

In an action of debt, if not guilty be pleaded, and there be a verdict for the plaintiff, it shall be aided by the statute; because being an ill plea, and a false one, the plaintiff ought to have his judgment, both for the badness of the plea and for its falsehood: but if the verdict had been for the defendant, yet the plaintiff should have judgment; because the declaration is not answered by the plea.

as for not setting out tithes, usury, &c.? 1 Term R. 462. Upon a *devastavit* against executors, not guilty may be pleaded as well as *nil debent*. *Ibid.*] || But the plea of *non assumpsit* in debt is a nullity, and the court will only set aside a judgment signed, on the terms of defendant paying the costs. *Brennan v. Egan*, 4 Taunt. 164. 6 East, 549.; and the plea of *nil debet* in *assumpsit* is a nullity. *Barnes*, 257. *Tidd*, 560. (9th. ed.) 5 Dow. & Ry. 621. 1 Dow. & Ry. 473. 7 Dow. & Ry. 511.||

Cro. Jac. 454.
Holmes v.
Brocket.

Cro. Jac. 44.
Yelv. 54.
Pigott v.
Pigott.

5 Co. 43.
Nichol's case.
Moor, 692.
S. C. Cro.
Eliz. 455. S. C.
5 Bulst. 301.

Noy, 56.
Cro. Eliz. 773.
2 Jon. 184.
[*Qu.* Whether
not guilty
would not be
a good plea in
debt on a
penal statute,

Cro. Eliz. 470.
Corbyn v.
Brown.
|| 2 Stra. 1022.

The plea of
"not guilty"
in *assumpsit*
cannot be

treated as a nullity. 1 Chitt. R. 715.; and see the cases in note. || (a) Where in debt against an executor upon the bond of his testator the defendant pleaded *non est factum*. Hard. 458.

Hob. 49.

Keble v.

Osbaston.

[(b) So, an
issue, that gold
was found in a
ship passing
or upon its
passage from
London to R.
is good.

Hardr. 17. 19.

So that the
customs were

not concealed or withheld. Hardr. 17. Dyer, 43. b. So that he paid or caused to be paid. Hardr. 19. For an issue may be upon a disjunctive, where the words of the disjunctive proposition are synonymous.]

Hob. 115.

(c) If in debt
upon an obli-
gation the de-
fendant pleads
the statute of
usury *et quod*
corruptè
agreat fuit,
&c. *et quod*
querens cor-
rupte recepit,
the usury is

taken upon both, and found for the defendant, he shall have judgment; though this issue is double, the one part material and the other not. Moor, 574. pl. 790. If in debt for rent the defendant pleads *nil hab. in tenementis*, and the plaintiff replies *quod hab. bonum et sufficientem statum*, &c. but does not shew what in particular, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though the issue is informal, yet the substance of the matter is found, viz. that he had an estate, &c. Glass v. Gill, Yelv. 227. Cro. Jac. 512.; *et vide* Buls. 241.

Sid. 289.

Lev. 185.

Walsingham
v. Comb.

(d) So, where
the covenant

is to repair, and the plaintiff assigns the breach, that the defendant suffered the houses to be ruinous, *et sic non reparavit*, and the defendant pleads that he did not suffer them to be ruinous. Moor, 599. Cro. Eliz. 457. 2 Leon. 116. || (e) But *non infregit conventionem* is clearly bad on demurrer where the declaration concludes, "and so defendant hath not kept his "covenant," for it is then only a negative against a negative; *et scemle* that in any case it is bad on demurrer. 8 Term R. 280. 2 Taunt. 278. ||

So, if in an *assumpsit* the defendant pleads not guilty, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though this is an improper issue (a) in this action, yet because there is a disceit alleged, not guilty is an answer thereto; and it is but an issue misjoined, which is aided by the statute.

If in debt against A. as executor of B. the defendant pleads that B. died intestate, and that administration of his goods was committed to C., and the plaintiff replies that, before the said administration granted, divers goods, &c. came to the hands of the defendant, which, as executor to the said B. *administravit seu aliter ad usum suum proprium disposuit et convertit*, &c., and thereupon in the disjunctive issue is joined, and found for the plaintiff, he shall have judgment (b); for the point in issue is directly found, and so it is within the statute; and this also is no improper issue; for whether he administered or converted to his own use both must be as executor.

If in replevin the defendant avows for damage-feasant, and the plaintiff replies, that he was seised in fee of a messuage and certain land, and that J. S. was seised of another messuage and land, and that they two, and all those whose estate, &c. had common, &c. in the place where, &c., and conveys to himself the other messuage and lands for years, and so justifies, &c., and the defendant traverses the prescription, and it is found for the plaintiff; though the prescription thus confessed for several is grossly faulty, and (c) the issue thereupon confused, yet after verdict it was saved by the statute.

If in an action of (d) covenant the plaintiff assigns a breach, that the defendant was not seised in fee, *et sic infregit conventionem*; and the defendant pleads *non infregit conventionem*, and thereupon issue is joined, and a verdict for the plaintiff, he shall have judgment; for this is but an informal issue. (e)

In an action of assault and battery, the defendant pleads, that the plaintiff neglected his service, *per quod moderatè castigavit*; the plaintiff replies, *quod non moderatè castigavit*; and the issue was found for the plaintiff: though this be an informal traverse, being rather a traverse of the chastisement than of the moderate manner of doing it, and the right traverse should have been *de injuriâ suâ propriâ absque tali causâ*, yet after verdict it is good; because the jury have ascertained that he did not beat him moderately,

Sid. 444.
Vent. 70.
2 Keb. 623.

If an issue be on a point that is impossible in substance and nature of the thing, it is not cured by the verdict; but if it be only impossible in the manner and form of it, a verdict will cure it; for where the substance is impossible, no verdict can cure it, because it cannot make that true which cannot possibly be; but where it is only impossible in the manner of it, there the thing which is possible may be found to be or not, and the manner which is impossible totally rejected (a): as if an action of assault and battery be brought, and the defendant justify by conveying to himself an estate by copy of a parcel of the manor of C., whereof D. is seised, and that the plaintiff came upon it, and that he laid his hands *mollitèr*; the plaintiff reply, and convey to himself an estate by copy of another parcel of the manor, and that D., lord of the manor, had for himself and tenants a way over the defendant's piece of land; issue is joined, and verdict for the plaintiff; this is a void prescription; for a copyholder, being originally but a tenant at will, could not prescribe at will but in the name of the lord for an easement; and for an easement out of the manor he could not prescribe in the lord's name, but must lay it by custom, as the *lex loci*; but being laid here by way of prescription, it is in its own nature void; and the verdict could not make that which was repugnant to the nature of the thing to be true or false, and by consequence could not help it.

(a) Hob. 112,
113. Moor,
867. Tasker
v. Salter.

But in debt on a bond conditioned for the payment of 100*l.* on 31 September, if defendant pleads payment at the day, and it is found against him, the plaintiff shall have judgment; because the payment is what is material, and the day is impossible and altogether idle and void; for, not being paid before the end of that month, the obligation is absolute.

Cro. Car. 78.
Jon. 140.
Latch. 158.
Noy, 85.
Purchase v.
Jegon.

[In an action upon a contract for stock, which was required by act of parliament to be registered before the 1st of November 1721, the defendant pleaded that the contract was not registered before the 1st of November 1720, *secundum formam stat.*; the plaintiff replied, it was registered before the 1st of November 1720, *secundum formam stat.*; upon which they were at issue, and the plaintiff had a verdict. Upon motion in arrest of judgment, that this was an immaterial issue, the court held it well enough; the registering of the contract was the material part; and the time which was impertinently alleged may be rejected as surplusage.

Woolley v.
Briscoe,
1 Stra. 554.
8 Mod. 173.
S. C.

To debt upon bond the defendant pleaded, *plenè administravit*; the defendant replied, that the defendant had assets in his hands

Collet v.
Masterman,
1 Wils. 258.

to satisfy the *damages* aforesaid, and thereupon issue was joined; and the jury found a verdict for the plaintiff. It was moved in arrest of judgment that this is an immaterial issue, for it ought to have been, whether the defendant had sufficient to satisfy the *debt and damages*. In answer, it was said, that the word *damages* is only surplusage, and by leaving it out the issue will be a sensible, material issue, *viz.* that the defendant had sufficient to satisfy, &c.; and of that opinion was the court.]

Hob. 117.
Napper v.
Jasper.

If in trespass issue is taken, that the prebendary of *A.*, and all his predecessors, &c. had used, time out of mind, to keep a shepherd, for the better keeping together their sheep feeding in the said pasture from the sheep of *T. Earl of S.*, and the issue is found for the plaintiff accordingly; though it is senseless and impossible that the sheep of the prebendary, &c. time out of mind could be kept from the sheep of the Earl of *S.*, being but one man's life, yet the plaintiff shall have judgment; for the substance of the issue is the keeping the sheep of the prebendary, &c., and the other part is but a consequence thereof, that thereby they were kept from the sheep of the said earl.

Cro. Car. 25.
Knight v.
Harvey.

In debt upon a bond against an administrator brought in *Hilary Term 22 Jac.* the defendant imparled: and in *Easter Term 1 Car.* the defendant pleaded a judgment upon a bond, dated *anno quinto regis nunc*, where it should have been *regis Jac.* and that he had not assets *ultra* to satisfy that judgment; and thereupon the plaintiff joined issue, that the said recovery was by fraud and covin; and it was found for the plaintiff; though it was impossible there could be a bond *anno quinto regis Caroli*, which was not then come, yet the plaintiff, having a good declaration, had judgment.

Lev. 183.
Sid. 289.
2 Keb. 10. 13.
47. S. C. Trin.
18 Car. 2.
between Wal-
singham v.
Coombe.
|| *Vide supra*,
p. 242. as to
the plea of
non infregit
conventionem.||

In covenant on a conveyance of lands, the vendor covenants that he was seised in fee, and assigns a breach that he was not seised in fee, and so had not performed his covenant; the defendant pleads, that he had not broken his covenant; and on the issue so joined, a verdict was for the plaintiff: it was moved in arrest of judgment, that this was not any issue, it consisting only of two negatives, *viz.* that he was not seised in fee, and so had not performed his covenant on the plaintiff's part, and that he had not broken his covenant on the defendant's part; also, that the pleading is too general, for that he ought to answer particularly in covenant to the breach assigned; and it was said, that though in actions founded upon tort, the declaration, being special, may be answered generally, yet in actions founded on a contract, a special declaration must be answered specially. The court at first doubted, but afterwards gave judgment for the plaintiff; for it is an issue, though argumentative and informal; for if he had not broken his covenant he was seised in fee, and if he was not seised in fee he had broken his covenant; that it is not wholly immaterial, and informal issues are cured by 32 H. 8. c. 30. after verdict, though immaterial ones are not.

|| Where the issue is immaterial the court will award a repleader, respecting which the following rules are laid down by the

the court, in the case of *Staple and Haydon*, 2 Salk. 579. 6 Mod. 1. 2 Ld. Ray. 922. First, that at common law a repleader was allowed before trial, because a verdict did not cure an *immaterial* (a) issue; but now a repleader ought never to be allowed till trial, because the fault of the issue may be helped after verdict by the statute of jeofails. Secondly, that if a repleader be denied where it should be granted, or granted where it should be denied, it is error. Thirdly, that the judgment of repleader is general, namely, *that the parties should replead*; and the parties must begin again at the first fault which occasioned the immaterial issue. 1 Lord Raym. 169. Thus if the declaration is ill and the plea and replication are also ill, the parties must begin *de novo*; but if the plea is good and the replication ill, at the replication. Fourthly, no costs are allowed on either side. Fifthly, a repleader cannot be awarded after a default at *nisi prius*. To which it may be added, a repleader cannot be awarded after a demurrer or writ of error, but only after issue joined; and it is not grantable in favour of the person who made the first fault in pleading. (b)

(a) The word is '*immaterial*' in the report; but it should seem to be a mistake: for the reason given, if that word alone be used, is wholly unsatisfactory, inasmuch as a verdict does not cure an *immaterial* issue at this day. It should seem that the reason of the distinction between the practice before and since the statute of

jeofails is this; that, before the statute, a verdict did not cure either an *immaterial* or an *informal* issue, and therefore a repleader was awarded before trial, because the trial could not have any effect upon the issue; but, since the statute, a verdict does cure an *informal* issue, and therefore the court will not interfere until the result of a trial is seen, which may render a motion for a repleader unnecessary. See 2 Saund. 319. b. (5th ed.) (b) 2 Will. Saund. 319. c. (5th ed.)

Where a plea is good in form though not in fact, or, in other words, if it contain a defective title or ground of defence, by which it is apparent to the court, on the defendant's own shewing, that, in any way of putting it, he can have no merits, and the issue joined thereon be found for him, there, as the awarding a repleader would not mend the case, the court, for the sake of the plaintiff, will at once give judgment *non obstante veredicto*; but where the defect is not so much in the title as in the manner of stating it, and the issue joined thereon is immaterial, so that the court know not for whom to give judgment, whether for the plaintiff or the defendant, then, for their own sake, they will award a repleader. A judgment therefore *non obstante veredicto* is always upon the merits, and never granted but in a very clear case — a repleader is upon the form and manner of pleading.||

Tidd's Prac. 922. (9th ed.) and cases there cited.

3. Of special Pleas; and therein, of Pleas amounting to the General Issue, and of Matters which may be pleaded or given in Evidence.

The defendant is at liberty to plead the general issue, or traverse any material point of the declaration; but (a) he cannot plead a plea that amounts to the general issue; for pleas which amount to the general issue are only facts on which the issue may be turned in evidence, and therefore are not issues of fact, to be referred to the court, but matters of evidence to be determined by a jury, and consequently not good pleas; because they

(a) Pleading that amounts to the general issue is not to be allowed; and when such plea is pleaded, it is a good cause of a

special demur- draw to the examination of the court what is proper to be deter-
rer since mined by a jury.

27 Eliz. c. 5.

and before it of a general one. 10 Co. 95. a. The reason of pressing the general issue is not for insufficiency of the plea, but not to make long records when there is no occasion. Hob. 127. A plea which amounts to the general issue is only matter of form, Roll. R. 112. 3. and therefore must be specially shewn as cause of demurrer. Cro. Car. 157. ||Vide 6 East R. 596. 8 East R. 311.||

3 Mod. 166.

Where the defence consists in matters of law, there the defendant may plead specially; but where it is purely fact the general issue must be pleaded. And in all actions the defendant may shew any matter to the court why the action does not lie; and this being matter of law, is proper to be shewn to the court, and not to the jury; for being questions of law the judges are to determine whether they discharge or bar the plaintiff's action; but such bars or matters produced by the defendant may be traversed by the plaintiff, whether they are true or not, which subsequently draws them to the examination of a jury.

5 Mod. 252.

2 Salk. 580.

pl. 1.

Hob. 174.

||(a) 2 Term R.

166. 7 Taunt.

156. acc.

But in an action on the case a release

may be shewn on the general issue. Winter v. Brockwell, 8 East, 508.||

Whatever, therefore, makes the fact complained of to be lawful is matter of justification, and to be shewn to the court; because the court are judges how far the fact, if done, was lawfully done; and therefore, on not guilty in trespass, the defendant cannot shew a licence to prove there was no trespass (a); because though the licence makes it no trespass, yet he shews that licence to an improper jurisdiction, viz. to the jury, who are not proper judges of the law.

||(b) But a release may be given in evidence in *assumpsit* on the general issue.

1 Camp. 249.

2 Camp. 557.||

So if the defendant shews a release (b) of a debt to a jury, it is no evidence; because, though the release makes it to be no debt, he shews it to an improper jurisdiction. But though a man must shew all matters to the court that confirm the fact complained of, and discharge it, yet where any thing goes in denial of the fact, there it must be given in evidence on the general issue; because whatever denies that cause of complaint is matter proper to be exhibited to the jury, who are judges whether the fact was, or not; and therefore actions of *trover* and *assumpsit*, which are modern inventions to get rid of the law-wager, which lay in the ancient action of debt and detainue, were so formed that almost every thing may be given in evidence on the general issue.

Vide tit.

Trover and Conversion.

As in *trover* the plaintiff declares of the property of the goods and chattels, and that they came by finding to the defendant, whatever matters are alleged that confess property in the plaintiff will entitle him to his damages, and whatever deny it are on the general issue; and therefore levying by distress, releases, and the like, which were anciently in this action, are now given in evidence, because they disaffirm the property of the plaintiff on which his action is founded.

Vide tit.

Assumpsit.

So in *assumpsit* the action is formed on a contract, and the trespass to the plaintiff is the nonperformance of it; and though
the

the issue be *non-assumpsit* instead of the old issue not guilty, yet on this issue every thing may be given in evidence which disaffirms the contract, for that goes to the gist of the action; since if there be no contract to be performed at the commencement of the action, there can be no trespass for the nonperformance of it: and therefore a release goes to the gist of this action; for it shews there was no cause of action at the time this action was commenced; for as in trover he must have a right to the thing, so in *assumpsit* he must a right to the thing declared on; therefore every thing that shews the contract to be void, as, nonage, or more money lost at play than the statute allows, may be given in evidence on the general issue. (a)

[(a) So, on *non assumpsit*, the defendant may give in evidence an usurious contract; for that makes it a void promise. Lord Bernard v. Saul, 1 Stra. 498. And in general, whatever affects the promise

may be given in evidence on this plea: as, where a seaman had sued in the Admiralty Court for his wages, and had judgment against him there, and afterwards brought an *assumpsit* at law, the defendant was allowed to give the sentence in evidence on *non assumpsit*. 2 Stra. 753.]

¶ The defendant may give in evidence on the general issue in *assumpsit* all matters which shew that the plaintiff *never* had any cause of action, and also most matters in discharge of the action, which shew that, at the time of the commencement of the action, the plaintiff had no existing cause of action.¶

1 Chitt. on Plead. 742. and cases cited.

But matters of law, which do not go to the gist of the action, but to the discharge of it, even in these new-framed actions, are to be pleaded, as the statute of limitations: so, if a less sum be paid before the time, because that is not a performance which destroys the being of the action, but a collateral agreement that destroys the performance of it.

Carth. 387. Salk. 278. pl. 1.

now given in evidence on

¶ But this is in the nature of *accord and satisfaction*, and might be *non assumpsit*.¶

If matter be pleaded which amounts to the general issue, yet if there be also a special matter of justification joined in the same plea the plea is good.

3 Lev. 41.

In trover the defendant pleaded a sale in a market overt, and thereby justified the conversion; and ruled that a *nihil dicit* should be entered if he did not plead the general issue, for that it amounted to it. And in another (b) case in trover the defendant pleaded another plea amounting to the general issue; and the court doubted, whether they should compel him to plead the general issue, or award a writ of enquiry; but resolved at last to award a writ of enquiry.

Cro. Jac. 165.

(b) Cro. Jac. 319.

In an action on the case by a commoner for digging pits, the defendant justified that he was lord of the soil and digged for coals, doing as little damage as he could, and that he left sufficient common; and on demurrer adjudged against him that it amounted to the general issue.

Sid. 106.

In trespass, if the defendant pleads property in a stranger or himself it amounts to the general issue; otherwise in replevin, in which case it may be pleaded in bar or abatement. But where in trespass the plaintiff declared, that the defendant broke

Vent. 249. 2 Lev. 92. Cro. Eliz. 329.

his close, and took *quædam averia*, &c., the defendant pleaded the cattle were his own, and that *J. S.* took them from him, and put them in the plaintiff's close by his assent, and that he took them, &c.; it was held a good plea; for the plaintiff does not declare that the property of the goods is in him; and when the defendant's beasts are taken from him by wrong, he may justify retaking them wherever he finds them.

Cro. Eliz. 871.

Salk. 344.

pl. 2.

Ld. Raym. 87.

Comyns, 4.

pl. 4.

5 Mod. 175.

Carth. 356.

Holt. 328. pl. 2. 12 Mod. 96. ||(a) The statute of gaming may be specially pleaded, not because it confesses and avoids the plaintiff's claim, but because the defence is *matter of law*, which therefore ought to be shewn to the court. See Lord Raym. 87., and so it is as to coverture, infancy, &c.

Carr v.

Hinchcliff,

4 Barn. & C.

547.

||In *assumpsit* for goods sold and delivered the defendant pleaded, that the goods were sold by *A.* the factor of plaintiff, with the privity of plaintiff, as and for the goods of *A.* the factor, and that the defendant did not know that the goods were not the property of *A.*; that at the sale and delivery *A.* was and still is indebted to defendant in more than the value of the goods, and defendant is ready and willing to set off and allow to plaintiff the value of the goods out of the monies so due and owing from *A.* The plea was specially demurred to, as amounting to the general issue, but the court held it good, as it was not in denial, but in confession and avoidance of the plaintiff's claim.||

Salk. 394.

pl. 2.

In trespass for taking his horse, the defendant pleads that the horse was the horse of *J. S.*, and that the plaintiff took and impounded him, and that he, the defendant, took him by replevin, &c.; this amounts to the general issue, for it does not so much as admit a possession in the plaintiff; for the taking and impounding gave him no possession, because the horse was thereby in the custody of the law, so no colour of action left to the plaintiff.

Boot v.

Wilson,

8 East, 611.

||To an action of *assumpsit* for use and occupation, the defendant pleaded specially, that he became bankrupt before the rent became due, and that by virtue of the commissioners' assignment all his term and interest became vested in his assignees, and that his assignees were possessed of and occupied the premises from the assignment to the time when the rent claimed became due; on demurrer this plea was held bad, on the ground that the bankruptcy did not discharge the defendant from his agreement to pay the rent; and *semble* that it was also bad as amounting to the general issue, since it in fact denied the defendant's occupation as tenant.||

Salk. 394. pl. 3.

2 Ld. Raym.

968.

In *assumpsit* the defendant pleaded *quod ipse performavit omnia ex parte suâ performand.*; and this was held to amount to the general

general issue; *sed qu.* for the *assumpsit* is admitted, so that this is but a discharge.

If a man executes a deed by (a) *duress* he cannot plead *non est factum*, for it is his deed, though he may avoid it by special pleading, judgment *si actio*, &c.

5 Co. 119.
resolved *per curiam*.
2 Inst. 485.

S. P. (a) In a plea of *per minas* the very manner of it, as, whether for fear of life, member, or imprisonment, ought to be specially laid. *Vide* Keb. 516.

- || But it may be shewn, on *non est factum*, that the deed was made by a lunatic, or that the obligor was made to execute the bond while drunk.

Yates v. Boen,
Stra. 1104.
B. N. P. 172.

So also where the deed is avoided by erasure, addition, &c. this may be shewn on *non est factum*.||

Powell v.
Duff,
5 Camp. 181.

[So if the bond were given for a gaming debt the statute should be pleaded; and the defendant in his plea should set out the game played at, and conclude *contra formam statuti*, that the court may see that it was within the statute.]

Colborne v.
Stockdale,
1 Stra. 495.
|| Com. Dig.
Pleader.

2 W. 26. 1 Saund. 295. a. ||

|| So also the defendant must plead specially that the bond is void on the ground of the condition being an illegal restraint on matrimony. He cannot shew this matter on *non est factum*.

Colton v.
Goodridge,
2 Black. R.
1108.

So also that the consideration was an illegal agreement to compound prosecutions for felony.

Harmer v.
Wright,

2 Stark. Ca. 35.; and see 2 Chitt. R. 354.

So also if a bail-bond is not made according to the c. 9. a special plea is necessary.||

2 Will. Saund.
59. note 3.

Upon an issue *feoffavit vel non*, the jury found a feoffment, but a covinous one, and the court was of opinion, that upon this issue a covinous feoffment was a feoffment, and that if the party would have taken advantage of the covin, he ought to have done it by special pleading. It is there likewise said, that a *non est factum* cannot be pleaded upon the (b) statute of usury or sheriffs' bonds; the reason of which is, that these things have the appearances of feoffments and bonds, though they want the validity.

Hob. 72.
Humberton v.
Howgil.

very strong terms, yet the bonds are void only as to their efficacy; for in these cases the defendant cannot plead *non est factum*, but must avoid them by special pleading.

(b) Though the statutes relating to sheriffs' bonds and usurious bonds are penned in

Dyer, 375. b.

|| And in an action on a bail-bond, the defendant cannot, on the plea of *non est factum*, object, that the action is brought in a different court from that where the bond was conditioned for appearance.

2 Camp. 396.

It has however been decided that where the bail-bond was dated and made after the return day of the writ, the defendant might avoid it on *non est factum*. (c)||

Thompson v.
Rock,
4 Maul. & S.
338.

(c) The court decided thus, on the ground that the defendant in such case might formerly have pleaded a special *non est factum*, and that now a special *non est factum* was never necessary. But it seems that the conclusion of the plea in such case would not have been, *et sic non est factum*, but, "and so the obligation is void." See Lord Raym. 349. 2 Vent. 237. 1 Saund. 159. Bro. Abr. *Non est Factum*, 14.; and the case does not seem consistent with the decisions above in the text, where a special plea is held necessary. See the note of the learned editor of Coke's Reports. 5 Co. 119. b. note (C).||

6 Mod. 218.

(a) *Sed qu.*

As to the case of an *escrow*; for it is his deed, though perhaps delivered to

It is said by my Lord Chief Justice *Holt*, that all the special *non est factums* in case of *escrow* and *rasure* are impertinent, for thereby the defendant brings all the proof upon himself; whereas if he had pleaded *non est factum* generally, he would turn the proof of whatever is necessary to make it his deed upon the plaintiff. (a)

another on condition? Indeed in pleading an *escrow* some are of opinion it should conclude, and so not his deed. *Vide post.* || In *Stoytes v. Pearson*, 4 Espin. 255., Lord *Ellenborough* C. J. allowed delivery as an *escrow* to be given in evidence, on *non est factum*, on the ground that it was a special *non est factum*, which, it seems, need never now be pleaded. *Vide* 4 Maul. & S. 358.; *et vide* Com. Dig. Plead. 2 W. 18.||

Vent. 2.

In debt upon a lease for years the defendant may plead entry into part, upon which follows suspension, and it does not amount to the general issue.

Dyer, 121.

Doct. pl. 203.

In every action on the case for a misdemeanor the defendant may plead generally not guilty, or traverse the point of the writ, as *ne forga pas, non ejecit, non rapuit, non manutenuit, &c.*

22 H. 6. 37.

Doct. pl. 204.

But in trespass *non depascit herbas* is no plea, but he ought to plead not guilty, the other being only argumentative.

40 E. 5. 15.

Doct. pl. 205.

In dower the tenant pleads, that the husband of the demandant was only tenant for life, the remainder in tail to his son; and this was held an ill plea, it amounting to the general issue *ne unques seise que dower*.

Hob. 127. Sir

Henry Warner

v. Wainsford.

(a) That it is

a good plea,

and safer than

pleading the

general issue,

Noy, 106.

Winch. 19.

Cro. Car. 157.

Cro. Jac. 165.

Leon. 178.

Hob. 218.

Like point; *et**vide* Raym. 250.

In debt against an administrator, the defendant pleads, that the intestate was indebted to him by bond 80*l.* and that goods to that value *et non ultra* came to his hands, which he detains for his debt; and on demurrer it was objected that it amounted to the general issue of *plenement administer*: but the better opinion of the court was, that this is no cause of demurrer, for the plea is (a) sufficient; and besides, it is some matter in law which hath been allowed always to be pleaded specially, and not left to a jury; and the reason of pressing a general issue is not for insufficiency of the plea, but not to make long records when there is no cause, which is matter of discretion; and therefore it is to be moved to the court, and not to be demurred upon.

[It was holden in *Plumer v. Marchant*, 5 Burr. 1580. as settled, that an administrator may either plead a retainer, or give it in evidence on *plenè administravit*.] || 2 Black. R. 965. The advantage of pleading the retainer is, that it compels the plaintiff in his replication to admit either the debt due, or the sufficiency of assets.]]

2 Mod. 274.

Birch v. Wilson.

In an action on the case by a commoner, the plaintiff declared, that the defendant had enclosed the places in which the plaintiff had a right of common, and likewise had put his cattle in those places, by which he could not *in tam amplo et beneficiali modo* enjoy the same; the defendant pleaded, that he put his cattle in rightfully, and that the plaintiff had common enough; and on demurrer it was held, that the plea was the same as not guilty, and therefore amounted to the general issue; yet the court likewise held, that for that reason alone the plaintiff had no cause of demurrer; for that the defendant may well disclose the matter of law in pleading, which is a much cheaper way than to have a

special

special verdict; and that this is on the same reason of giving colour; but if the matter by which the defendant justifies, be all matter of fact, and proper for the trial of a jury, then the defendant ought to plead the general issue.

In assault and battery at *Maidstone in com. Kent*, the defendant pleads, that he is possessed of a house in *D.*, and that the plaintiff with another woman came to his door, and the other woman endeavoured to turn him out of possession, and thrust him down, and that in his fall he threw down the plaintiff against his will and fell upon her; *absque hoc*, that he is guilty of a battery at *Maidstone* or any other place *extra*, &c. Plaintiff demurs, 1st (*a*), Because the defendant has traversed the place without alleging any such local justification as to make it material. 2dly, Because the plea amounts to the general issue. *Per cur.* — The justification, if we may call it so, is local; but the plea does amount to the general issue: but we are not bound to give judgment for the plaintiff upon that, though he do assign it as cause of demurrer; it is a discretionary thing, and we may allow of a plea that does amount to the general issue, if it contain any thing that may breed a scruple in the *lay gents*; and therefore they advised the parties to compound the matter.

An action on the case was brought upon a bill of exchange, to which the defendant pleaded, that after the acceptance of the bill he gave a bond in discharge thereof; and upon demurrer to this plea it was objected that it amounted to the general issue; for, the debt upon the bill being extinguished by the bond, the defendant ought to have pleaded *non-assumpsit*, and to have given the bond in evidence; and the court seemed to be of that opinion; but by consent the defendant pleaded the general issue.

By the statute of bankrupts, 5 Geo. 2. c. 30. § 7. a liberty of pleading *generally* is given to the bankrupt, and thereby he may avoid the hazard of pleading *specially*; but then he must take upon himself the proof of his conformity to the statute in every particular; or, if he thinks fit to plead the matter specially, then he must set forth every point; and by it he has this advantage against the plaintiff, that he must reply to one particular only, upon which issue must be taken: but, where he pleads the matter specially, but does not set forth the whole, judgment must be given against him; for by the act it is so to be pleaded as that the whole merits may be tried.

country, (in a mode similar to that given by stat. 5 G. 2. c. 30. § 7. to bankrupts in *England*), is bad. *Quin v. Keep*, 2 H. Bl. 553.]

¶ The general plea of bankruptcy given by the 5 Geo. 2. c. 30. § 7. is sufficient, not only where the certificate has been obtained previous to the commencement of the suit, but where it is obtained at any time before plea: and this construction is consistent with the form of the plea given, which is merely, "That the cause of action accrued before such time as the defendant became bankrupt."

And a bankrupt may on this plea avail himself of the discharge given him by the 49 Geo. 3. c. 121. § 8. against the claim of a surety

Pasch. 29 C. 2. in C. B. Nicholls v. Jeames.

(a) For this *vide* Cro. Eliz. 705.

5 Mod. 314. Hackshaw v. Clerk.

5 G. 2. c. 30. § 7. 1 P. Wms. 258. [*Vide* tit. *Bankrupt*, *supra*, Vol. I. A general plea of bankruptcy in *Ireland*, referring to an *Irish* act of parliament, and concluding to the

Harris v. James, 9 East, 82.; *et vide* 6 East, 413.

Westcott v. Hodges, 5 Barn. & A. 12.

surety who has paid the bankrupt's debt subsequent to the bankruptcy; for the words of that statute place the bankrupt in the same situation, as to such surety, as if he had been a creditor before the bankruptcy.

Gowland v.
Warren,
1 Camp. 362.

Bankruptcy of the defendant cannot be given in evidence on the general issue. ||

Carth. 580.
5 Mod. 252.
Hallet v. Byrt.

In trespass for taking three cows at *Beomister* in *Dorsetshire*, the defendant pleaded specially, that the Bishop of *Sarum* was seised in fee of the hundred of *Beomister* in the right of his bishoprick, and that he and all his ancestors, time out of mind, had a hundred court of all personal actions under 40s., and of replevin within the said hundred from three weeks to three weeks; and that the bishop, and all those whose estates, &c. had used time out of mind by their steward of the said hundred, upon complaint made, &c. to replevy cattle unjustly taken at any place within the said hundred, and that the bishop had demised the said hundred unto *Carleton Whitlock*, Esq. for three lives, by virtue of which he was seised, &c. and that the plaintiff and *T. S.* took those cows, being the cows of one *E. G.* at *Beomister* within the said hundred, and impounded them there, and thereupon the said *E. G.* complained to *Henry Samways*, steward of the said *Carleton Whitlock* of his hundred court aforesaid, of the unjust taking the said three cows; and that thereupon the said steward made his precept to the bailiff of the said hundred, &c. to replevy those cows; by virtue whereof the defendants took them and delivered them to the said *E. G.* On a special demurrer to this plea, for that it amounted to the general issue, it was adjudged that the plea, in the form it was drawn, did amount to the general issue, for that the defendants had not admitted by their plea so much as a possession of the cows in the plaintiff at the time of taking, &c. for they say the cows were then impounded, which is the custody of the law, and not of the party, so that the defendants by their plea had not given any colour of action whatsoever to the plaintiff.

Carth. 63. *per Holt*, and two other Judges.
(a) The text is

If there are three or more partners, and an action is brought against two of them, and they plead the partnership, this amounts to the general issue. (a)

equally erroneous, as I conceive the reporter, Carthew, to be; no such plea of partnership being pleaded. The defendants pleaded the general issue of not guilty; and though in Carth. it is said that judgment was given for plaintiff, yet Salk, and all the other reporters of this case, who are numerous, expressly say judgment was given for defendants, by reason of all the partners not being made defendants. It was to be sure argued that such matter ought to have been pleaded in abatement, if defendants mean to take advantage of such matter; but then it was doubted whether it was pleadable in abatement, it only amounting to the general issue. *Vide* 2 Salk. 440. — *N. B.* This case in Carthew was against some of the owners of a ship, for damages to goods. [It was in form an action of *assumpsit*, and its authority hath been denied in latter cases; for it hath been holden, that in *assumpsit* against one partner, the partnership must be pleaded in abatement, and cannot be given in evidence. *Rice v. Shute*, 5 Burr. 2611. *Abbott v. Smith*, 2 Black. R. 947. And the law is the same in an action of the custom of the realm. *Buddle v. Wilson*, 6 Term R. 369. In an action *ex delicto*, that there are other partners not named is no cause of abatement, for every *tort* is several. *Mitchell v. Tarbutt*, 5 Term R. 649.]

In many cases, though a man plead a thing which may be given in evidence, yet this shall not amount to a general issue; as where the plea goes by way of confession and avoidance, as in trespass where the defendant acknowledges the plaintiff to have a good cause of action, unless for the matter which the defendant has pleaded in his plea; in such case such plea shall not amount to a general issue.

Skin. 362. pl. 5.
per Holt.
||Sec 4 Barn &
C. 547||

In an appeal of maihem if the defendant plead not guilty, he cannot give in evidence that it was *se defendendo*, but ought to plead it by way of justification in bar of the action.

2 Inst. 316.
||And so it is
in an action of
assault and
battery, 1 Will. Saund. 77. 296 ||

In trespass brought by *R.* for breaking his close and beating his servant, and carrying away his goods; upon not guilty pleaded the jury found this special matter, *viz.* that Sir *F. B.*, Chancellor of *England*, was seised, and leased to the plaintiff and one *A.*, which *A.* assigned his moiety to one *C.*, by whose command the defendant entered: And it was moved in arrest, &c. that this tenancy in common betwixt the plaintiff and him in whose right the defendant justifies could not be given in evidence; so it could not be found by verdict, but ought to have been pleaded specially: but the whole court was against that, and held that it might be given in evidence. (*a*)

3 Leon. 94.
Rosse's case.

In debt for rent, if the lessor has nothing in the land, the lessee may plead that the lessor *non dimisit*, and give in evidence the other matter.

||(*a*) See Cubitt
v. Porter,
8 Barn. & C.
257 ||

Co. Lit. 47. b.
In debt for
rent the de-
fendant may

plead *nil debet*, and give in evidence *nil habuit in tenementis*, per Holt C.J. Or on such plea may give eviction in evidence. Comb. 238. [But in *assumpsit* under the stat. 11 G. 2. for use and occupation, *nil habuit in tenementis* is not good. Lewis v. Willis, 1 Wils. 314.] ||And where the demise is by indenture *nil habuit in tenementis* is a bad plea, for the tenant is estopped by the indenture to plead it. Co. Lit. 47. b. Wilkins v. Wingate, 6 Term R. 62. But in such case the lessor must rely on the estoppel in his replication, and must not traverse the plea. Kemp v. Goodal, 1 Salk. 277. Veal v. Warner, 1 Saund. 324, 325. note 4., or, if the declaration state the lease to be by indenture, then the plaintiff may demur to the plea, since the estoppel appears on the record. *ibid.* The tenant, however, is not estopped from shewing that the lessor was only seised in right of his wife, and that she died before the covenant was broken, for that shews an interest to have passed and to be determined, and then there is no estoppel. Blake v. Foster, 8 Term R. 487. Andrew v. Pearce, 1 New R. 158. An assignee is bound by the estoppel which bound his assignor, and therefore the assignee of a lease by indenture cannot plead *non dimisit*. Taylor v. Needham, 2 Taunt. 278. And the assignees of a bankrupt lessor have the benefit of the estoppel, and therefore a tenant cannot plead *nil habuit*, &c. to an action by the assignees on the lease, since he could not have pleaded it to an action by the lessor. Parker v. Manning, 7 Term R. 537. Though it is only in cases of demise by indenture that an estoppel can be replied to the plea of *nil habuit*, &c.; yet a tenant is now in no case permitted to dispute the title of the landlord under whom he came into possession. Cook v. Loxley, 5 Term R. 4. Phipps v. Sculthorpe, 1 Barn. & A. 50. Doe v. Lady Smith, 4 Maul. & S. 347. Rennie v. Robinson, 1 Bing. 147. Doe v. Budden, 5 Barn. & A. 626. And therefore the dictum of Holt C. J. *supra* in Comb. 238. seems not to be law. A lessee may however, shew his landlord's title to be expired, though he cannot shew that he had none. 4 Term R. 682. 5 Maul. & S. 516. 2 Stark. 230.; and see Alchorne v. Gomme, 2 Bing. 54. Pope v. Biggs, 9 Barn. & C. 251. ||

In waste the defendant may plead *nul wast fait*, and give the lopping of trees in evidence.

Dyer, 92. a.
pl. 16.

But if waste be assigned in houses, and the defendant plead *nul wast*, he cannot give in evidence that the houses were repaired before the action brought, but ought to plead it specially; for

Dyer, 276. a.
pl. 51.

for having once committed waste, he ought to discharge himself by shewing the special matter to the court, which would be a good bar.

Carth. 356.
5 Mod. 175.
Salk. 344.
pl. 2.
Ld. Raym. 87.
Comyn, 4.
pl. 4.
5 Mod. 175.
Carth. 356.
Holt, 328.
pl. 2.
12 Mod. 96.
Hussey v.
Jacob.
||See 4 Barn.
& C. 547.||

In an action brought against *Jacob* a goldsmith, upon a bill of exchange drawn by the Lord *Chandois* on the said *Jacob* for 112 guineas, which was accepted by him, the defendant pleaded in bar, that after the 29th of *September* 1664, and before the making that bill of exchange, viz. on a such a day, the said Lord *Chandois* and the plaintiff *Hussey* played together with dice, at a certain play, called hazard, upon tick and credit, without ready money, and that the Lord *Chandois* then and there at one time and meeting lost to the plaintiff the said 112 guineas upon tick, and that for the security of the payment of the said guineas lost as aforesaid the said Lord *Chandois*, on the day and year in the declaration, &c. made the said bill of exchange, and directed it to the defendant requesting him to pay, &c. and that the defendant did accept of the said bill and assume upon himself, as the plaintiff had declared, *quorum præmissorum prætextu et vigore statuti in eo casu edit. & provis.*, the said bill of exchange so by him accepted, and the acceptance thereof, and the promise of the said defendant so as aforesaid made, *devenierunt et fuerunt et modo sunt vacua, et nullius vigoris in lege, et hoc, &c.* To which the plaintiff demurred, and shewed for cause, that it amounted to the general issue. *Sed per cur.* — The plea is good, both as to the matter and form, and it does not amount to the general issue; and it is not a rule, that because such a matter may be given in evidence, therefore it ought not to be pleaded specially; for it often happens to be in the election of the defendant, either to plead it specially or not, as he may be advised; as for instance, the pleading of a release, coverture, or infancy, in an *assumpsit* is certainly good; and yet those things may be given in evidence upon *non-assumpsit* pleaded: however the defendant sometimes may not be willing to put such matters of law to the judgment of the jury, or, perhaps, may design to save the costs of a special verdict.

Salk. 278.
pl. 1. ruled by
Holt at *Hertford*
assizes.
||(*a*) This
doctrine seems
questionable;
and the prac-
tice is to plead
the statute in debt
as well as in *assumpsit*;
and the reasons
for pleading it are
equally applicable
to both forms of
action. *Vide* 1 Saund.
285. n. 2. 2 Saund.
63. a. n. 1. And
Bayley J. decided
that it could not be
given in evidence
on *nil debet*.
Woodhouse v. Williams,
York Summer As.
1829.||

4 Burr. 2469.

In debt for rent, upon *nil debet* pleaded, the statute of limitations may be given in evidence (*a*), for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense: but in case on *non-assumpsit* the statute of limitations cannot be given in evidence, for it speaks of a time past, and relates to the time of making the promise.

[Whatever is matter of inducement may be given in evidence on the general issue: *secus*, of matter of substance.

Ibid.

A proviso in the same act of parliament whereon an action is brought, and the matter provided in it, may be given in evidence on the general issue: as, in an action against a parson for merchandizing, contrary to 21 H. 8. c. 13. which has a proviso for

neces-

necessaries to maintain his household. So it seems that a proviso in the bribery act of 2 G. 2. c. 24. that a person, who has been a discoverer, shall not be an object of that law, may be taken advantage of under the plea of *nil debet*.]

¶ On a prosecution for exercising a trade contrary to the provisions of a statute, the defendant may shew, on the general issue, that he is exempted from penalties by a subsequent act.

Rex v. Pemberton,
1 Black. R.
230.

On the trial of an indictment against a parish for not repairing a highway, the defendants may, on the general issue, give in evidence an act of parliament which exempts them from repairs, and transfers it to the commissioners.¶

Rex v. Inhabitants of St. George,
5 Camp. 222.

4. *Of sham Pleas, and the Consequence of false Pleading.*

The pleading a sham plea, or such a one as the party knows to be false, is a great abuse of the justice of the court; and such pleas have not only been set aside with costs, but the parties censured, and otherwise punished according to the discretion of the court.

If it appears judicially to the court, on the defendant's own shewing, that he hath pleaded a false plea, this a good cause of demurrer; as, where the defendant brought an indenture into court, and pleaded that it contained no covenants, and on inspection it appeared to contain several, judgment was given against him.

Saund. 516.
Smith v.
Ycomans.

It hath been holden, that pleading a false plea is within the statute of *Westm.* 1. (3 Ed. 1.) c. 29. which my Lord *Coke* says was made in affirmance of the common law.

2 Inst. 215.
Vent. 213.

¶ By this statute, if a serjeant or pleader do any manner of deceit in the King's Court, or consent unto it, to beguile the court or the party, he shall be imprisoned for a year and day, and from thenceforth shall not be heard to plead, and if he be no pleader he shall suffer the imprisonment.¶

If therefore, says he, a serjeant, or an apprentice of the law, in pleading a matter of fact issuable for his client, allege the same to be done at a town in such a county, where indeed he knoweth there is no such town, of purpose to delay justice, *et a' enginer la court*, this is a deceit within the statute, and hath been so holden.

2 Inst. 215.

And if the client would have the attorney plead a false plea, he ought not to do it, for he may plead *quod non sum veraciter informatus et ideo nullum responsum*, and that shall be entered in the roll to save him from damages in a writ of deceit; and if an attorney ought not wittingly to plead a false plea, *a' fortiori* (a), a serjeant or apprentice ought not to do the same.

2 Inst. 215.
(a) Though counsel are obliged to be faithful to their clients, yet not to manage their

causes in such a manner as justice should be delayed or truth suppressed.

Vent. 213. *per*

¶ Where the defendant pleaded a false plea in abatement that the plaintiff was dead, it was moved that the attorney might be compelled to swear it, and *Holt* C. J. said, they could not compel

Pierce v.
Blake, Salk.
515.

compel him to swear any plea except a foreign plea, but he might be fined for the deceit; and they ordered him to plead immediately, so as he would stand by it, or the court would enquire into the truth of the plea, and if there were a deceit fine him.

Solomons v.
Lyon, 1 East,
369.

So where the defendant pleaded a set-off of a sum due on recognizance, and of another sum due on simple contract, and the replication was bad, the court permitted the plaintiff to amend without costs, on the ground of the plea being a sham plea, and to discountenance such pleading.

Blewitt v.
Marsden,
10 East, 237.
Penfold v.
Hawkins,
2 Maule & S.
606. Thomas
v. Vander-
moolen,
2 Barn. & A.
197. Bartley
v. Godslake,
ibid. 199.
Bones v. Pun-
ter, *ibid.* 777.
et vide 3 Taunt. 338.

And where sham pleas have been pleaded of judgments recovered in the court of *Piepodre* in *Bartholomew* fair, in terms palpably fictitious,—of a set-off due on recognizance, and on simple contract, of judgment recovered and payment, or judgment recovered, and delivery of goods in satisfaction, which require different modes of trial, or a subtle plea which obliges the plaintiff to consult counsel,—the courts have, on affidavit of the falsehood of the pleas, permitted the plaintiff to treat them as nullities, and sign judgment; and have, in several instances, made the defendant or his attorney pay the costs of the pleas, and of the application to the court.

Shadwell v. Berthoud, 5 Barn. & A. 750. Richley v. Proone, 1 Barn. & C. 286.;

Merington v.
Becket,
2 Barn. & C.
81.; and see
1 Bing. 380.

However, in a subsequent case the court refused to permit the plaintiff to sign judgment, or compel the defendant to verify his plea, though the plea was precisely similar to that in *Richley v. Proone*.||

Cro. Jac. 64.
Davis v. Clerk.
(a) The *capitatur pro fine*
is taken away,
and other pro-
vision made in
lieu thereof, by
5 W. & M.
c. 12.

In debt upon an obligation the defendant pleaded *non est factum*, and afterwards *relictâ verificatione* confessed the action, and the judgment against him was *in misericordiâ*: it was moved, that it should be *capitatur* (a), because he once denied his deed, and so ought to be fined to the king; and of this opinion was *Gawdy*; but *Fenner* and *Williams* held otherwise, because a fine is not payable but where he denies his deed, and it is found against him upon a false plea, and the jurors are troubled with the trial thereof; there, for troubling the king's courts, and for troubling the country, and the falsity of his plea, he shall be fined and imprisoned; but when it is not found against him, but he relinquishes his plea, he shall only be amerced, and accordingly the judgment was affirmed.

Co. Lit. 366.a.

In dower if the tenant pleads non-tenure for part, and detainee of charters for the residue, and these pleas are found against the tenant, the defendant shall recover damages for all the time from the death of her husband, without any defalcation, for which reason the tenant ought to be careful that he does not plead a false plea.

Dyer, 222.
Doct. pl. 181.

If an obligation be made to pay money at a certain day and place, payment before the day and at another place is a good discharge: yet in pleading, if the defendant says, that he paid at the same day and place, according to the obligation, the issue will be

be found against him unless the jury help him, which they are not obliged to do, his plea not being in strictness true. (a) before, payment before the day, *scil.* such a day is good. Anon. T. 3 G. 3. 2 Wils. 173. — If money is payable *at or before* such a day, and is paid before, it should be pleaded, paid at such precedent day; and plaintiff may reply, not paid that day, nor before, nor after. Fletcher v. Hennington, Pasch. 33. G. 2. 2 Burr. 944.

(a) If the bond is conditioned to pay on or

In a formedon, if the tenant pleads warranty and assets descended and the demandant takes issue thereon, and the issue is found for the demandant that assets did not descend, and thereupon the demandant recovers; in this case, although assets afterwards descend, yet the tenant shall never have a *scire facias* on the same judgment; for by his false plea he hath lost the benefit of the statute of *Gloucester*, and of the statute *de donis* in this point.

Co. Lit. 566.
Doct. pl. 180.

If an heir at law pleads *riens per descent*, which is found against him, there shall be a general judgment of his body and other lands and goods, because of his false plea.

Doct. pl. 181.
Vide title
Heir and An-
cestor. || *Vide*
2 Saund. 7. n. 4. ||

But in a writ of annuity against one as heir to his ancestor, the defendant pleaded, *non est factum patris sui*, and found against him; whereupon it was moved, that the execution ought to be awarded of his proper lands and of his lands descended, because he had pleaded a false plea: but *per cur.* — The denying the deed to be his father's was not a false plea in his cognizance; and although it were false, yet being charged in respect of his ancestor's deed, the land of his ancestor shall only be taken in execution, for that is the cause of his charge.

Cro. Car. 456.

(H) *Traverse*: And herein,

1. *The Nature thereof.*

A TRAVERSE is the denial of some material point alleged in the pleadings, and which, if properly taken, closes (b) the issue. It may be taken to the declaration, bar, replication, &c.; and therefore, if properly taken to the declaration, it destroys the plaintiff's action; and if to the bar, it destroys what is said in avoidance of the action; and if to the replication, what was said in avoidance to the bar.

Doct. pl. 344.
2 Lil. Reg. 586.
Co. Lit. 282
Yelv. 195.
(b) In most cases it does not close, but only offers the issue; and if

the traverse is material, issue must be taken thereon by the adverse party: a traverse, properly so called, being by *absque hoc*, or without that, that, &c., and concluded with a verification. The author may here, perhaps, mean a general traverse, or a positive denial of the most material fact alleged or pleaded by the opposite party; in which case, the party so denying, concludes to the country: but the common acceptation of the term is, where issue is offered in the above-mentioned form, the party concluding with a verification. — *N. B.* A general traverse *absque tali causa* concludes to the country. || *Vide post*, as to the conclusion of the replication; and 1 Saund. 103. a. ||

But, for the better understanding the nature of a traverse, we shall, in the first place, insert some general rules that have been laid down herein.

And first it is laid down, that where a matter is expressly pleaded

36 H. 6. 15.

Cro. Eliz. 755. pleaded in the affirmative, which is expressly denied by the other
Lit. Rep. 15. party, there a traverse is needless; because in such case a suf-
same rule. ficient issue is joined.

Vent. 101. same rule laid down; and that if it were otherwise, they might traverse one upon another *in infinitum*.

Cro. Eliz. 754, As, where in *audita querela*, to avoid the execution of a recog-
755. Huish v. nizance, the plaintiff set forth that it was defeasanced upon the
Phillips. payment of divers sums of money at certain days, and that he
was at the place appointed and tendered the money, and that the
defendant was not there to receive it; the defendant pleaded
protestando that the plaintiff was not there to pay it; and that
he was there ready to receive it, *absque hoc* that the plaintiff was
ready to pay it, which being specially demurred to, the court
held the plea naught; and that there being an express affirmative
and negative there should have been no traverse.

2 Roll.R. 35. So if in an assize the defendant pleads a feoffment by a
Hob. 71, 72. stranger, which he avers to be absolute and without any con-
dition, and the plaintiff replies that it was on condition, this is
sufficient without any further traverse.

5 H. 7. 5, 6. But this rule, that there shall be no traverse where the matter
Vent. 215. alleged by one party is expressly denied by the other, must be
Lutw. 15. understood of those cases where the denial makes a complete
issue; for though the matter contradicts, that is not sufficient
without an apt issue is formed upon an affirmative and negative;
(a) *Sed qu. de* as where the death of a man is positively alleged on one part and
hoc, unless the traverse con- his life by the other party, here the death ought to be traversed (a),
clude to the otherwise no issue is joined.
country.

Hob. 103, 104. A traverse, therefore, seems to be properly taken when the
(b) That *absque* adverse party to the declaration, plea, replication, &c. forsaking
hoc, so that the general issue sets up a title for himself, or sets forth a
&c. are the particular specification of his case, with a justification thereof, &c.
proper words with a traverse (b), *absque hoc*, or denial of the matter alleged by
of a traverse. the adverse party, or that the same is true in that (c) manner
Sand. 22. and form he hath alleged; and such specification is called an (d)
2 Salk. 628. inducement to the traverse.

pl. 2. Ld. (c) Where the words *modo et formā* are only words of form and not of substance,
Raym. 349. and the diversities therein, *vide* Co. Lit. 281. Doct. pl. 344. (d) Such inducement is said to
be the shewing of cross matter contrary to the allegation of the adverse party. Dyer, 365.
pl. 33.

Hence it is said to be a rule, that when any thing pleaded specially by the defendant is directly contrary to the matter in the declaration, such plea is not good without a traverse; yet it is in the election of the other party to waive the advantage thereof, or demur thereupon.

Cro. Car. 356. The inducement to the traverse ought to be (e) sufficient in
(e) Also it is matter.

rule that nothing can be an inducement to a traverse but such a thing as is traversable. 2 Leon. 32. *per Manwood*. [In general, the inducement to a traverse cannot be traversed: it ought, however, to be such as, if true, will defeat the title of the other party; otherwise it amounts to a negative pregnant. *Per Parker* C. B. Park. 131.] ¶ But if a traverse be not to the substance and point of the action, the other party may either pass it by, and traverse the inducement, or demur specially for this cause. See 1 Will. Saund. 22. note.]

A traverse

A traverse ought not to be taken but where the thing traversed is issuable. (a) 3 Mod. 320. (a) That matter of law

not be reversed, Yelv. 200. nor where part is matter of law, and part matter of fact. 2 Mod. 55. [Hence, in an information in nature of a *quo warranto*, the defendant made title under the constitution of *Honiton*, and then traversed the usurpation: the Attorney General, without taking any notice of the title, joined issue on the traverse; and it was holden to be ill, because the user being admitted by the defendant's making title, the usurpation was a matter of law, not to be sent to a jury. *Rex v. Blagdon*, Pasch. 1 Geo. cited in 2 Stra. 841.—But matter of law connected with fact is clearly traversable; as seisin in fee, or in tail, *Ewer v. Moile*, Yelv. 140. simony, *Rast. Entr.* 552. a. right of a county to repair a bridge, 2 Lev. 112. right to present to a church. *Grocers' Company v. Archbishop of Canterbury*, 3 Wils. 254. 2 Black.R. 776.] [It has been considered, that the traverse in 2 Lev. 112. of the obligation to repair a bridge is bad. See *Doug.* 154. 1 Will. Saund. 25. note 5. But this has been since doubted: and in 1 Barn. & A. 348., *Rex v. Ecclesfield*, one of the objections to the plea was, that it did not conclude with a traverse of the obligation of the parish to repair. But the court said, that if such a traverse were necessary, the conclusion of the plea "and that the inhabitants of the said parish at large ought not to be charged," was a sufficient and effectual traverse.]]

And therefore where, in ejectment upon a lease made by *E. J.*, the defendant pleaded, that before *E. J.* had any thing to do, &c. *M. J.* was seised in fee, after whose death the land descended to his heir, and that *E.* entered and was seised by abatement; the plaintiff replied, and confessed the seisin of *M.*, but said, that he devised it in fee to *E. J.*, who entered; *absque hoc* that *E. J.* was seised by abatement; upon demurrer this was held to be an ill traverse; for the plaintiff had confessed the seisin of *M.* and avoided it by the devise, and therefore ought not to have traversed the abatement; for having derived a good title by the devise of the lessor, it is an argument that he entered lawfully, and it was that alone that was issuable, and not the abatement; therefore it was ill to traverse that, because it must never be taken, but where the thing traversed is issuable. Cro. Jac. 221. Yelv. 151. *Bedell v. Lull.* [In this case, according to Yelverton, the court said, that the traverse ought to pursue the very words of the plea traversed. Though perhaps this may be too strict, and it may be not necessary

to follow the very words of the plea; yet, most certainly, the traverse must be *ad idem*, it must be the same with the plea in effect and substance; thus where in trespass a plea alleged the injury to be in consequence of cutting a beam, the replication, traversing its being previous, was adjudged ill. *Humphreys v. Churchman*, Ca. temp. Hardw. 289.] [It is clear, according to the case in the text, that where a material point alleged by one party is fully confessed and avoided, then it must not also be traversed; and see *Cro. Car.* 384. *Hob.* 104.; and so also where a party sets up matter consistent with, but qualifying the matter on the other side, he should not also traverse. *Kenchin v. Knight*, 1 Wils. 253.]]

The traverse is regularly to be taken to the (b) most material point alleged by the other party, and is not to be (c) multifarious but to a single point. (b) 2 Sand. 5. 28. Roll.R. 235.; *et vide infra.*

(c) 3 Lev. 40, 41.

But any part of what the defendant (d) makes his title is traversable; as, if in trespass the defendant allege a seisin in fee in *J. S.*, and a demise to himself; the plaintiff may traverse either the seisin in fee or the demise, at his election. Hard. 317. (d) But a defendant cannot traverse a matter not

alleged in the declaration. 2 Vent. 79. 2 Lutw. 1560. 1480. But if the plaintiff assign several breaches the defendant may traverse any of them. Salk. 138.

Also when the defendant traverseth any part of the plaintiff's count or declaration in a *quare impedit*, it ought to be such part as is inconsistent with the defendant's title, and being found against the plaintiff absolutely destroys his title; if it do not so, Vaugh. 8. [See 1 Will. Saund. 22.; and 209. note 8.]]

however inconsistent it be with the defendant's title, the traverse is not well taken.

But for the exceptions to this general rule, *vide infra*.

Co. Lit. 126.

(a) Salk. 4.

pl. 10. S. P.

admitted to be the general rule; but the court seemed to think, that where an *absque hoc* comprises the whole matter generally, as *absque tali causâ*, it may conclude *et de hoc ponit se super patriam*; but where it only traverses a particular matter, as *absque tali warranto*, &c. it ought to be averred. 7 Mod. 105. L. P. [Although it is a general rule that a traverse must conclude with a verification, yet it may, and when it comprises the whole substance of the plea it ought, to conclude to the country. Boyce v. Whitaker, Dougl. 96. Haywood v. Davies, 1 Salk. 4. Robinson v. Rayley, 1 Burr. 316. Smith v. Dovers, Dougl. 428. Hedges v. Sandon, 2 Term R. 439.]

3 Mod. 203.

In assault and battery the defendant pleaded a release of all actions, &c. The plaintiff replied that the release was gotten by duress, &c. The defendant rejoined, and shewed cause why it was not gotten by duress. || The plaintiff sur-rejoined that it was gotten by duress; || *absque hoc* that it was voluntary, *et hoc petit quod inquiratur per patriam*: upon this issue the cause was tried, and the plaintiff had a verdict; and it was moved in arrest of judgment, that he ought not to conclude to the country after a traverse; because a traverse itself is negative, and therefore the defendant ought to have joined issue in the affirmative: it was admitted, that if issue had been joined before the traverse it might have been helped by the statute of jeofails; but not being so in this case, the judgment was arrested.

|| According to the modern rules of pleading, the defendant in the above case would have rejoined, denying that the release was gotten by duress, and concluding to the country.

Hedges v. Sandon, 2 Term R. 439. 1 Will. Saund. 103. a. and the cases there digested.

The general rule as to the conclusion, appears now to be that where the replication denies the whole of the matter in the plea, it *may* conclude to the country; but where a particular fact is selected and denied, there the replication *must* conclude with a verification. The last part of the rule is invariable. The former part appears only to be imperative in some cases; as, for instance, in replying to a plea of accord and satisfaction, that the plaintiff did not accept in satisfaction; there the replication *must* conclude to the country. But in some cases a conclusion either way seems to be good.

Ibid.

It seems therefore to be a safe rule, that were the replication is such that the defendant cannot take any new or other issue in his rejoinder than a repetition of the matter in his plea, without a departure from the plea, that the replication in such case ought to conclude to the country. And such is generally the modern practice in pleading. As, for instance, in trespass the defendant pleads a licence; if the replication deny it, the conclusion should be to the country, there being a direct affirmative and negative: for if the plaintiff reply with a special traverse, and a conclusion with

with an averment, the rejoinder can only repeat what is already alleged in the plea, *viz.* that the plaintiff did give a licence. As this rule tends to avoid prolixity in pleading, it will probably in all cases be safe; although as the general course of older precedents is to traverse in such cases with an *absque hoc*, and an averment, the courts would probably hold either mode of replying good.||

1 Will. Saund.
103. b. and
the cases
there cited.

If the defendant's plea be in the negative, the plaintiff need not traverse it, for a negative cannot be traversed; and therefore, if an executor or heir in debt, for a debt due by the testator or ancestor of the defendant, pleads no assets, or *riens per descent præter*, &c., the plaintiff, without traversing the *præter*, may reply generally assets *ultra*, without saying what or where they are.

Palm. 511.
2 Mod. 50.
But for this
vide 8 Co.
Mary Ship-
ley's case, Cro.
Car. Dorches-
ter v. Webb.
Yelv. 165

Hob. 104.

But for the fuller explication of this matter we shall consider more particularly:

2. In what Cases a Traverse is permitted.

It hath been held, on the 26 H. 8. c. 3. for payment of tenths, which enacts, *That after default and certificate made thereof to the court, under the seal of the bishop, the benefice shall be void*, that the party may traverse such certificate; for herein the bishop acts only as an officer, not as a judge.

Cro. Eliz. 80.
Leon. 269.
Moor, 541.
915. Savil,
case 63.

But if on a trial of general bastardy, the party be certified a bastard by the ordinary, such certificate cannot be traversed, for herein the ordinary acts as judge; and such certificate shall bind perpetually the person certified a bastard, though he was not party to the suit; as all persons are estopped to speak against the memorial of any judicatory, because the act of the public judicatory, under which any person lives, is his own act; and were they not thus bound there might be contradiction in certificates.

Roll. Abr. 362

If upon a judgment obtained by *A.* he sues out a *scire facias*, upon which *J. S.* is returned tertenant, he cannot traverse this return of the sheriff. (*a*)

2 Mod. 10.
Whitrong v.
Blaney.

(*a*) That a sheriff's return of a rescous cannot be traversed. Dyer, 212. Cro. Eliz. 780.

On the statutes against forcible entries and detainers it hath been holden that one justice of peace may make a record of a forcible detainer, and that such record is not traversable; because the justice of peace in making thereof acts not as a minister but as a judge.

(*a*) That a
Cro. Eliz. 780.
Hawk. P. C.
c. 64. *Vide*
title *Forcible*
Entry and
Detainer.

It hath been held that presentments in the quarter sessions of the peace, and even in *B. R.*, are traversable; and that if it be so in courts superior to the leet *à fortiori* it must be so in presentments at the leet.

Carth. 74.; but
for this *vide*
Hawk. P. C.
c. 76. § 72. 83.
2 Hawk. P. C.
c. 11.

It is held that whenever an escape is finable the presentment of it is traversable; but where the offence is amerciable only

2 Hawk. P. C.
c. 19. § 21.

(a) Yet there are cases where these are traversable, or their truth called in question. — Perhaps in all cases by removing them into *B. R.*, or by pleading to actions brought on them for recovery of the amerciements; or where there is a distress and replevin.

But for this *vide* title *Coroner*, letter (D).

It is held, by some opinions, that an inquisition taken by the coroner *super visum corporis* cannot be traversed: also, in respect to that high credit which the law gives to an inquisition found before a coroner, it hath been held, that if an inquisition finds that a person has been slain, and that *J. S.* hath fled, he forfeits his goods and chattels; the coroner's inquest being of that solemnity as not to be traversable.

Roll. R. 226.
2 Roll. Abr.
299. Hard.
131. Raym.
406.

The probate of a will is not traversable; and herein it is settled that the ecclesiastical courts having the probate of wills, they, as incident to such jurisdiction, have power to determine all those matters that are necessary to the authenticating of such testament: therefore, if the seal of the ordinary appears, it cannot be suggested, or given in evidence in the common law courts, that the will was forged, or that the testator was *non compos*, or that another person was executor; for of these they had proper jurisdiction, and the remedy must be by appeal.

Dyer, 254.
Goulds. 351.
3 Leon. 199.
5 Co. 57.; but
vide Show. P.
Cases, 88.
3 Lev. 315.

If the ordinary refuse a person presented to him for cause, such cause is traversable, and shall be tried by the metropolitan, if the party be living, but if dead by a jury; for though the bishop be judge in examining, yet, as his proceedings are not of record, the cause of refusal is traversable.

Watkins v.
Barry, 1 Stra.
444. Hayley
v. Fitzgerald,
Id. 645. S. P.
||*Vide* as to

[In debt on a bail-bond, the defendant traversed the arrest of the principal, and on demurrer judgment was given for the plaintiff; for otherwise this would be a way to avoid all bail-bonds that are civilly taken, without exposing the party by an arrest.]

traverse of offices, Tidd's Prac. 1101, 1102, (7th ed.)||

3. In what Cases a Traverse is necessary.

Lutw. 381.
||See 1 Will.
Saund. 22.
note.||

Herein it is laid down as a general rule, that where the matter alleged by the defendant in his plea is contrary to the matter set forth in the declaration, there must be a traverse or denial of such matter set forth in the declaration. So if the replication contradicts the matter alleged in the plea, &c. (b), as where the defendant alleges seisin in one from whom he claimeth, the plaintiff cannot allege seisin in another from whom he claimeth, without traversing, confessing, or avoiding the seisin alleged by the defendant.

(b) Cro. Eliz.
30.

5 H. 7. 11, 12.
Doct. pl. 349.
Dyer, 312. b.
S. P. (c) Leon.
78. S. P. ||See
1 Will. Saund. 22. and 209. note 8.||

So if it be alleged by the defendant that the party died seised in fee, and the plaintiff allege that he died seised in tail, he must traverse the dying seised in fee (c), because two affirmatives cannot make an issue.

The omission of a traverse where necessary is matter of substance; and therefore, where in trespass for taking his horse, the defendant pleaded that he was seised of such lands, and entitled himself to an heriot; the plaintiff replied, that another person was jointly seised with the defendant, *et hoc paratus est verificare*; on demurrer it was adjudged for the defendant, because the plaintiff ought to have traversed the sole seisin.

2 Mod. 60.
Snow v.
Wiseman; *et*
vide Cro. Jac.
221. that the
plaintiff having
said enough in
his case to
avoid the bar,

if he had traversed it also it would make his replication naught; *et vide* 1 Leon. 43, 44. that a traverse is but matter of form, and the want thereof shall not prejudice the other party in point of judgment; but the judges ought to judge upon the substance, and not upon the manner or form of pleading; *et vide* title *Amendment and Jeofail*.

Where a man confesses and avoids he needs not traverse; but, where in *assumpsit* against the defendant as executor, he pleaded that the testator made *J. S.* executor, who proved the will, and took upon him the execution thereof, and concluded in abatement; here, because he had not traversed, *absque hoc* that he was executor, or administered as executor, it was adjudged against him.

2 Mod. 168.
Singleton v.
Bawtres.

¶ And where a party confesses and avoids his adversary's pleading, he *ought not* also to traverse; for by so doing he deprives his adversary of the power of traversing the matter which confesses and avoids his title.¶

1 Saund. 209.
n. 8.

When a malfeasance is laid to the defendant's charge, he ought expressly to traverse it, and not to answer it by argument; but in waste the defendant may say it was ruinous, without answering expressly to the waste: so, in case of an innkeeper, he may allege a robbery, without traversing it was by his default.

Cro. Eliz. 281.

In debt for rent, the plaintiff declared on a lease of four acres of land at 5*l.* rent, and for rent arrear he brought the action: the defendant pleaded to part *nil debet*, and to the residue, that the lease was of the said four acres, and of one acre more, and that before the rent was arrear the plaintiff entered into the fifth acre; on which the plaintiff demurs; and the reason shewn on, the argument was, for that he did not traverse that he demised four acres. But on the other side it was said for the defendant, that the traverse ought to come on the plaintiff's part, *viz.* he ought in his replication to have maintained the lease in the declaration, and have traversed that he demised the fifth acre. To which it was answered, that that would be a departure from his declaration, and therefore the traverse ought to have been on the defendant's part; for when he pleads another lease than that upon which the plaintiff declared, he ought to traverse the lease on which the plaintiff declared, *viz.* to plead the lease of the fifth acre, *absque hoc* that he demised the four acres only; and so held the court and gave judgment for the plaintiff. (a)

Sand. 206.
Sid. 405.
Rayn. 175.
2 Keb. 467.
Lev. 263. Salmon v. Smith.
¶ (a) But Saunders, in this case thought the better pleading was, that the traverse should come from the plaintiff, and Serjeant Williams is of his opinion; for the plea in fact confesses the demise in the declaration, but

alleges a fact which avoids the effect of it. Therefore to add a traverse would be informal, and vitiate the plea on demurrer, according to the rule stated above. *Vide* 1 Saund. 209, n. 2. 2 Saund. 5. n. 3., *Ibid.* 50. n. 5.¶

In an action against a sheriff for an escape, the plaintiff declared, that the defendant being sheriff of *Surrey* voluntarily suffered *J. S.* whom he had in execution to escape, the defendant, protesting that he did not let him voluntarily escape, pleaded, that he

Vent 211. 217.
Sir Ralph Bovey's case.
Lutw. 521.
S. C. cited.

Latch, 200.
S.P. adjudged;
et vide Cro.
Jac. 657.

took upon fresh pursuit. To which it was demurred; because he did not traverse the voluntary escape: and resolved for the defendant; it being impertinent for the plaintiff to allege it no-ways necessary to his action; and it being out of time to set it forth in the declaration, being a matter that ought to come in the replication. And *per Hale* C. J.—It is like leaping before one comes to the stile; as, in debt upon a bond, the plaintiff should declare, that at the time of the sealing and delivery of the bond the defendant was of full age, and the defendant should plead *deins age*, without traversing the plaintiff's allegation.

Lutw. 381.
Duppa *et al.* v.
Stephens.

But in debt by the gentlemen ushers of the king for a fee of 5*l.* due to them from one who had received the degree of knight-hood, they declared, that time out of mind they had used to receive a fee of 5*l.* of every person who voluntarily and without compulsion had received the degree of knight, &c. The defendant pleaded, that he had taken the degree in sole obedience to the king; but because he had not traversed *absque hoc, quod def. recepit vel suscepit gradum militaris. voluntariè et sine compulsionè*, it was adjudged for the plaintiff; for the voluntary acceptance of honour, without compulsion, is of the essence of the action, and not like the aforesaid case of an escape.

Dyer, 66. b. pl.
15.

In account against one as bailiff of a manor such a year, it is a good plea, that *J. S.* was his bailiff that year; but there he must traverse that he himself was not.

Dyer, 66. b.

So in escape against a gaoler, he may plead that the prison was broken open by the king's enemies, or that it was burnt by sudden fire; but then he must traverse, that the escape was not in another manner, or as the plaintiff hath alleged.

Poph. 67.

(a) That where the parties in pleading vary in the estate alleged, or in the quantity thereof, there ought to be a traverse. *Yelv.* 180. || See 1 Will. Saund. 22. note (2).||

If in trespass the defendant entitles himself by the feoffment of a stranger, and the plaintiff replies and maintains that the same stranger did enfeoff him, this cannot be a good issue (a) without a traverse of the feoffment alleged to be made to the defendant.

Stile, 150.
198. 210.

In assault and battery the defendant pleads a special plea, and justifies; the plaintiff replies *de injuriâ suâ propriâ*; upon which issue is joined, and a verdict for the plaintiff; but in arrest of judgment it was held, that the replication was not good, in not answering the special matter pleaded, and traversing the *absque tali causa*, so that an issue might be joined on an affirmative and negative; and therefore the court ordered a replender.

Stile, 373.

If in covenant for payment of money the defendant pleads that he was at *Lisbon* in *Portugal* at the day of the payment of the money which he had covenanted to pay, the plaintiff may reply that he was in *England*, without a traverse, *absque hoc*, that he was in *Portugal*.

Godb. 43.

If account be brought against two, and one of them plead *ne unques son receiver*, this is good without a traverse that he and his companion were receivers.

3 l.con. 15.

If in trespass for chasing his ewes, being great with lamb, so as by driving them he lost his lambs, the defendant justifies that they

they were damage-feasant, and that therefore he drove them to pound, &c.; this is naught without a traverse (a); for though he might take and drive them to pound, yet this should have been without any prejudice to them, and was therefore a matter traversable.

(a) Instead of a traverse he should have pleaded he drove the ewes gently, doing as little

damage as he could, and there would not have been any occasion for a traverse; nor do I see what traverse could, properly, have been taken. || Such a traverse would certainly have been improper and demurrable. The plea justified that which was the gist of the trespass, and the plaintiff might now assign for excess in the manner of driving the ewes.||

If there are two prescriptions, one pleaded by the defendant by way of bar, the other set forth by the plaintiff in his replication, without any traverse of that which is alleged in bar, this is naught.

2 Leon. 209. that one prescription pleaded against an-

other is not good without a traverse, *vide* Yelv. 217. 9 Co. 59. 2 Mod. 104. Carth. 116.

As where in trespass for cutting oaks the defendant pleads that he was seised of a messuage in fee, and prescribes to have *rationabile estoverium ad libet. capiend. in boscis*; the plaintiff replies, that the *locus in quo* was within the forest, and that the defendant and all those, &c. *habere consueverunt rationabile estoverium*, &c. *per liberationem forestarii*; upon a demurrer, the replication was held naught; because the plaintiff ought to have pleaded the law of the forest, *viz. lex forestæ talis est*, or to have traversed the defendant's prescription, and not to have set forth another prescription in his replication without a traverse.

2 Leon. 209, 210. Russel v. Broker.

|| The modern practice in such a case is to traverse the defendant's prescription, according to the rule now settled, that wherever a material fact is alleged in pleading, which will, on issue joined upon it, decide the cause one way or the other, if the adverse party plead a fact inconsistent with it, he must traverse it. In the above case the plaintiff's allegation, that the defendant's prescription was to have reasonable estovers by the assignment of the forester, was inconsistent with the prescription stated by the defendant, to have reasonable estovers to be taken at pleasure; the plaintiff ought therefore to have traversed the defendant's prescription, either with a formal inducement of the prescription alleged by the plaintiff, or, according to the shorter modern form, by merely denying the matter of the plea, and concluding to the country, and the issue on such traverse must have decided the cause.||

1 Saund. 22. n. 2.

In trespass for pulling down his hurdles in his close, the defendant justified that *J. S.* was lord of the manor of *D.*, and that the said *J. S.*, and all those whose estate he had in the said manor, had a free course for their sheep in the place where, &c., and that the tenant of the said close could not there erect hurdles without the leave of the lord of the manor, and that the said *J. S.* let to the defendant the said manor, and because the plaintiff erected hurdles without leave, &c. in the said close, he threw them down, as it was lawful for him to do: the plaintiff replied of his own wrong, without cause, &c. and it was held an ill replication, because the plaintiff had not traversed the prescription.

4 Leon. 16. Ruishbrook v. Pusanics.

4. *Whether there may be a Traverse upon a Traverse.*

Co. Lit. 282. It is laid down as a general rule, that there cannot be a traverse upon a traverse; because that in all pleadings whereupon
 Hob. 104. a traverse is properly taken, the issue is closed (a); and there-
 ||1 Saund. 22. fore a traverse cannot be taken on a traverse, for a traverse must
 n. 2.|| be of a material point; and if to the declaration, it destroys the
 Hutt. 97. plaintiff's action; if to the bar, it destroys what is said in avoid-
 Saund. 20. 22. ance of the action; and if to the replication, what was said in
 Vaugh. 62. avoidance of the bar, *et sic de ceteris*; and, consequently, a sub-
 1 Jon. 216. sequent traverse will be insignificant; because (b) when a mate-
 Cro. Car. 105. rial traverse is taken the rest stands confessed.

and not traversed is admitted. † Salk. 91.—† This is avoided by protesting against every thing the party does not mean to admit: though the protestation does not put the adverse party to prove what is so protested against, where issue is taken on another point; but the protestation operates as an exclusion of a conclusion; or, in other words, the record cannot, as to the points protested against, be used as evidence against the party protesting, as to those points; because by protesting he has denied them. Had he not protested, those points might, perhaps, as between the same parties in *another* suit relative to the same matter, be considered as admitted: and the party protesting might in such subsequent cause find it necessary to offer an issue on some point that came under the *protestando* in a former cause. ||As to a *protestando*, see 2 Will. Saund. 105. note.||

Hob. 104.

This rule is thus laid down by my Lord *Hobart*, that regularly, whensoever a traverse is taken apt and material to the plaintiff's title, the plaintiff is bound to it, and cannot for the same thing leave it, and force the defendant to accept another traverse tendered by him.

20 H. 4. 2.
 12 E. 4. 6.
 2 Rich. 3. 9.
 Hob. 104.
 ||Vide Co. Lit.
 282. b.||

But if a man bring an action of trespass for breaking his close on a certain day, if the defendant plead a release of actions, he shall traverse all trespasses after; if a feoffment, he shall traverse all trespasses before; if a licence for once, all before and after: and in these cases the plaintiff hath it in his choice to leave the traverse, and traverse the point of justification, *ss.* the release, feoffment, or licence; or he may allege a trespass before or after, and so join upon the traverse offered, which is traverse after a traverse, but yet is not, according to the rule, a traverse upon a traverse to the self-same point.

Hob. 104.

So if a man bring an action of waste for the felling of trees, and lay that the lessee felled and sold them, and the defendant confess that he felled them, but say, that he bestowed them in repairing the house, *absque hoc* that he sold them; the plaintiff may reply that he let them rot, or any like case of waste, *absque hoc* that he employed them in reparations; and though this be a traverse upon a traverse, and directly to the same thing, yet it is out of the above-mentioned rule, because the traverse in this case was not material; for the plaintiff might have declared of the selling only, and the other point was mere surplusage.

1 Saund. 22.
 n. 2. and cases
 there cited.

||Whenever the traverse is not on a material point, the other party may either pass it by and tender another traverse, or may demur specially for that cause.||

Poph. 107.

Cro. Eliz. 418.

If assault and false imprisonment be laid in *London*, and the defendant plead a special justification in (a) another county, with a traverse

a traverse or *absque hoc*, &c. the plaintiff may maintain his action, and traverse the special matter alleged by the defendant, though this be a traverse upon a traverse; for as the matter alleged by the defendant may be false, it would be unreasonable by such falsity to oust the plaintiff of the liberty the law gives him, of laying his action in the proper county where the cause arises. and like point adjudged, Cro. Eliz. 99. S. P. adjudged. (a) There never shall be a traverse upon a traverse, but where the traverse in the bar takes from the plaintiff the liberty of his action for the place of time, or such like; for there the plaintiff may maintain his action for the place or time, and may traverse the inducement to the traverse, and needs not to join with the defendant in the traverse, but at his pleasure may do the one or the other: but, when the inducement is made and concluded with a traverse of a *title* shewn by the plaintiff, there the plaintiff is enforced to maintain his title, and not to traverse the inducement to the traverse. Cro. Car. 105. 2 Lutw. 1630. S. P.

||Co. Lit. 282. b.||
Moor, 350.
S. C. Paramor and Verrald.
2 Lutw. 1437.
S. C. cited,
and like point

In trespass the defendant justifies his entry by the command of *J. S.* Plaintiff replies, and shews that *J. S.* was seised in fee, and let unto him at will, and traverseth the command of *J. S.* The defendant maintains his plea, that *J. S.* commanded him to enter, and that he entered by his command, and traverseth the lease at will; and it being hereupon demurred, it was adjudged for the plaintiff that the command is traversable, and that therefore the defendant's rejoinder to make a traverse upon a traverse is not good.

Cro. Car. 586.
Thorn v.
Shering.

Where one traverses a thing which he had before confessed and avoided, this is merely form, and aided upon a general demurrer: for the other party might traverse that traverse (*b*), and also the inducement to it.

||1 Saund. 21.
n. 1.||
Carth. 166.
2 Lutw. 1632.
||(b) This lan-

guage is inaccurate — a traverse cannot be traversed. In such case, the party may either specially demur, or pass the traverse offered, and traverse the *inducement*.||

Where to an indictment for not repairing a bridge the defendants plead that *A. B.* ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves; the Attorney-General in this special case may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against *A. B.*, and an issue ought to be taken on such second traverse; and the Attorney-General may afterwards surmise that the defendants are bound to repair it, and then the whole matter shall be tried by an indifferent jury.

2 Lev. 112.
Sid. 140.
Hawk. P. C.
c. 77. § 5.
||See Rex v.
Ecclesfield,
1 Barn. & Ald.
348.; and
1 Will. Saund.
25. note.||

So, though regularly a common person cannot take a traverse upon a traverse, yet the king by his prerogative may, upon a title disclosed in the traverse of the party, desert his own title, and take a traverse to such matter disclosed, though this be a traverse upon a traverse.

Vaugh. 62. 64.
Mod. 280.
Standf. 64.
for this *vide*
tit. *Prerogative*.

In debt on an obligation conditioned to appear on a bill of *Middlesex*, returnable *die Sabbati prox. post quinden. Pasch.*, the defendant pleads, that he was arrested on a bill returnable *die Veneris*, and pleads the statute of 23 H. 6. c. 9. and that the bond was given for ease and favour. The plaintiff replies, that he was taken on a bill returnable *die Sabbati*, and not *die Veneris*. The defendant rejoins, that he was taken by virtue of a bill

Lev. 192.
Saund. 20, 21.
2 Keb. 94.
105. S. C.
Bennett v.
Pilkins.

returnable

returnable *die Veneris, absque hoc*, that he was taken by virtue of a bill returnable *die Sabbati*; on which the plaintiff demurred: and it was argued, that the rejoinder was ill, and a traverse upon a traverse; for when the plaintiff replied, that he was taken by a bill returnable *die Sabbati et non die Veneris* the *et non die Veneris* was a traverse whereon the defendant might have joined and taken issue. On the other side it was argued, that the *et non* was not any traverse, at least not a formal (a) traverse, or such as the books mention, that a traverse cannot be taken on a traverse; and to have joined issue on the *et non die Veneris* would have made an immaterial issue; for it matters not whether he were taken by virtue of a bill returnable *die Veneris*, or not; for if he were not arrested on a bill returnable *die Sabbati*, the bond is void by the statute; but if he were taken on a bill returnable *die Sabbati*, it is good, for that only is traversable and triable; and so held the court.

||(a) It seems the court did not pay much regard to this objection.
2 Saund. 22.]]

Carth. 99,
100. Crosse
v. Hunt.

||(b) This traverse is bad, because it is taken on matter not before alleged nor necessarily implied. Such a traverse, however, seems only form, and must be specially demurred to; see 1 Will. Saund. 312. d. note 4. Serjeant Stephen, in his valuable work on pleading, observes on this case, that the plea ought to have been in confession and avoidance, stating merely the affirmative matter, that, before the plaintiff offered, the defendant offered, and the plaintiff refused him, and omitting the *absque hoc*. Stephen on Plead. p. 217.]]

In debt upon a speciality for 200*l.*, which was to this effect, ss. *The defendant did declare from his heart before God, that he had taken the plaintiff to be his wife, as she had taken him for her husband; and the more to confirm the said plaintiff, that he had no design but to perform his promise aforesaid, he (the said defendant) obliged himself by the same deed to pay unto the plaintiff 200*l.* if he should happen to be so base as to be worse than his word; and that if he did not pay it when demanded, she (the plaintiff) should have good right to sue and recover it by law, &c.* The breach assigned was, that she had tendered herself to marry the defendant, but that he refused, and afterwards married another woman, *per quod actio accrevit*. The defendant pleaded, that he, after the making of the aforesaid writing, *obtulit se* to marry the plaintiff, and she refused; *absque hoc*, that he refused to take her for his wife before she had refused to take him for her husband. (b) The plaintiff replied, that she tendered herself to marry the defendant, and he refused, *absque hoc* that the defendant offered himself to marry the plaintiff; *et hoc*, &c. And upon a demurrer to this replication it was insisted for the defendant that the traverse in it was ill, because she had traversed that which was the inducement of the traverse in the bar, so that it is a traverse upon a traverse, which the law will not allow; besides, the words of this deed are *in presenti*, and not executory, but declaratory of an act executed. On the other side it was argued that the words in this deed are sufficient to create a contract, and that of the highest nature, for *God* is called as a witness to it; and these words cannot import any other sense but only a contract to marry the plaintiff: that the traverse in the bar is ill, because it is too large, for the defendant had traversed more than was alleged in the declaration; ss. *absque hoc*, that he had refused to take the plaintiff for his wife before she had refused to take him for her husband, so that he intended to make this circumstance of time parcel of the issue, whereas there is no such circumstance alleged in the declaration, nor any affirmation that the defendant had refused before the plaintiff

tiff had refused; and therefore, because the traverse in the bar was idle and frivolous, the plaintiff might well traverse the substance of the matter of the bar; and of this opinion was the court, as well to the pleading as to the matter in law.

[In trespass for fishing in the plaintiff's fishery, the defendant pleaded that the place in question is an arm of the sea in which every subject has a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right: the defendant in his rejoinder insisting upon the general right, traversed the prescriptive right claimed by the plaintiff. The court of K. B. held, that the defendant ought to have taken issue on the traverse in the replication, and not to have traversed the prescriptive right claimed in the replication, for that the first traverse was a material one, and put in issue the true question in dispute between the parties. But this judgment was reversed in the Exchequer-chamber. For the first traverse was of the right of *all* the king's subjects to fish in an arm of the sea, stated by the defendants; but this was clearly a bad and an immaterial traverse, for it was not only a traverse of an inference of law, but it was so taken, that if at the trial it had been proved that it was the separate right of others, and not of the plaintiff, the issue must have been found for the plaintiff, not only without his being obliged to prove either possession or right, but where in fact he had neither possession nor right. An immaterial traverse may be passed over, and the matter of the inducement traversed; which had been properly done by the defendant in this case.]

Mayor, &c.
of Orford v.
Richardson,
4 Term R.
437.

2 H. Black.
182.

In prohibition for that the defendants had petitioned the court of common council, complaining of an undue election of the plaintiff as a common councilman, which court had no jurisdiction therein, the jurisdiction belonging to the court of mayor and aldermen, the defendant pleaded, that the common council have the jurisdiction, *absque hoc* that the jurisdiction is in the court of mayor and aldermen: the plaintiff replied that the common council have it not, and concluded to the country. The defendants demurred, and shewed for cause, that the replication is a departure, and that the plaintiff ought to have taken issue on the traverse. But *per curiam*—The traverse is immaterial; for what is the ground of sending a prohibition? Not because the court of aldermen have a right, but because the common council have none; and therefore the traverse, which would avoid trying the right of the common council, and bring that of the court of aldermen in question, is immaterial. And where the first traverse is immaterial, that is, where it will not put the proper point in issue, there may be a traverse upon that traverse.

King v. Bolton,
1 Stra. 1117.
1 Bro. P. C. 98
S. C.

In *quare impedit* by the king, for the next turn of a living void by promotion, the defendant pleaded, that the crown presented D., who is since dead, and that he himself is parson imparsonnee, and concluded with a traverse that the church is still vacant by the promotion. This plea is a full confession and avoidance, without

Rex v. Arch-
bishop of
Armagh,
2 Stra. 837.

Thrale v.
Bishop of
London,
1 H. Black.
376.

without the traverse; which for that reason is immaterial, and therefore may be passed over.

In *quare impedit* the plaintiffs entitled themselves to the advowson in question, as executors and devisees in trust under the will of *Caleb Lomax*, whom the declaration stated to have been seised in fee of the advowson, and to have presented on a former avoidance. The defendant in one of his pleas stated a title to the advowson in one *Ellis*, who presented in 1680; that *Ellis* conveyed it to *Killigrew*; that *Killigrew* devised it to his wife *Lucy* for her life; and that the reversion on the death of *Killigrew* descended to his three daughters in coparcenery. It then stated an avoidance during the life of *Lucy* the widow, and a presentation by *Lomax* the father of the testator, usurping on *Lucy*. It then stated, that the living again became vacant after the death of *Lucy*, by the resignation of the then incumbent *Romney*, and that the crown by usurpation on the right of the eldest coparcener presented again the same clerk. It then stated an avoidance by the death of that presentee, and another presentation on that evidence by *Lomax*, usurping on the right of the second coparcener. A title was then deduced at considerable length to the defendant from the second and third coparcener, concluding with a claim to present on the existing vacancy, in the third turn. The replication to this plea stated a purchase by *Lomax* of the right of *Lucy* the widow, and a presentation to the advowson made by him during the life of *Lucy*, on an avoidance then happening. It then set forth a fine, levied by the three coparceners of the advowson, and a conveyance to *Lomax* under that fine; and concluded, that the resignation of *Romney* was fraudulent and without notice, and traversed, that upon that resignation it belonged to the eldest coparcener to present. In the rejoinder to this replication the defendant traversed the fine; upon which the plaintiff demurred specially, alleging as a defect in the rejoinder that there was a traverse upon a traverse. But the court held, that the traverse in the replication was an immaterial traverse, and being such, the defendants were at liberty to pass it by; and therefore the rejoinder was good.]

5. *To what Point the Traverse shall be taken; and therein, what Matters are traversable, and of the Manner of taking thereof.*

2 Saund. 5. 28.
6 Co. 24. a.
Roll. R. 235.
Carter, 217.
Lane, 18.

(a) A traverse
should be al-
ways of such

part, as, if found for the defendant, destroys the plaintiff's action. Comb. 321.

Poph. 161.
Latch. 12.
Noy, 75.
Bendl. 116.
Palm. 397.

Herein the general rule is, that the traverse must be taken to some material point alleged by the adverse party, which, if found for him who takes it, absolutely destroys the adverse party's right, by shewing that he hath none in manner and form as he hath alleged; and being to the (a) principal point alleged puts an end to the matter.

If in covenant on a charter-party the plaintiff declares, that upon the ship's going with the next fair wind, &c. he, the defendant, should pay so much; the defendant by way of traverse says, that the ship did not go with the first fair wind; this is an ill traverse,

traverse, not being to the principal point, or gist of the action, which is the going of the ship, and not the nature of the wind.

A traverse must be taken to some matter alleged; and therefore where in false imprisonment the defendant justified by process out of an inferior court, and the plaintiff replied, that the cause of action accrued out of the jurisdiction, *absque hoc*, that it accrued within the jurisdiction, the traverse is ill, being of a matter not alleged before; but it was held, that this being only an immaterial traverse no advantage could be taken of it on a general demurrer, and that then the residue of the replication should stand good.

If any thing in the count be traversed, it must be such part as, if true, is consistent with the defendant's title, and if false, or found against the plaintiff, doth absolutely destroy his title; nay, if the traverse leaves no title in the plaintiff, then it is good, whatever comes of the defendant's.

In a *scire facias* against *A.* and his wife, reciting, that the wife *dum sola fuit* recovered in the King's Bench, in an action upon the case, 26*l.* 13*s.* 4*d.* for damages and costs, and had execution of these damages, and is thereof possessed; and whereas afterwards the said judgment was removed by writ of error into the Exchequer-chamber, and there reversed, and restitution awarded; and afterwards she took the said *A.* to husband: The plaintiff thereupon brought this writ to have restitution. The defendant pleaded, that after the reversal had, and before the purchase of this writ, he paid to the plaintiff the said debt and costs of 26*l.* 13*s.* 4*d.* *absque hoc* that they are *possessionati* of the said money *prout*: And upon demurrer the plea and traverse were both held ill; and, 1st, Three judges held the plea ill, because it is grounded and affirmed against a record; for a payment being against matter of record cannot be a discharge, unless by a matter of record. 2dly, Admitting it a good plea, yet it is ill as pleaded; for he doth not rely upon it, but traverseth that which is not material, viz. *absque hoc*, that he is *possessionatus*, &c. which was idly alleged, and not material or traversable; and by this traverse he waives his pleading of the payment, which being (a) specially shewn for cause of demurrer, the demurrer is good: but *Berkley* held, that payment had been a good plea, if he had relied thereupon; because he avers, that thereby the party is satisfied; and that in divers cases matter in fact may be pleaded in discharge; as, in debt upon an escape, he may plead that the plaintiff commanded him to let him out of execution, and such like, &c., but as to the traverse he conceived it ill; and therefore agreed with the other justices, that judgment should be given for the plaintiff.

In trespass and ejectment the defendant pleads that the plaintiff disseised *J. S.* of the land and then made a lease of it to him, and that afterwards the land descended to the plaintiff; the plaintiff replies, that he was seised of the lands, and traverseth the disseisin on *J. S.*: and on demurrer, for that he ought to have traversed the descent, and not the disseisin, it was held by *Rolle C. J.* that the traversing the disseisin makes an end of all, and

S.C. Constable v. Clobery.

Lutw. 935. 1560. || See ante p. 268. note (a).||

Sand. 21. Vaugh. 3. Show. Parl. Ca. 220, 221.

Cro. Car. 328. Vezey v. Harris et ux.

(a) That an immaterial traverse is aided by 27 El. c. 5. unless it be specially demurred to. Dyer, 366. Yelv. 151. Co. Ent. Cro. Jac. 505. 2 Lutw. 221.

Style, 344. Wood v. Hol-land.

and was therefore well taken, being the most material matter, although the descent might likewise have been traversed.

Cro. Car. 502.
Arundel v.
Sanders.

(a) Why was not the tender transversable if taken in the words of the declaration; as, if the marriage tendered

Trespass upon the case was brought by bill in the King's Bench, that the defendant's father held of him such lands by knight's service, and died in his homage, his heir within age, and that he tendered unto him a convenient marriage, and shews what, &c., and demanded of him the value of the marriage, &c. The defendant *protestando* to the tenure, *pro placito* traversed the tender, &c.; and hereupon the plaintiff demurred: And it was resolved that the plea was ill, for the tender is not traversable.(a) was not convenient or proper, how could the plaintiff be entitled to recover?

Yelv. 122, 123.
Lane v. Alexander.

(b) He might have traversed the grant, in manner and form, &c.; ||for

these words only put in issue matter of substance. Com. Dig. Plead. (G) 1. Chitt. on Plead. 470. Stephen on Pleading, 214.||

If the plaintiff in his replication sets forth a grant of copyhold lands such a day, and by such a seneschal; and the defendant by way of rejoinder maintains his bar, and traverses the grant to the defendant the said day, and by the said seneschal, the traverse is ill; for the principal point is the grant, which may be at another court and day, and by another seneschal, and yet good.(b)

If a feoffment by deed such a day be pleaded, there can be no traverse to the day, because the estate passes by livery, and not by the deed.

6 Co. 24, 25.
Cro. Eliz. 650.
Moor, 551.

Helyar's case, 2 Vent. 212.
S. C. cited, and held to be only form, and aided by the 27 Eliz. c. 5.

(c) The party having the elder grant may confess the other, and avoid its effects by shewing his own; and if made by a different grantor, he should shew that before such other grantor had any thing in, &c. his grantor was seised, &c. and made such elder grant.

A difference hath been taken between pleading a feoffment and a grant of a particular estate; that in the first case, if the other will entitle himself by an elder feoffment, he ought to traverse, but not in the last case; because a man may come to a fee-simple by divers means, viz. by disseisin and tort, or by lawful means; and therefore, when one entitles himself to a particular estate by an elder grant, he shall not traverse the last grant, but shall compel the other to shew by what title he claims it after the elder grant.(c)

Marc. 21.

A man pleaded a descent of a copyhold in fee; the defendant, to take away the descent, pleaded, that the ancestor did surrender to the use of another, *absque hoc*, that the copyholder died seised: and the opinion of the court was, that it was no good traverse; because he traversed that which needed not to be traversed; for being copyhold, and having pleaded a surrender of it, the party cannot have it again, if not by surrender, as in *Helyar's case supra*; for as none can have a lease for years but by lawful conveyance, so none can have a copyhold estate if not by surrender.

Doct. pl. 365.
6 Co. 24. S.P. and that where there are several material things alleged,

In trespass the defendant pleads, that *A.* was seised, and enfeoffed *B.* who enfeoffed *C.* who enfeoffed *D.*, whose estate the defendant hath; in this case the plaintiff may traverse which of the feoffments he pleases.

it is in the election of the party to traverse which he pleases.

If in trespass or case the plaintiff declares that *J. S.* was seised in fee, and made a lease to him, and the defendant pleads that *J. N.* was seised in fee, and leased to him, &c.; this seisin of *J. N.* shall be intended by disseisin, for he ought to have traversed the seisin of *J. S.*, and said, that long before such a one was seised, &c.

Sid. 227.
Palm v.
Fleeshees.

In trespass the defendant pleads, that long before the trespass one *James Stephens* was seised in fee, and 12 *Eliz.* enfeofed *Thomas Norwood* to the use of *James Baker* and *Mary* his wife, and the heirs of their bodies; and that they had issue *Henry Baker*, and died seised, which descended unto him, and from him to his three daughters, and justifies by their lease, and gives colour to the plaintiff: the plaintiff replies, that long time before the trespass *Sir Thomas Tyrrel* was seised in fee, and gave it to *Edward Baker* and *Joan* his wife, and the heirs male of their bodies, and that they had issue the said *James Baker* and the plaintiff; and that *James* had issue *Henry*, and died, which *Henry* died without issue male; wherefore he as heir male entered, and that the defendant committed the trespass, &c., and traverseth the seisin in fee alleged in *James Stephens*; whereupon the defendant demurs, and shews that he traversed the seisin in fee of *James Stephens*, whereas he ought to have traversed the gift in tail, which is the principal matter of the bar; but the court held that it was in his election to traverse the one or the other.

Cro. Jac. 681.
2 Roll. R.
362. S. C.
Baker v.
Blackman.

Where by the (a) inducement or conveyance to the action the defendant is ousted of his (b) law, there the defendant may as well traverse the conveyance as the gist of the action.

Dyer, 121. b.
Leon. 252.
S. P. (a) But,

seisin is alleged by way of conveyance to the title or possession of the plaintiff, it need not be traversed. Dyer, 655. b. pl. 34. (b) Where the conveyance to the action is that which doth entitle the plaintiff to the action it may well be traversed if the defendant cannot wage his law; otherwise where he may wage his law. Cro. Eliz. 169. 201. S. P.

where a dis-

In *assumpsit*, supposing that such a day 4 *Jac.* upon an account betwixt them, the defendant was found in arrear in such a sum, and assumed to pay, &c.; the defendant pleads that such a day 4 *Jac.* they accounted, and then he was found in arrear such a sum as the plaintiff supposed, and that the same day he made an obligation for the payment thereof, and traverseth that any other day after the obligation made they accounted together *prout*, &c. and it was thereupon demurred; for that the account (which is the cause of the *assumpsit*) is not traversable, nor the time, for it is but an inducement and conveyance to the action: but the court held, that the account which was the ground of the promise was well traversable; wherefore it was adjudged for the defendant.

Cro. Jac. 254.
Yelv. 171.
Bulst. 16. S. C.
Dalby v. Cook.

It is said that the consideration of a promise is never traversable, nor allowed to be traversed, but it is the promise itself which is traversable. But herein a (c) difference is taken between a consideration of a promise which is executed and a consideration which is executory; that the one is not traversable, but the other is.

Cro. Eliz. 201
Roll. R. 43.
401. Carth.
82. (c) The
difference be-
tween a pro-
mise upon a
consideration

executed and executory is, that, in that executed, you cannot traverse the consideration by itself,

because

because it is passed and incorporated, and coupled with the promise. Hob. 106. ¶The consideration of an agreement by simple contract is now seldom or never specially traversed, because the general issues of *nil debet*, and *non assumpsit* put in issue this, as well as every other part of the agreement declared on; *et vide tit. Assumpsit*, Vol. I.¶

Cro. Eliz. 97. In trover and conversion the conversion is traversable; for it *per Coke*; ¶but is the substance of the action, and the tort supposed in him, and for this *vide* so may well be traversed; for if one finds goods, but doth not *tit. Trover*, convert them, no action lieth. Vol. VII.¶

Hope v. [In debt for an annuity, it appeared upon oyer of the deed, Colman, that the defendant covenanted to pay it, (if the same were personally demanded by the plaintiff,) whereupon the defendant 2 Wils. 221. traversed the demand. The plaintiff demurred: and *per curiam* ¶(a) And where a by-law imposed a penalty and enacted that if any offender refused to pay it, he should be liable to an action of debt, it was held unnecessary to prove a demand, although alleged in the declaration. Master, &c. of the Butchers' Company v. Bullock, 3 Bos. & Pull. 434. But where the sum is not a precedent debt or duty, but a mere collateral sum, as the penalty of a bond, or a sum agreed to be paid on nonperformance of an award, there a demand is necessary to be averred, and is consequently traversable; for the bond is not forfeited, or the sum due on the award, till demand. 1 Saund. 32. Carter v. Ring, 3 Camp. 459.; *et vide* 1 Chitt. on Plead. 322, 323.¶

Cro. Jac. 501. In debt on an obligation of 100*l.* dated 12 *Julii*, 10 *Car.* 1., Nevison v. with condition for the payment of 58*l.* at the end of six months, Whitley. the defendant pleads the statute (21 Jac. 1. c. 17.) of usury: the plaintiff replies that he lent the 50*l.* for a year, and that the defendant should pay 8*l.* for the forbearance for a year, and that, by the scrivener's mistake, it was made payable at the end of half a year: the defendant rejoins, that the lending was only for half a year, and that he was to pay for it 8*l.* at that time; and traverseth, that upon the said 12th *July*, it was agreed the loan should be for one entire year, or that he should forbear it for a whole year. It was held, that this traverse in the rejoinder, making the day parcel of the issue, was ill; and that the agreement only was traversable.

Co. Lit. 282. In trespass for goods carried away, or battery, or false imprisonment, if the defendant plead that he is not guilty in the Style, 382. manner as the plaintiff supposes, and it be found that he is Leon. 59. guilty at another day, or in another town or county than the 2 Leon. 79. plaintiff supposes, yet he shall recover; for in transitory actions Roll. R. 265. the defendant shall not traverse the county or town where the 395. (a) Cro. fact is laid, without some special cause of justification, which is Eliz. 667. so local that it cannot be alleged in another place; as, where a constable of a town in another county arrests a man for a breach of the peace, in which case, if an action be brought against him, he shall traverse the county, and all other places, saving the town whereof he is constable (a): so, where the defendant justifies for damage-feasant, &c.

In trespass for goods carried away, or battery, or false imprisonment, if the defendant plead that he is not guilty in the manner as the plaintiff supposes, and it be found that he is guilty at another day, or in another town or county than the plaintiff supposes, yet he shall recover; for in transitory actions the defendant shall not traverse the county or town where the fact is laid, without some special cause of justification, which is so local that it cannot be alleged in another place; as, where a constable of a town in another county arrests a man for a breach of the peace, in which case, if an action be brought against him, he shall traverse the county, and all other places, saving the town whereof he is constable (a): so, where the defendant justifies for damage-feasant, &c.

¶In such cases the averment of *quæ est eadem*, seems not a sufficient traverse of the place in the declaration; the safest way seems to insert the traverse, and omit the *quæ est eadem*. See 2 Will. Saund. 5. c. note.¶

In false imprisonment for imprisoning him at *Bristol*, the defendant justifies, for that he arrested him at *Gloucester* by virtue of a commission of rebellion, *absque hoc* that he was not guilty at *Bristol*; and it was moved that the traverse was not good, the cause of justification not being local, and therefore he might have justified in that place where the action was brought; otherwise, if the commission had not been to arrest him at *Gloucester*; and of this opinion was *Wray*.

Cro. Eliz. 184.
Cowleigh v. Edwards.
|| Cowper, 162.
1 Saund. 297.;
et vide Serjt. Williams's note, as to traverses of time and place

in the declaration. 2 Saund. 5. note 5.||

In trespass for an assault and battery laid in *London*, the defendant pleaded, that the plaintiff entered into his house in *Waltham* in the county of *Essex*, and that he *molliter manus imposuit* to put him out of his house, *absque hoc* that he is guilty *extra Waltham*: and this was held a good traverse, the cause of justification, *viz.* the defence of his house, being local: *secus*, if the justification had been personal and transitory, and such as might have been alleged in any place; || for where the justification is transitory it is a rule that the plea must follow the place in the declaration.||

Cro. Eliz. 705.
Peacock v. Peacock.

|| 1 Saund. 247.||

In trespass laid *apud Edinbridge in comitat. Cant.* for killing his dog, the defendant pleaded that *J.S.* was seised in fee of a warren in *D.* in the same county, whereof he is and then was warrener, and that his dog was divers times killing conies there, and therefore, finding him there *tempore quo*, &c. running at conies, he there killed him, *absque hoc*, &c. that he is guilty *apud Edinbridge prout*, &c. And on demurrer it was objected, that he had traversed the place only, &c. and had not traversed all other places; but the court held that the traverse was good, his cause of justification being local, and that he needed not allege any more than that place.

Cro. Jac. 44,
45. Wadhurst v. Damme;
|| *sed vide*
2 Will. Saund. 5. b.||

Trespass of assault, battery, and wounding in *London*; the defendant justifies in the county of *Norfolk*, by virtue of a warrant from the sheriff of *Norfolk*, upon a writ of *latitat, quæ est eadem transgressio*, &c., *absque hoc* that he is guilty in *London, vel alibi extra comitatum Norf.* On demurrer one objection was, that he had justified and also traversed, which he ought not to have done: but the court held it well enough; for the justification being in another county, the county wherein the action is brought ought to be traversed; and the plaintiff may maintain the action and issue, if he will, or he may traverse the defendant's plea, at his election.

Cro. Jac. 372.
Bateman v. Woodcock.
Cro. Eliz. 868.
S.P. adjudged.

If a man bring an action of trespass for breaking his close on a certain day, if the defendant plead a release of actions, he shall traverse all trespasses after; if a feoffment, he shall traverse all trespasses before; if a licence, all before and after.

Hob. 104.
Carter, 207.
Sid. 293, 294.
Sand. 14. Lev. 241. 307.

2 Mod. 68. That where the justification goes to a time and place not alleged by the plaintiff, there must be a traverse of both. || Unless it is necessary to the justification to mention a particular time and place, the general rule is to follow the time and place in the declaration. Where it is material to state the true time, if it varies from the day in the declaration, the day must either be traversed, or the defendant must conclude his plea with an averment '*quæ est*

est eadem, that the trespasses in the plea are the same with those in the declaration; but defendant must not do both, or the plea will be bad on special demurrer. See 1 Will. Saund. 81. a. *notis*, and 2 Will. Saund. 5. b. *notis*. Where the defendant's justification is local (being confined to a certain manor or district), there he must in his plea traverse the place in the declaration, and all other places except the manor, &c., or the plea is bad on special demurrer; and the averment of *quæ est eadem* is not held a sufficient traverse of the *place*, as it is of the *time*, in the declaration, though there seems no good reason for the distinction. See Benjamin v. Howell, 1 Wils. 81. 1 Will. Saund. 85. 2 Will. Saund. 5. e. *notis*.||

5 Buls. 209. In trespass laid to be done 1 *Maii*, the defendant pleads a release made to him 1 *Junii*, and traverses, *absque hoc*, that he was Roll. R. 406. guilty at any other time after the 1st of *June*; and this was held S. C. Amson v. an ill traverse; for the day not being material in trespass, he Walcot. || *Vide* 2 Saund. 5. n. 3. ought to have traversed, *absque hoc*, that he was guilty before or 1 Saund. 14. after 1 *Junii*. 78, 79. 82. n. 3.||

Cro. Eliz. 87. If in trespass for entering a house the defendant says, that it Higham v. was the freehold of *J. S.* and justifies 27 *Eliz.*, a year before the Reynold. trespass supposed, and traverses the time before 27 *Eliz.* but says nothing as to the time after; yet the traverse is good; for when he pleads his freehold, or the freehold of another, it shall be intended so to continue, unless the contrary be shewn, and therefore no need of traversing the time after.

Sid. 254. Herein also this difference hath been agreed, that where a Keb. 680. 822. general action is brought, in which the time is not material, there, upon a traverse to the fact charged upon the defendant, he must add *absque hoc*, that he was guilty either before or after; but where the thing traversed is not to the point of the action, (though the case may be so, that if it happen before or after the action might have laid,) the party need not add *absque hoc*, that he did it before or after, and this whether the traverse comes in of the plaintiff's part or the defendant's.

7 Mod. 16. In case upon several promises, the statute of composition of Beverly v. two thirds was pleaded in bar; but the plaintiff shewed the contract to have been since the time of the statute, which the defendant did not traverse in his plea, as he ought to have done; and therefore judgment was given for the plaintiff; for if you vary from the time in the declaration, and make such variance material, you ought traverse the time in the declaration. Pim.

|| *Vide* note *supra*.|| Trespass and imprisonment laid the first of *May*, 17 *Car. 2.* Lev. 216. The defendant justifies, as sheriff of *Coventry*, to arrest him for a breach of the peace made upon him in the execution of his office, Law v. King. for which he arrested him, and carried him before the mayor; and (a) If the traverse be taken more narrow than it need, traversed all the time before he was sheriff, or afterwards; and the traverse was adjudged good, though it was objected to be too large. (a)

being to the prejudice of the party, no jeofail. 2 Lev. 81. — But where the traverse contains more than is alleged in the breach, it is not good. 3 Lev. 167. || The traverse must not be too narrow, but must go far enough to destroy the *substance* of the opposite pleading. Therefore where a defendant avowed for 120*l.* rent, and the plaintiff pleaded in bar, that the said 120*l.* was not due in manner and form, this traverse was informal for want of adding "or any part thereof," for if any rent at all was due, the defendant was entitled to recover it on his avowry; but after verdict this defect was cured. Cobb v. Bryan, 3 Bos. & Pul. 348. So where the plaintiff declared he had served the defendant during a certain space of time, and the defendant traversed

traversed the service during that precise period, this traverse was too narrow; for defendant ought to have traversed it *distributive*, otherwise the plaintiff on the issue could not recover any thing, without shewing a service for the whole time. 1 Saund. 270. *et vide* 1 Burr. 517.||

If in ejectment the defendant pleads a surrender of a copyhold by the hands of *J. S.* then steward of the manor, and issue is joined, *absque hoc*, that he was steward; this is naught, for the traverse ought to be general, that he did not surrender; for if he were not steward, the surrender is void: so of a surrender pleaded into the hands of the tenant of the manor.

Cro. Eliz. 260.
Wood v.
Butts.

In battery, the defendant pleads a judgment obtained by *A.* his father, and an execution thereupon, whereon the goods of *J. S.* were taken in execution; and that the plaintiff assaulted the bailiffs, and would have rescued the goods; whereupon in aid of the bailiffs, and by their command, the defendant *molliter manus imposit* upon the plaintiff to prevent his rescue of the goods. The plaintiff replied *de injuriâ suâ propriâ, absque hoc*, that the defendant by command of the bailiffs, and in aid of them, to prevent a rescue of the goods, &c.; whereupon the defendant demurred generally: and upon argument it was resolved, 1st, That the replication in traversing the command of the bailiffs was not good, for he might of himself do that to prevent the rescue, which is a tort and breach of the peace. 2dly, The defendant's plea is ill, for the action was brought as for a battery at *D.*, and the defendant justifies at *S.* in the same county, whereas the bailiffs have authority through the whole county, and therefore the cause of justification in the same county not local; so that he should have conformed and justified in the same place, being the same county where the plaintiff declared; and if the place had been material, he ought to have traversed all other places within the same county; *et sic quâcunque viâ datâ* the plea was held ill.

3 Lev. 115.
Bridgwater v.
Bythway.

[To an action of trespass in the common called *A.* the defendant pleaded that *A.* and *B.* commons lie open to each other, and then prescribes for a right in both commons. It was holden, that the plaintiff could not traverse part only of the prescriptive right claimed by the defendant, the prescription in *A.*, but must traverse the *whole* prescription, for all prescriptions are entire; and when they are pleaded, the adverse party cannot deny a part only, but must either demur or traverse the whole. (a)]

Morewood
v. Wood,
4 Term R. 157.
[(a) Mr. Ser-
jeant Williams
observes, that
perhaps this
case of More-
wood v. Wood
may be distin-

guished from the cases subsequently stated, (see pa. 278.) by its being a *prescription*, which is in its nature entire, and therefore cannot be denied in *part*, but the whole must be traversed. See 1 Will. Saund. 269. And the last learned editors of Saunders remark, that the principal argument relied on in *Morewood v. Wood*, was, that the plaintiff, by narrowing the prescription, had deprived the defendant of the means of proving his right by evidence of acts of ownership exercised in the other common *B.*, which evidence he was entitled to adduce, having stated in his plea the connection between *A.* and *B.* If the plaintiff meant to deny that connection, he should have traversed the averment of it; if not, he should have traversed the whole prescription, and so admitted the connection. This argument assumes, that upon the narrow traverse the defendant would not have been at liberty to adduce evidence of the connection between *A.* and *B.*, and then to establish his right upon *A.* by evidence of the exercise of it upon *B.*: which point seems not to be clear, inasmuch as the whole of such evidence taken together would go directly to prove the issue on the record; and in this view of the case it is directly contrary to *Harpur v. Painter*. See note (h). 1 Will. Saund. 269. (5th ed.)||

See 1 Will.
Saund. 268. a.
(5th ed.)

¶ The case of *Harpur and Painter, East*. 18 Geo. 3. K. B. is perhaps hardly reconcileable with this decision. This was an action of trespass, *quare clausum fregit*; the defendant pleaded the *locus in quo* was parcel of a large waste, and that the waste was the soil and freehold of Mr. *Bassett*, and justified as his servant. The plaintiff replied, that the *locus in quo* was the soil and freehold of Mr. *Pitt*, and not the soil and freehold of Mr. *Bassett*. The defendant demurred specially: the cause of demurrer assigned was, that the replication contained no traverse of any thing asserted in the plea, but was merely argumentative. *Batt*, for the defendant, argued, that it was a settled point that the replication must traverse, or confess and avoid the bar directly. 1 And. 166. 1 Leon. 77. *Zouch and Bamfield's case*. The plaintiff might have traversed the *locus in quo* was part of the waste, or that the waste was the soil and freehold of Mr. *Bassett*, &c. He has not done this, but has traversed what was merely argumentative, for there was no allegation in the plea that the *locus in quo* was the soil and freehold of Mr. *Bassett*, and cited *Priddle and Napper's case*, 11 Rep. 8. b. *Chambre contra* argued, that the plaintiff had tendered the only proper issue. The sole point contended for by the defendant was, that the whole waste belongs to Mr. *Bassett*, the plaintiff says only part is Mr. *Pitt's*; if he had tendered the issue that the whole was not the soil and freehold of Mr. *Bassett*, it would have been immaterial, because, had it been found with him, it was no necessary consequence that any part belonged to Mr. *Pitt*. It was objected, that the matter put in issue was no assertion: that cannot be stated, without shewing the plea bad, because it was equally argumentative. (See 36 H. 6. 19. b. 20. a. per *Billing* accordingly.) See Definition of an Issue, Co. Lit. 120. It is enough if the party denies the substance and effect of what is said, without following the words of the other party. 2 Salk. 629. *Gilbert v. Parker*. In 11 Rep. the only determination was that matter of law could not be traversed; with regard to what is there said of ancient demesne, it may be answered, that it can only be so by being parcel of a manor: he cited the above-mentioned case from Bro. Traverse, 156. *Batt* in reply — The averment is as distinct here as that in *Priddle v. Napper*, that the *locus in quo* is parcel of a manor which was ancient demesne. The issue if found for plaintiff would have been material, because Mr. *Bassett* claimed it only as parcel of the waste; therefore it would be decisive that the whole was not his. Lord *Mansfield* — The point in dispute is, whether the *locus in quo* be the soil and freehold of Mr. *Bassett*. It is nothing to the plaintiff whether the whole waste belongs to Mr. *Bassett*. Is not the assertion that the whole is his, an assertion that every part is so? The court were unanimous against the demurrer, but on some particular circumstances attending the case the defendant was allowed to withdraw his demurrer and take issue. But the contrary seems to have been held in *Bradburn v. Kennerdale*, Carth. 164., where the defendant made cognizance as bailiff to Sir *P. W.*, for that

that Sir *P.*, *tempore quo*, &c. was seised of the manor of *A.* (of which the *locus in quo* is, and time out of mind was, parcel) in his demesne as of fee, and that the defendant as bailiff took, &c. damage feasant. It was held that the plaintiff could not traverse the seisin in fee of the *locus in quo*, because there was no positive and express allegation that Sir *P.* was seised of the *locus in quo*, but only argumentatively, and by consequence, as it was parcel of the manor.

So also in trespass *quare clausum fregit*, the defendant pleaded that *A. B.* was seised in fee of the *locus in quo*, and also of a close adjoining the *locus in quo*, and before the time when, &c. demised the said close to defendant for a certain term of years, together with all ways then appurtenant to the said close, or used or enjoyed therewith, and afterwards demised the *locus in quo* to plaintiff; and then averred that at the time of the demise a way over the *locus in quo* was used and enjoyed along with the demised close, and that the defendant entered, &c. to enjoy this way. The plaintiff in his replication, instead of traversing the demise in the terms of the plea, or of traversing that the way was used or enjoyed with the demised close, replied, that *A. B.* did not demise the said close to the defendant together with the said way over the *locus in quo*, to which the defendant demurred; and on the case coming on for argument, the court expressed themselves strongly against the replication as being argumentative, and not directly traversing any allegation of the plea; whereupon the plaintiff's counsel declined arguing the point, and had leave to amend.||

[To an action of trespass the defendant justified, under a prescriptive right to a duty, and also a prescriptive right to distrain for it. The plaintiff traversed the prescription for the duty, but not the prescriptive right to distrain; and upon demurrer for that cause, the replication was holden good.]

To an action of covenant by an assignee for rent arrear, the defendant pleaded that the lessor made a conveyance in fee before the lease, and traversed that he was afterwards seised in fee. This traverse was adjudged to be bad for its generality, as it tied the plaintiff up to prove an estate in fee, when any other would do.]

||But it has been decided, that in covenant by the assignee of the lessor against the lessee for rent in arrear, an allegation that the lessor was possessed for the remainder of a term of 22 years, commencing on, &c. is material and traversable.||

In replevin the defendant makes conusance as bailiff to *J. S.*, plaintiff pleads that he took them *de injuriâ suâ propriâ, absque hoc*, that he was bailiff to *J. S.* To which it was demurred: and after argument the traverse was held to be well taken; and a difference (a) observed between an action of trespass *quare clausum fregit*, and an action of trespass for taking cattle or replevin: in the first case, if the defendant justifies an entry into the close by command, or as bailiff to one in whom he alleges the freehold to be, the plaintiff shall not in his replication traverse the command; because it would admit the truth of the rest of the plea, *viz.* that the freehold was in *J. S.* and not in the plaintiff;

Nicholson v. Evans, Mich. Term 1825, K. B., MSS.

Griffith v. Williams, 1 Wils. 558.

Palmer v. Ekins, 2 Stra. 817.

Carrick v. Blagrove, 1 Bro. & B. 531.

Salk. 107.
pl. 1. Trevilian v. Pyne.
(a) For this vide Cro. Eliz. 14. Roll R. 46. 2 Leon. 215. Yelv. 148. Comb. 471.

plaintiff; which would be sufficient to bar his action, whether the defendant was empowered by *J. S.* to enter or not; for it is not material that the defendant has done a wrong to a stranger, if it be none to the plaintiff: but in the other two cases, if the defendant justifies taking the cattle as bailiff to *J. S.*, in whom he lays a title to take them, as for a distress, or other cause, there it may be material to traverse the command or authority; for though *J. S.* had right to take the cattle, yet a stranger who had no authority from him will be liable; so that both parts of the defendant's plea in this case must be true, and therefore an answer to any part is sufficient: so in trespass for taking goods; *aliter*, in trespass *quare clausum fregit*.

Chambers v.
Donaldson,
11 East, 65.

¶ But the rule is now the same in trespass *quare clausum fregit*; for it is settled that where a defendant pleads *liberum tenementum* in another, and an entry by his command, that the plaintiff may traverse either the *liberum tenementum*, or the command.¶

3 Lev. 20.
Dobson v.
Douglas.

In replevin the defendant made conusance as bailiff of *J. S.* for a rent-charge; the plaintiff in bar says that he took the distress without the privy or command of *J. S.*, and that such a day after the distress *J. S.* came first to have notice, *et deadvocavit captiones prædictas*; the defendant demurred generally. *Et per cur.* — The bar is naught, for he should have traversed his being bailiff; and he was ruled to replead accordingly, and to mend his bar, paying costs, and go to trial upon issue, bailiff or not.

2 Sand. 160.
Rex v. Stoughton; ¶ *et vide*
the notes to
this case in
Will. Saund.
(5th ed.)¶

If on a presentment for not repairing a highway, it is alleged that the defendant is chargeable *ratione tenuræ quarundum terrarum parcell. dictæ peciæ terræ*, &c. *dicta communi alta via regia inclus. et incrochiat.*; the traversing the *ratione tenuræ* is sufficient, without answering to the encroachment, being the principal point to be traversed.

Lutw. 935.
1560.

(a) Mere matter of supposal is not traversable, no more is matter alleged out of due time, nor matter immaterially alleged.

A traverse must be taken to some matter alleged; and therefore where in false imprisonment the defendant justified by process out of an inferior court, and the plaintiff replied, that the cause of action accrued out of the jurisdiction, *absque hoc*, that it accrued within the jurisdiction, the traverse was adjudged ill, being of a matter not (a) alleged before; but it was held, that this being only an immaterial traverse, no advantage could be taken of it on a general demurrer, and that then the residue of the replication should stand good.

2 Salk. 628. pl. 2. Ld. Raym. 349. — But whatever is necessarily understood, intended, and implied, is traversable, as much as if it were expressed. 2 Salk. 629. pl. 6. ¶ 6 Mod. 158., and see 2 Will. Saund. 9. c.¶

Sid. 96.

(b) That matter of intention is not traversable.

In case against a sheriff for taking insufficient bail to the intent to deceive him of his debt, the (b) intention to deceive is not traversable.

Style, 383. Leon. 50. S.P. Nor cause of suspicion. 3 Bulst. 284.

Show. 271.

In ejectment, ancient demesne was pleaded in bar; plaintiff replied, that the lands are pleadable at common law, and traversed that the tenements are parcel *de antiquo dominico*: and it was adjudged ill on demurrer; because he should have traversed that

that the manor was ancient demesne, or that these tenements were held of the manor.

In an action of (a) covenant a person cannot take a traverse in mitigation of damages, but must help himself upon (b) evidence; and the traverse must be to the (c) point of the action: as in covenant for payment of rent, the plaintiff says that there were seven years' rent behind; the defendant cannot traverse two of these years being behind, but must plead covenants performed. (d) special matter. Carth. 82. (b) That in many cases the matter may be specially traversed; which probably might have been given in evidence upon the general issue. Carth. 82.; ||see *ante*, p. 272, 273.|| (c) In trespass, that which comes under the *ita quod*, for aggravation of damages, need not be traversed. Lev. 283.—(d) How can he plead covenants performed, whether rent is or is not in arrear? — If there is not any rent in arrear, the defendant should plead rent not in arrear. — If rent is in arrear, he should move the court to stay proceedings, on payment of all rent in arrear, and costs: If there is any other breach of covenant assigned, plaintiff may go on for that. ||But the plea of no rent in arrear is a bad plea in covenant, 1 Brownl. 19. Cowp. 588.; and if the rent has been paid, it may be pleaded as an accord and satisfaction for the damages by reason of the breach.||

In debt on a judgment obtained 1 May, 14 Car. 2. before the mayor and bailiffs of *Norwich*, at a court then held according to the custom of the said city, the defendant pleads, that the court there, according to the custom, &c. is held before the mayor, *absque hoc*, that he recovered at the court held the said 1 May, before the mayor and bailiffs, according to the said custom. And upon demurrer (e), the traverse was held ill in traversing a matter of record which is not to be tried *per pais*, and in (g) joining the matter of the custom, which is triable *per pais*, with the matter of record; but he ought to have pleaded *nil tiel record*, which would have made an end of all, or that there was not any such custom, and have tried it *per pais*: it was likewise held, that making the day parcel of the issue made the traverse ill.

Lev. 193.

Dring v.

Respass.

(e) That it would have been good after verdict.

Hob. 244.

Hutt. 20.

(g) A traverse must not be multifarious, but to a single point. 3 Lev.

40, 41.—Traverse must

not be imple-

cated. Skin. 63, 64.

Debt upon an obligation to the sheriff, conditioned to appear *octabis Martini ad. respondend.*, &c. Defendant pleaded the statute 23 H. 6. c. 9. and that he was taken and imprisoned *virtute brevis retorn. quinden. Martini*, and that the obligation was taken for ease and favour. The plaintiff replied, *auter brief retorn. octabis Martini*, and that he was taken and imprisoned upon that, *absque hoc*, that he was in prison *virtute brevis quinden. retorn. Martini*. The defendant demurred generally. *Saunders* argued, that the traverse was ill and immaterial; for it matters not whether the writ was returnable *quinden. Martini* or not, but he should have concluded *et hoc paratus est verificare*, and left the defendant to traverse the writ returnable *octabis Martini*; and upon this traverse no good issue can be taken; for it is not material whether any writ was returnable *quinden. Martini*, or not; the only material thing to maintain the goodness of the obligation is this, that the writ was returnable *octabis Martini*. *Sed per curiam* — If the traverse be immaterial, the defendant waiving that should have traversed the writ's being returnable *octabis Martini*;

2 Lev. 174.

Gold v.

Cutler.

Martini ; but the traverse is well enough in this case, it being taken to the most material thing pleaded in bar to avoid the obligation. They therefore gave judgment for the plaintiff.

Comb. 245.
Foden v.
Haines.

In debt on a bond made by a prisoner to an under-sheriff, conditioned to pay 60*l.*, the defendant pleads the statute 23 H. 6. c. 9. of sheriffs' bonds, and that this bond was made for ease and favour, and so void by the statute. The plaintiff replies, that it was for the better security of money due to himself, and traverseth the ease and favour : and herein it was adjudged for the defendant ; for though the traverse be good, yet the inducement being ill, in not saying that it was *pro bono et vero debito*, the plaintiff cannot recover.

Yelv. 225.
Bulst. 116.
Saund. 268.
S. C. cited,
and like point
adjudged.

(a) That in an action for damages, and in which the plaintiff is to recover in proportion to his loss, every part is to be put in issue. 2 Saund. 206.

If in an action on the case for stopping three windows, the defendant justifies the stopping of two of them, and traverses the stopping of three windows ; the traverse is ill, for the inducement goes only to part, *viz.* the stopping of two windows ; and yet the traverse goes to all three, which ought not to be ; for if the defendant had stopped only two, yet in case the plaintiff shall recover damages (a) *pro tanto* ; and therefore the defendant ought to have pleaded, as to the stopping of one window, not guilty, and as to the other two to have justified, and then every part of the injury alleged by the plaintiff had been put in issue.

Vent. 70.
Aubrey v.
James.
Sid. 444.
2 Keb. 623.
S. C. (b) But
the general
replication
would have
been better,
as it would
have obliged
the defendant
to prove the
whole of his
plea.

In assault the defendant justified, for that he, being master of a ship, commanded the plaintiff to do some service in the ship, which he refusing to do, he *moderatè castigavit* the plaintiff, *prout ei bene licuit*. The plaintiff maintains his declaration ; *absque hoc, quod moderatè castigavit* : after verdict for the plaintiff, it was moved in arrest, that the issue was not well joined ; for *non moderatè castigavit* doth not necessarily imply that that he did beat him at all, and so no direct traverse to the defendant's justification, which *immoderatè castigavit* would have been ; but *de injuriâ suâ propriâ absque aliquâ tali causâ* would have been the most formal replication ; but it was held to be well enough, being after verdict. (b)

Vent. 77.
Gifford v.
Perkins. Sid.
450. 2 Keb.
635. S. C.
adjudged.

(c) How could *non est factum* be an answer to the bond, when produced in court, though in possession

In debt upon a bond entered into to *Eliz. Perkins*, who was the plaintiff's wife, he, as her administrator, brought the action ; the defendant pleads that he delivered the bond to one *Eliz. Perkins, quæ obiit sola et innupta, absque hoc*, that he delivered it to *Eliz. Perkins*, the plaintiff's wife. To which it was demurred specially ; for if it be taken that there are two of the name the defendant should have pleaded *non est factum* (c), for it amounts to no more ; or at least he ought to have induced his plea, that there were two *Eliz. Perkins's* ; but this traverse is designed to bring the marriage in question, which is not to be tried ; wherefore the court gave judgment for the plaintiff.

of a person not entitled to recover upon it ? — Might not defendant have pleaded generally, admitting the bond to be his, but that it was not given to the *E. P.* mentioned in the declaration,

ation, but to another *E. P.*? Indeed now, by virtue of the stat. 4 Ann. c. 16. § 4. he might plead *non est factum*, and a special plea. ||It would seem, that the defence might be made on the plea of *non est factum*, for that plea would put in issue that the defendant did not execute a bond to the *Eliz. Perkins* of whom the plaintiff was administrator. Perhaps a plea of *ne unques administrator* might also be expedient.||

In *assumpsit* against an executrix she pleads several judgments, and that she hath not assets *ultra*. The plaintiff replies, that *judicia prædicta*, &c. were kept on foot by fraud. The defendant maintains her bar, and traverses that all or any of the judgments were kept on foot by fraud. And on demurrer it was objected, that the defendant ought to have rejoined severally to every judgment, and not to include all three judgments in one general traverse: but it was held, that this general form of pleading was good, it being no disadvantage to the plaintiff; for if issue had been joined that all the judgments had been kept on foot by fraud, and if it had been found that one of them alone had been kept, &c. by fraud, this issue had been found for the plaintiff; because the plea was false in part, and for that reason the whole is false. (a)

that all or any, or *either*, &c. The next paragraph is not in point against this see 1 W. Saund. 512. d. note (5.)||

Lessee for years brings covenant against the lessor, declaring upon a demise and covenant for quiet enjoyment, and assigns for breach, that the lessor did enter upon him, and oust him of the premises; the defendant pleads that he entered to distrain for rent arrear, *absque hoc*, that he ousted him *de præmissis*; to which the plaintiff demurred, thinking the traverse ill, because if he had ousted him of any part of the premises he had a good cause of action; therefore he should have traversed, *absque hoc*, that he ousted him of the premises, or any part thereof: but *per cur.* — The plea is well enough in this case; for if the plaintiff will join issue upon the matter of the traverse and prove the ouster of any part the issue will be for him; and the court took a diversity between pleading the general issue, as in debt you must plead *non debet nec aliquam inde parcellam*, and a special issue, as this is.

|| Where an action is brought for damages, in which the plaintiff is by law entitled to recover *in proportion* to the loss or injury sustained, it seems to follow that a traverse which ties him up to prove the *whole* damage stated in his declaration, before he can recover it all, is contrary to the principles of law which govern actions of this kind, and therefore cannot be supported. It shall not be permitted to a defendant, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do if the defendant had pleaded only the general issue.||

Carth. 125.

Beake v.

Kent. 4 Mod.

63. S. C.

||It is usual to

reply and re-

join in such

cases severally

as to each

judgment,

and such a

replication is

not double.

1 Saund. 337.||

(a) The tra-

verse should

have been

position; ||and

2 Salk. 629.

pl. 5. White

v. Bodinam.

||Vide 3 Bos.

& Pull. 380.

1 Saund. 270.

1 Burr. 517.

et supra,

p. 277.||

2 W. Saund.

207. note 24.

(I) Pleas in Bar, their Sufficiency and Certainty: And herein,

1. *That the Plea must be proper, and adapted to the Action.*

Co. Lit. 285.
503. Hob.
162.

Hard. 332.
of pleading
non est factum,
vide infra.

Cro. Jac. 377.
Wingfield v.
Bell.

(a) Payment at
or after the
day, may now

be pleaded by virtue of the stat. Ann. c. 16. § 12.; ||but it is not a good plea to a suit by the crown. 1 Price, 23.||

HEREIN it is laid down as a general rule, that every man must plead such pleas as are pertinent and proper for him, according to the quality of his case, estate, and interest.

As, in an action of debt upon a bond or other specialty, the defendant cannot plead *nil debet*; it is otherwise in debt founded upon a matter *in pais* only, as upon a prescription, or upon a deed, that is not requisite to maintain the action.

Therefore, if an action of debt be brought on a bond or single bill, and the defendant plead payment without an acquittance under seal, this, though it be found for him, will not entitle him to judgment; for the obligation is in force till it is dissolved *eo ligamine quo ligatur*. (a)

Keilw. 147.

(b) But in
debt upon the
grant of a rent
charge *nil de-*
bet is a good
plea, because

the plaintiff hath other remedy to levy it, *viz.* by distress. Otherwise upon the grant of a bare annuity, for there being no remedy by distress the grant must be avoided by matter of as high a nature, *viz.* by acquittance. Hardr. 33.

So in debt for the arrears of an (b) annuity granted for life *nil debet* is no good plea; for the action is merely founded upon the deed, since without it no action can be maintained; and though by the death of the grantee the nature of the action is changed, the annuity being determined, yet this proves not but that the action is founded upon the deed.

Cro. Eliz. 257.

Gouls. 39.

Noy, 56.

2 Inst. 651.

Moor, 914. pl. 1295.

[Certain it is,

that the plea of not guilty to debt on a

penal statute is not such a nullity as will warrant the plaintiff in signing judgment. 1 Term

R. 462.;] ||and see 3 Bos. & Pull. 111.||

Where the action is founded upon a penal statute it hath been adjudged that not guilty is a good plea.

2 Inst. 651.

and Hob. 218.

S. P. adjudged.

Hardr. 332.

Wilson's case.

(c) Where the

testator could

not plead *nil*

debet, his ex-

ecutor shall

not plead *nil*

detinet.

2 Mod. 266.

So in debt upon the 2 & 3 E. 6. c. 13. for not setting forth tithes, it hath been held that not guilty or *nil debet* are good pleas.

In debt for the arrears of a rent-charge by will devised to the plaintiff's wife for life, against the administrator of the occupier of the land, it hath been adjudged that (c) *nil detinet* is a good plea; for a will is no deed, nor wants any delivery; and in this case it was said that the action was not so much grounded upon the will itself as upon the statute, by which men are enabled by will to dispose of their lands and rents issuing thereout.

Hardr. 332.

(d) For which

vide Hetl. 54.

Dyer, 14.

4 Leon. 18.

Vent. 41.

In debt for rent, if it be by deed, the proper plea is *non est factum*; but if it be without deed, the defendant may plead *non dimisit*, nothing in arrear, or that he never entered: also, by the better opinion of the (d) books, if the rent be due by indenture, the defendant may plead *nil debet*; for an indenture does not acknowledge

acknowledge a debt like an obligation, since the debt accrued by subsequent enjoyment. Mod. 3.
Sid. 425.
Palm. 117.

Salk. 209. pl. 1. Ld. Raym. 170. [So in debt for rent reserved by deed, *riens in arriere* is a good plea. Cowp. 588.]

¶ So in debt for an escape, or on a *devastavit, nil debet* is a good plea; for the escape and the *devastavit* are the foundations of the action. ¶ Lord Raym.
1502. 1 Will.
Saund. 38. a.

It is said, that not guilty is a good plea to any misfeasance whatsoever (a), though formerly in actions for nonfeasance not guilty was not pleaded, but they pleaded specially, and traversed any special point alleged in the declaration; and not guilty to such actions was not pleaded till after the time of the case of *Yalding v. Fay*. (b) (a) 5 Mod. 324.
per cur. Skin.
(b) Moor, 355.
where the case
was, the
plaintiff de-
clared on a
custom that

the parson should find a bull and a boar, to which the defendant, *protestando* that there was no such custom, pleaded not guilty; on demurrer it was held, that not guilty was no plea to an action for a nonfeasance, being two negatives, which cannot make an issue; but the court held, that to an action for a misfeasance it was otherwise. Cro. Eliz. 569. S. C.; *et vide* Palm. 395. 2 Roll. R. 368. ¶ But wherever an act of nonfeasance amounts to a tort, so as to be the subject of an action on the case, not guilty is a good plea to it; — as in *case* for not removing a distress within a reasonable time, — for not assigning a bail-bond, &c. &c. ¶

In *assumpsit*, the defendant pleaded not guilty, issue thereon, and verdict that he was guilty, and that he assumed in manner and form as declared; and it was moved in arrest, &c. that not guilty was no issue in this case, and the finding farther that he assumed is void, not being in issue; but *Wyndham* and *Twisden* being only in court held it cured at least by the verdict, and *Wyndham* held that not guilty (c) was a good plea, and issue in *assumpsit*, it being a trespass on the case. Lev. 142.
Elrington v.
Doshant.
(c) But in the
case of Mar-
shal v. Gibbs
in B. R. Mich.
9 G. 2. it was
ruled to be
ill on de-
murrer, though good after verdict, according to this case. 2 Stra. 1012. S. C.; ¶ and see
Cro. Eliz. 470. Atk. 77. 2 Salk. 734. ¶

In an action of covenant for nonpayment of rent, the defendant cannot plead levied by distress, for that is a confession it was not paid at the day, for it could not be distrained for till after the day. But it was agreed that the covenant alters not the nature of the rent (d), but that nothing behind, or payment at the day, is a good plea. 2 Brownl. 273.
Hare v. Savile,
adjudged.
(d) But this in
1 Brownl. 91.
per cur. was
held a bad
plea, for that

by it the defendant confessed the covenant broken, and it tended but in mitigation of damages. ¶ And the proper mode is to plead the payment as an accord and satisfaction. *Vide ante*. ¶

Nil debet was pleaded to an action brought on a covenant for a forfeiture, and on demurrer the plea was held ill. Trin. 5 G. 2.
in B. R.
Meard v.
Phillips, 2 Stra. 906. S. C.

In trover there is no plea, but a release or not guilty, for every plea in justification is but tantamount. Keb. 305.
Noy, 46.
Hob. 187.

[The defendant may plead the statute of Limitations, Lutw. 99.] *et vide* title *Trover*.

In *assumpsit* and *quantum meruit* for 20*l.* the defendant pleaded *onerari non debet*, because he paid the money at the time, &c. 2 Salk. 516.
pl. 7. Ld.
Raym. 217.
et

- Brown. v. Cornish. *et hoc paratus est verificare*; and it was held by *Holt*, that *onerari non debet* was no plea here, because the defendant allows the promise to be a good promise, but avoids it by a matter of discharge *ex post facto*, and therefore in this case he should have pleaded *actionem non*: but, where the matter of the plea shews that there never was a good cause of action, *onerari non debet* may be proper; as, in debt on a bond, the defendant may plead *onerari non debet quia riens per discent*.
- Roll. Abr. 121, 122. Cro. Car. 116. Hetl. 114. In account, the defendant may plead that he was never receiver, agent, factor, or bailiff to the plaintiff; or, if charged as bailiff, he may plead that he was only hired as his servant to drive his plough, or he may plead a release, or a submission to arbitration.
- Roll. Abr. 123. *et vide Yelv. 202. || Vide tit. Extinguishment. (D.)* So he may plead in bar, that after the receipt of the sum of which the account is demanded, by the mediation of their friends it was agreed between them, that the defendant should make an obligation of 100*l.* for the 100*l.* received, and the profit thence to arise; which obligation he did make and deliver accordingly to the plaintiff; for the acceptance of the obligation destroys the duty, and the sum in demand is thereby as strongly released as by a release of all actions.
- Dyer, 22. 145. 6 Co. 7. Ferrer's case. 4 Leon. 91. Style, 353.410. But it is no good plea in bar to an action of account, that the defendant hath made payment of the money which he received, or that he hath made satisfaction, or that the defendant hath given him a receipt or an acquittance for the sum received; for these pleas, being matters that shew he was once accountable, are only to be made use of before the auditors.
- Cro. Eliz. 850. Tresham v. Ford, adjudged. If in account upon receipt by the hands of *J. S.* the defendant plead, never his receiver, &c., and the jury find that he was his receiver of such a sum, &c., and the defendant plead before the auditors that he was possessed of several obligations, in which the son of the plaintiff was bound to the defendant, and that *J. S.* paid him this money in satisfaction of those bonds, and thereupon he delivered to him the said bonds to the use of the plaintiff, which he after accepted, this is no good plea, for it is no more than *not his receiver*, which is found and adjudged against him.
- Noy, 225.; *et vide tit. Assize.* In an assize, the general issue is *nul tort, nul disseisin*; and therefore in an assize of an office it is no plea to say that there is no such office, for that amounts to no more than saying, that he did not disseise him.
- Keilw. 150. In an attainit the petit jury can plead no plea but such as may excuse them of the false oath.
- 10 Mod. 211. 299. The Queen v. Blagden. In an information in nature of a *quo warranto* against a person, to know by what authority he exercised the office of portreeve of a borough, *non usurpavit* is no plea, which appears from the nature of the charge, which is for him to shew by what warrant or authority, &c., to which that plea is no answer.
- Show. 50. Allen *et ux.* v. Grey. (a) That this In debt by baron and feme the defendant pleaded (a) *ne unques accouple in loyal matrimony*, and on demurrer it was held an ill plea; because it puts it upon trial by certificate, which admits a marriage,

marriage, but not *secundum leges ecclesiæ*, and therefore he should have pleaded no marriage in fact, which must have been tried *per pais*.

In waste the general issue is *nul wast*. So, reparation of waste before the writ brought is a good plea in waste, as is a special nontenure.

is no plea but in dower or appeal, *vide tit. Bastardy*.

2 Inst. 302.
306. Noy, 93.
3 Leon. 203.;
et vide tit. Waste.

In an action of waste for cutting down 300 oaks, the defendant, as to 200, pleaded that the houses let to him were ruinous, &c. and he cut them down, and keeps them to employ about reparation *tempore opportuno*; and on demurrer this plea was held ill.

Cro. Eliz. 593.
Gorges v. Stanfield.

Every defendant may plead in a *quare impedit* the general issue, which is *ne disturba pas*; because the plea doth but defend the wrong wherewith he stands charged, and leaves the plaintiff's title, not only uncontroverted, but in effect confessed; and the plaintiff may, upon that plea, presently pray a writ to the bishop, or (at his choice) maintain the disturbance for damages.

Hob. 162.
Vaugh. 58.
cited.

At common law plenarty before the writ of *quare impedit* brought was a good plea: *secus*, of plenarty pending the writ: but by the statute *West. 2.* (13 Edw. 1. st. 1.) c. 5. plenarty is no plea in a *quare impedit* or *darrein presentment*, unless it be by the space of six months before the writ brought: also, plenarty by six months is no bar against the king, according to the rule *nullum tempus*, &c.

2 Inst. 360.
vide tit. Quare Impedit.

In a *quare impedit*, where the incumbent pleads the presentment of a stranger, there he ought to shew that the stranger had a title, and that he was seised of the advowson, &c., or that he was seised of a manor, &c., to which, &c. But where he pleads that he was in for six months by the presentment of the plaintiff himself, or by collation, by lapse, by the ordinary, there he need not make any title.

Noy, 30.
Lister v. Cramel.
||In the former case the title must be supposed to be in the knowledge of the
his own title.||

defendant, but in the latter the defendant need not state to the plaintiff

2. *That the Plea must be good in Substance; and therein, of Matter of Inducement, and that which is the Gist of the Defence.*

As the plaintiff's action must have all essentials necessary to maintain it, so the defendant's bar must be (a) substantially good, that is, the essence or gist of the plea must be such as, if found for the defendant, the court, according to the rules of law, must dismiss, or give judgment for him. But if the gist of the bar be naught, it cannot be cured even by (b) a verdict found for him. If indeed it be bad only in form, a verdict will cure it; and if the gist be traversed, all collateral circumstances will be intended after a verdict.

(a) *Note:*
That what is substance and what not must be determined in every action according to its nature.

(b) A verdict cures not only

such defects as may be called artificial defects, and come within the purview of the several statutes of jeofail, but natural defects, or the omissions of the parties in their allegations, which must be presumed to have been given in evidence to the jury, otherwise they could not have found a verdict for the party. *Vide tit. Amendment and Jeofail*, that these statutes do not help substance. 2 Salk. 521. pl. 25. ||As to the defects which are cured by verdict at common law, and as to those which are cured by the statutes of jeofails, see 1 Will. Saund. 228. note (1).||

Cro. Eliz. 268.
Pendlebury v.
Elmott.

(a) That the
plea ought to
be according
to the de-
mand.

Hob. 527.

3 Lev. 575.

The defendant's plea must fully (a) answer the count or declaration; as where, in assault, battery, and wounding, the defendant pleaded that he was constable of *D.*, and for such a misdemeanor of the plaintiff he laid his hands on him, and carried him to the stocks, *quæ est eadem transgressio*; on demurrer it was adjudged for the plaintiff, because the defendant had not either justified or pleaded not guilty as to the wounding. But if one pleads that the hurt which the plaintiff had was of his own assault, this is a good answer to all.

Cro. Eliz. 812.

Whitnel v.

Cook. ||This

replication

was clearly

bad, since it

put in issue

an interest in

land, which

must be done by a special plea. See *Jones v. Kitchin*, 1 Bos. & Pul. 76.; and see *Willes R.* 52. 7 Price, 670.||

In replevin the defendant as bailiff to *P.*, who was seised of the third part of the place, &c. justifies for damage-feasant; the plaintiff saith that a stranger was seised of the other two parts, and by his licence he put in his cattle; the defendant saith *de injuriâ suâ propriâ absque tali causâ*, &c.; the plaintiff demurs; and it was adjudged no plea, but he ought to answer to the special matter in the bar.

Lev. 16.

Thompson v.

Noel.

||In this case the consideration for the defendant's covenant was divisible, and the plaintiff was entitled to payment for the 180 men actually carried, although he had failed in carrying 280 according to his covenant. *Vide* 8 Term R. 375. 10 East, 295.||

So where in covenant the plaintiff declared that he the plaintiff had covenanted with the defendant to go with a ship to *D.* in *Ireland*, and there to take in 280 men from the defendant, and to carry them to *Jamaica*; and the defendant covenanted to have the 280 men there ready, and to pay for the carriage of them 5*l.* a man, and said that the defendant had not the 280 men ready, but that he had 180, and those he took and carried, and the defendant had not paid for them; the defendant pleaded, that he had the 280 men ready, and tendered them to the plaintiff, and that he would not receive them, but said nothing to the carrying of 180 men, nor to the nonpayment for them; as this was not a plea to the whole, but to the carrying only, judgment was given for the plaintiff on a demurrer.

11 Co. 6. b.

2 Leon. 174.

Godb. 55.

Roll. R. 161.

Cro. Jac. 355.

Hob. 187.

Goulf. 109. Bulstr. 25. Carter, 51. 3 Lev. 59. (b) Hardr. 351.—If many words contain one thing in signification, if he answers to them in substance it is good. Cro. Eliz. 256.

If as to part the defendant joins issue, but says nothing to the rest, and this issue is found for the plaintiff, he shall have judgment. But (b) if the matter is pleaded to the whole, though in fact but an answer to part, this is a bad plea, and not helped by the statute.

1 Saund. 28.

n. 1, 2, 3.

2 Bos. & Pul.

427. 3 Bos. &

Pul. 174.

1 H. Black. 645. 1 Bos. & Pul. 411. 6 Taunt. 646.

||Where the plea professes to answer only part, and is in fact but an answer to part, there the plaintiff may take judgment for the part answered, and if he demur or plead over, the whole action is discontinued.

2 Bos. & Pul.

427. 1 Saund.

28. n. 3.

But where the plea professes to answer a part, and in fact answers the whole, the plaintiff may demur, for the plea is bad; although it has been said it is a discontinuance, and the plaintiff should take judgment for the part omitted in the introduction.

Ibid.

5 Taunt. 27.

If the plea profess to answer more than it actually does answer, it is clearly bad, and the plaintiff may demur; as where
in

in covenant for seven quarters' rent, the plea professed to answer the whole, but shewed a surrender before the *last four* of the seven quarters became due, the plea was held bad on demurrer because it did not answer the whole breach, which was not entire, and therefore a part of it might be proved. But it is only necessary to answer that part of the declaration which is the gist of the action, and not that which is merely matter of aggravation.||

3 Wils. 20.
1 H. Black.
555. 2 Camp.
175.

In an action of trespass on the case brought by a commoner against a stranger for putting his cattle in the common, *per quod communiam in tam amplo modo habere non potuit*, the defendant pleads a licence from the lord to put his cattle there, but does not aver there is sufficient common left for the commoners, this is no good plea; for though it may be objected the plaintiff may reply thereto, yet, being the very gist of the action, the defendant should have pleaded thereto.

2 Mod. 6.
Smith v.
Feverell.
1 Frcem. 190.
S. C.

In debt upon an obligation conditional, the defendant cannot plead in bar matters in discharge of the obligation, but he must plead it in discharge of the sum contained in the condition of the obligation; for it is not a debt simply by the obligation, but the performance or breach of the condition makes it a debt; for the obligation is guided by the condition, so that if the condition be not discharged the obligation remains in force.

Yelv. 192.
Cro. Jac. 254.
Neal v. Sheff-
field.

In debt upon a bond it is no plea that the plaintiff accepted a new bond in satisfaction of the old, for that is no satisfaction actual and present, as it ought to be.

Hob. 68.
Lovell v.
Cockatt.

In debt upon an obligation of 10*l.*, recited to be for rent, entry and suspension is no plea; because it only answers a recital in the condition, which is not material, and not the condition itself.

Hob. 130.
St. John v.
Diggs.

The condition of an obligation was, that if *A.* pay 20*l.* at *Michaelmas* next, and 20*l.* at *Easter* after, so 20*l.* at every of the said feast so long as *A.* shall live, or until *B.* shall be preferred to a benefice of 40*l.* *per ann.*, that then, &c. In an action of debt upon this obligation the defendant pleaded that *B.* was preferred, &c. before *Michaelmas* next; and held no good plea on demurrer; for, take it which way you will he ought to pay the 20*l.* at the said two feasts that are expressly set down, for they are absolute.

Noy, 64.
Countess of
Warwick v.
the Bishop of
Litchfield.

In debt upon an obligation the condition was, if such lands be proved to be parcel of the manor of *D.*, then the plaintiff may enjoy them without interruption of the defendant, that then, &c. the defendant pleads that they were not proved to be parcel of the manor, and it was thereupon demurred; and it was insisted that he ought to have pleaded that they were not parcel of the manor, so as proof thereof might have been in that action; and of that opinion was the whole court.

Cro. Jac. 232.
Elve v. Sabe,
adjudged.

In an action on the case against a common bargeman, for goods delivered to him to carry to such a place, &c., if he pleads, that he was discharged of keeping, without saying of carrying them, it is not good.

Hob. 18.

In debt upon a bond conditioned to perform covenants, one of which was for payment of money upon making assurances, the

2 Mod. 53.

Durk v.
Vincent.

defendant pleaded he paid the money such a day, but did not mention when the assurance was made, that it might appear to the court the money was immediately paid pursuant to the condition; and for that reason the court were all of opinion the plea was not good.

2 Vent. 156.
Brown v.
Rands.

In debt upon an obligation, conditioned to permit the obligor's wife (whom he intended to marry) to dispose of his personal estate, the defendant the obligor pleaded *quod conditio ejusdem scripti nunquam infracta fuit per ipsum ad aliquod tempus hucusque; et hoc paratus est verificare*: and on demurrer the court held the plea naught, and that for saving the bond it was necessary to shew he had performed the condition.

2 Mod. 176.
Harman's
case.

But where in covenant the breach assigned was that the defendant did not repair, and he pleaded generally *quod reparavit, et de hoc ponit se super patriam*, this was held good after a verdict.

March, 77.
(a) He should
have pleaded
non assumpsit.

If in a *quantum meruit* for medicines the defendant pleads that he had paid to the plaintiff *tot et tantas denariorum summas* as the said medicines were worth, without shewing what sum in certain he hath paid, this is no good plea. (a)

March, 106.
||But *non assumpsit* would
now be plead-
ed to the
whole, and the
payment might
be shewn in evidence.||

If in *assumpsit* the plaintiff declares that the defendant did assume and promise to pay the plaintiff so much money, and also to carry away certain wood before such a day, the defendant, as to the money, cannot plead that he paid it; and as to the carriage of the wood, *non assumpsit*; for the promise being entire cannot be apportioned.

4 Term R.
194. 5 Term.
R. 97. 4 Taunt.
459.

||The defendant cannot plead *non assumpsit*, or *non est factum* to the whole, and a tender as to part; for the former totally denies the cause of action, and the latter partially admits it.||

2 Mod. 45.
Mod. 205.
S. C. Milward
v. Ingram.
[But an ac-
count without
payment or
release is
surely no bar
in this case.
Mayor, &c.
of Scarbro' v. Butler, 5 Lev. 237.

If the plaintiff declares upon an *indebitatus assumpsit*, and upon a *quantum meruit*, and the defendant pleads that after the said several promises made, and before the action brought, the plaintiff and defendant came to an account concerning divers sums of money, and that the defendant was found in arrear to the plaintiff in 30*l.*, and thereupon, in consideration that the defendant promised to pay the said 30*l.*, the plaintiff promised likewise to release and acquit the defendant of all demands; this is a good plea, for by the account the first contract is merged.

of Scarbro' v. Butler, 5 Lev. 237. And an *insimul computasset* with payment amounts to the Com. Dig. tit. Pleader, (2 G. 2.) ||Vide tit. Accord and Satisfaction.||

Raym. 449.
2 Jon. 158.
Case v. Barber.

If the plaintiff declares upon an *indebitatus assumpsit* for 100*l.* and upon an *insimul computasset* the same day for another 100*l.*, and the defendant pleads that the said several sums of 100*l.* are for one and the same cause of action, and for one sum of 100*l.* only, and not for several sums; and that after the time of the said several promises made, the defendant, by order of the plaintiff, paid to one B. 30*l.* in part of payment and satisfaction of the said money in the declaration mentioned, and in full payment and satisfaction of the residue of the said money did become bound

to the plaintiff in a bond of 120*l.*, conditioned for the payment of 65*l.* to the plaintiff at a certain day in the condition specified, which 30*l.* and bond the plaintiff accepted, &c., this is a good plea; for though it is no plea to say the several *narr.* are for one sum only, and so to go no further, yet, when the defendant pleads over that the very sum demanded is satisfied, this is a good plea; and if the several 100*l.* were distinct sums, the plaintiff might have replied so, and taken issue thereupon: but when he admits there was but 100*l.* due and that satisfied the plea is good.

In trespass for taking several goods, the defendant justified for several amerciaments assessed in a court-baron; but, because he did not shew an affeerment by the affeerors, judgment was given for the plaintiff.

3 Lev. 19.
Coniers v.
Frank. [So
Stephens v.
Haughton,
2 Stra. 847.]
5 Lev. 92.
Sprigg v. Neal.

In trespass for pulling down a grate, treading grass, &c., the defendant, as to pulling down the gate, justified, that time out of mind he had a passage *per et trans* the yard, and that a gate was erected upon the passage so that he could not pass with his beasts, wherefore he broke and pulled down the gate, &c. And on demurrer to this plea, it was objected that the defendant could not justify the pulling down and breaking of the gate, not having shewn that it was locked or nailed, so that he could not pass. *Scd per curiam* — Having pleaded that the gate was put there so that he could not use the passage it shall be intended that it was locked or nailed, or the way thereby straitened that he could not pass, and the plea therefore good.

In debt upon an obligation the defendant pleads that he delivered it as an escrow, *et hoc paratus est verificare*; this held a vicious plea, for he ought to shew to whom he delivered it; and also he ought to conclude his plea (*a*), *et issint nient son fait*.

Vent. 9.
|| *Vide ante*.
4 Espin. 255.
4 Maul. & S.
578. ||

(*a*) *Vide* 1 Vent. 210.

If in an action for the following words, *Thou art a bankrupt*, the defendant pleads, that such a day and year the plaintiff became a bankrupt, and so justifies, but does not allege that he continued a bankrupt; this is no good justification, for it shall not be presumed that he continued so.

Cro. Jac. 371.
Upsheer v.
Betts.

If in an action for these words, *She is a thief to you and to me, and hath stolen 20*l.* from me, and 40*l.* from you*, the defendant pleads the plaintiff is a thief, and stole two hens from the defendant, this is no good plea; for it does not answer the particular charge in the declaration, and the last words are as material to be answered as the first.

Cro. Jac. 676.
2 Roll. R. 414.
Hiscen v.
Mercer.

If the plaintiff declares, that whereas she was a woman of good fame and reputation, &c., the defendant said of her, *She is a common whore*, &c. *per quod*, &c. and the defendant pleads, that at the time when the words were spoken the plaintiff was not of an honest reputation, as in the declaration is alleged, this is no good plea.

Style, 118.
Starchy's case,
adjudged
upon a de-
murrer to the
plea.

If the defendant pleads a proper plea, though it is not full it is aided by the statute; and therefore in all cases where issue is taken upon an insufficient plea in bar, which would have been

5 Mod. 226.
said *arguendo*.

Gilb. H. P. C. 140.
 1 Salk. 365.
 2 Ld. Raym. 1225. 1 Bur.
 501. 2 Bur.
 1159. 3 Wils.
 275. 4 Term
 R. 472. 1 Term
 R. 145. 2 New
 R. 225. (a.)
 4 Taunt. 821.
 6 Taunt. 305.
 1 Bro. & B.
 280. 1 Saund.
 228. (1.)
 Tidd's Prac.
 924, 925.

ill upon demurrer, it is held, that after a verdict the defendant shall not take advantage thereof: ||That is, if the verdict be for the plaintiff, the defendant shall not take advantage of the defectiveness of his plea, but the plaintiff shall have judgment for its falsity: but if the verdict be for the defendant, then the above defect of want of fulness will be cured by the verdict, although it would have been bad on special demurrer: but where the *gist* of the bar is bad, it cannot be cured by a verdict found for the defendant, for that is matter of substance; and it appears on the record that the defendant's defence is no bar to the action; for it is a general rule (which is equally applicable to all pleadings), that a verdict will aid a title defectively set out, but not a defective title; or, in other words, nothing is to be intended after verdict but what is expressly alleged in pleading, or necessarily to be inferred from the facts alleged||.

Cro. Eliz. 778.
 Roll. Abr. 225.
 Moor, 696.
 5 Mod. 226.
 cited. (a) So
 ruled on error
 being brought;

In trespass, where the defendant pleaded a concord in bar, but not with satisfaction, issue being taken upon the concord, the plea was held ill for want of satisfaction being pleaded; yet it was not merely void, because concord was a good plea to such an action, though not so fully pleaded as it might. (a)
 ||*sed vide* Com. Dig. Pleader, (E) 57.||

Hob. 326.
 Reynolds v.
 Buckle.

So in debt for rent upon a lease for years, entry is a proper plea, but not good without saying he did expel and hold him out; yet if issue be taken upon *non intravit*, and found for the defendant, he shall have judgment.

Cro. Jac. 678.
 Johns v.
 Ridler.

In ejectment the defendant pleaded that one *Ridler* was seised in fee, and made a lease to him for five years, by virtue whereof he was possessed, until the lessor of the plaintiff entered and dis-seised him, and made a lease to the plaintiff; that thereupon he re-entered and ejected him, *prout ei bene licuit*. The plaintiff replied that the lessor was seised in fee, and leased to him, and the defendant ousted him, *absque hoc*, that he did disseise the defendant; upon which issue was joined, and found for the plaintiff; and though this issue was vain, it being impossible that a lessee for years should be disseised, yet the defendant shall not take advantage of such an ill plea; but having confessed a lease made to the plaintiff, and it being found that he did not disseise the defendant, judgment shall be given for the plaintiff: but if there had been a verdict for the defendant he could not have judgment; for then the jury would have found against the law, that a termor was disseised.

3. Of general Pleading to avoid Prolixity; and therein, of affirmative and negative Pleas.

Co. Lit. 505.
 8 Co. 153.
 Plow. 123.
 126. 129.
 (a) Salk. 8. 5.
 Keilw. 95.
 40 E. 3. 30.

It seems that formerly great certainty and exactness was required in setting forth all the particulars in a declaration, as likewise in pleading the performance of conditions and covenants; as, in a bond for performance of covenants (a), it was held necessary to demand oyer of the condition, and likewise of the covenants, and to plead particularly the performance of each of them.

This

This created great inconveniences in overloading the proceedings with a recital of useless facts; and therefore this rule hath in the modern practice received a relaxation; and it is now settled, that where the matters to be pleaded tend to infiniteness and multiplicity, whereby the rolls may be incumbered in the length thereof, the pleading shall be general.

||For a clear statement of the several rules of pleading, tending to prevent prolixity and delay, see Ste-

phen on Pleading, ch. 2. § 6.; and see 1 Will. Saund. 117. Serjeant *Stephen*, after explaining the degree of certainty and particularity required in the allegations in pleading, ch. 2. § 4. rule 7., deduces, from the cases, various rules, which limit and restrain the degree of certainty required in pleadings, and which consequently tend to prevent prolixity. These rules, which appear sound, are, 1st, It is not necessary, in pleading, to state that which is merely matter of evidence. 2d, It is not necessary to state matter of which the court takes notice *ex officio*. 3d, It is not necessary to state matter which would come more properly from the other side. 4th, It is not necessary to allege circumstances necessarily implied. 5th, It is not necessary to allege what the law will presume. 6th, A general mode of pleading is allowed where great prolixity is thereby avoided. 7th, A general mode of pleading is often sufficient where the allegation on the other side must reduce the matter to a certainty. 8th, No greater particularity is required than the nature of the thing pleaded will conveniently admit. 9th, Less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading. 10th, Less particularity is necessary in the statement of matter of inducement or aggravation than in the main allegations. 11th, With respect to acts valid at common law, but regulated as to the mode of performance by statute, it is sufficient to use such certainty of allegation, as was sufficient before the statute, see ch. 2. § 4. ||

As if in an *assumpsit* the plaintiff declares, that whereas there was a certain discourse between the plaintiff and defendant, concerning a marriage to be had between the nephew of the plaintiff and the niece of the defendant, and thereupon the defendant, in consideration the plaintiff would do his endeavour and labour to persuade his nephew to marry the niece of the defendant, did assume and promise to pay the plaintiff, &c.; and avers, that such a day, and divers other days and times, *omnibus modis quibus poterat conatus fuit et elaboravit suadere* his said nephew to marry the defendant's said niece, &c.; this is a good declaration, without shewing in particular how he did his endeavour; for if he should set forth his several speeches to his nephew in the praise of the young lady, or the advantages of a married life, &c. the record would be too long.

Raym. 400.
Aglionby v.
Towerson,
adjudged.

So in an *assumpsit* the plaintiff declares, that in consideration the plaintiff would find and provide for a sick man all such necessities as he should want, the defendant assumed and promised to pay, &c.; and avers, that he had found him necessities, amounting to such a sum, &c.; this is a good declaration, without shewing in particular what those necessities were, for that would make the record too prolix.

3 Bulst. 51.
Roll. R.
173. Crips
v. Bainton.

In *assumpsit* for labour and medicines in curing the defendant of a distemper, &c. who pleaded, *infra ætatem*; the plaintiff replied it was for necessities generally: and upon demurrer to this replication it was objected that the plaintiff had not assigned in certain how or in what manner the medicines were necessary; but it was adjudged that the replication in this general form was good.

Carth. 110.
Huggins v.
Wiseman; et
vide tit. *In-
fancy*, letter
(I).

Vent. 114.

Emery's case.

(a) *Sed qu. de*

hoc? He

might have

declared of a

certain num-

ber of books;

but surely nothing can be more uncertain than the term *library*; as what may be a very proper library for a gentleman in one art or profession may be a very improper one for another,

&c. || See 2 Will. Saund. 74. a. ||

(b) Bulkeley's case, cited also Raym. 9.

Mich. 16 Car.

2. in *B. R.*

Prior v.

Dawkes. Keb.

825. S. C.;

|| and see

Plowd. 118.

128. 54, 55.

But "divers

"goods and

"chattels"

is too general in a declaration in trover. 2 Ld. Raym. 1410. 1 Stra. 637.; and see 2 Will. Saund. 74. ||

Saund. 74. ||

Cornwallis v.

Savery,

2 Burr. 772.

So where trover was brought for a library of books (a), it was held to be good without expressing what they were; because to set down the particular books would make the record too prolix: and in this case *Plow.* (b) was cited, where a man pleaded, that he was knight of the shire *per majorem numerum*, and held to be good.

but surely nothing can be more uncertain than the term *library*; as what may be a very proper library for a gentleman in one art or profession may be a very improper one for another, &c. || See 2 Will. Saund. 74. a. || (b) Bulkeley's case, cited also Raym. 9.

So, in an action on the case for setting an house on fire, *per quod*, amongst divers other goods, *ornatus pro equis amisit*: after verdict for the plaintiff, it was objected that this was uncertain; but the objection was disallowed by the court. And in this case Justice *Windham* said, that if he had mentioned only *diversa bona* it had been well enough; as a man cannot be supposed to know the certainty of his goods when his house is burnt; and that, to avoid prolixity, the law will sometimes allow such a declaration.

is too general in a declaration in trover. 2 Ld. Raym. 1410. 1 Stra. 637.; and see 2 Will. Saund. 74. ||

[So in an action on a bond entered into by the agent of a regiment conditioned to pay to the colonel, commissioned and non-commissioned officers, &c. all such sums as he should receive from the paymaster general, it is not necessary in assigning a breach to enter into the detail, and state the respective proportions each person was entitled to, and the various deductions out of the whole pay upon various accounts.]

|| So where in debt on bond conditioned for *J. S.*'s rendering a true account of all monies, which he should receive as plaintiff's agent, the defendant pleaded performance in the words of the condition; it was held sufficient, on special demurrer, to reply that *J. S.* received divers sums of money amounting to 2000*l.*, belonging and relating to plaintiff's business, as his agent, and had not rendered a true account to the plaintiff of the said sum of 2000*l.*; and it was not necessary to state from whom, or in what manner defendant received the sums.

So in debt on bond conditioned that *B. R.* should account for and pay over to the plaintiff, as treasurer of a charity, such voluntary contributions as he should collect for the use of the charity, the defendant pleaded general performance, and the plaintiff replied that defendant had received divers sums, amounting to so much, from divers persons, for divers voluntary contributions for the use of the charity, which he had not accounted for or paid over, the replication was held sufficient on special demurrer. ||

As to general and particular pleading there are many distinctions, which may be reduced to this rule—that a certainty or generality in pleading is required, according to the nature of the subject-matter pleaded. And this has begotten the distinction

between

Co. Lit. 503.

Leon. 156.

Keilw. 95.

Palm. 70.

Lev. 303. Sid.

between negative and affirmative pleas (*a*); as, if a man is bound to perform all the covenants of an indenture, if they are all in the affirmative, he may plead performance thereof generally, and is not obliged to exhibit to the court a performance of each of them; for this would overload the proceedings with a recital of all the covenants, whereas one only might be in controversy between the parties.

affirmative pleas, none of which are necessary in negatives. Show. Parl. Cases, 97. and several authorities there cited.

But if some of the covenants are in the negative (*b*), the defendant must plead specially; for a negative cannot be performed: therefore, on a special demurrer the defendant's plea would be bad; *aliter* on a general demurrer.

117.¶ (*b*) But if the negative covenants are all void and against law, and the affirmative good and lawful, he may plead performance generally, and the court shall take notice that the negative covenants are void and against law. Moor, 850. Godb. 212. Hob. 12.

Even in affirmatives our law allows of general pleading where particulars would be many: as in a bond for performance of covenants upon an apprentice's indenture, for finding him meat, drink, washing, lodging, and other necessities, held, that *invenit* meat, drink, washing, lodging, *et alias res necessarias*, is a good plea, though uncertain what or how much: and the reason is not only because it is in the words of the covenant (for that reason doth not always hold; for many times you must shew how, and are forced to vary from the words of the covenant in a breach: as, in the case of quiet enjoyment, the breach must allege how, and by whom, and under what title the man was disturbed,) but there is another reason, because the particulars would be many.

¶ It is a rule in pleading, that whenever a subject comprehends multiplicity of matters, to avoid prolixity generality of pleading is allowed, as a bond to turn *all writs*, &c.; or that the sub-collector of subsidies should give an account in the Exchequer of *all sums* which he had received, and the other party shall be put to show a particular breach. But if there be any thing specific in the subject, although consisting of a number of acts, they must all be enumerated, as on a covenant "to enfeof all his lands" the covenantor, in shewing performance, must state them all.

So if a person be bound "to pay all the legacies in a will," he must specify them all, and aver payment of each: and the reason is because all these facts lie within the knowledge of the party.¶

Where some of the covenants are in the disjunctive, there the defendant cannot plead performance generally, because both the alternatives are not to be performed; and by pleading performance generally, he does not shew in certain what is performed by him; and therefore this is bad on a special demurrer, which shews the want of that certainty: but where the plaintiff does not demur for want of such certainty it shall be intended that the defendant performed one of them, and therefore good.

215. 2 Vent. 156. ¶ 1 Saund. 117. n. (1).¶ (*a*) Mode, and other circumstances of quality, time, and place, are requisite in af-

firmative pleas, none of which are necessary in negatives. Show. Parl. Cases, 97. and several authorities there cited.

Co. Lit. 303. Moor, 856. Cro. Eliz. 691. Sid. 87. ¶ See 1 Will. Saund.

Show. Parl. Ca. 9. *arguendo*.

1 Term R. 755, *per Buller J.*, Co. Litt. 303. b. Cro. Eliz. 253. 749. 1 Sid. 334. 1 Lutw. 421. Com. Dig. Pleader, 2 (V) 13. 2 (W) 53.

1 Will. Saund. 117.

Co. Lit. 303. Palm. 70. Cro. Eliz. 560. Leon. 511. ¶ See Stephen on Pleading, p. 369.¶

Earl of Kerry
v. Baxter,
4 East, 340.

||And in debt on bond, the condition of which refers to an agreement, it is not sufficient, on special demurrer, to set out, on oyer, the condition, and state that the agreement contains, amongst others, certain particulars, and then plead performance of all the covenants contained in the agreement; for it does not appear that the agreement does not contain negative, or disjunctive, covenants, to which a general performance cannot be pleaded.||

Savil, 120, 121.

If the condition of an obligation be to perform the award of *J. S.*, and he award the obligor to pay 100*l.* or to procure a stranger to be bound in 200*l.*, &c., the defendant may plead performance generally; because one part is void, and it will be intended that he pleads performance of that part which he was bound to perform, and not the other part.

Cro. Eliz. 870.
Waller v.
Croot.

If in debt upon an obligation, conditioned that if the obligee shall enjoy such lands till the full age of *J. S.*, and if *J. S.* within one month after his full age makes an assurance thereof to the obligee, then, &c. the defendant pleads, that *J. S.* is not yet of full age; this plea is not good without shewing the obligee hath enjoyed the lands in the mean time; for the condition is in the copulative.

Dyer, 229.
Hob. 69. 170.
(a) If the
condition be
to convey an
estate, in
pleading it
must be shewn

Where the covenants are to do a matter of law, as to (a) convey, discharge an obligation, ratify, or to confirm, &c.; there, it must be pleaded specially; because, being a matter of law to be performed, it ought to be exhibited to the court, to see if it be well performed, who are judges of the law, and not a jury, who are judges of the fact only.

by what manner of conveyance it was done. Leon. 72. 2 Leon. 39. 2 Mod. 240. Godb. 36. — So, if the condition be to shew a sufficient discharge of an annuity, in pleading performance it must appear what manner of discharge it was, that the court may adjudge whether sufficient or not. 9 Co. 25. Hob. 107. ||Cro. Eliz. 916.|| — In debt upon an obligation, conditioned to deliver all evidences concerning such lands, the defendant must plead that he hath delivered such and such charters, which are all the charters concerning the land. Keilw. 95. But *per* Cro. Eliz. 869. he may plead, that he hath delivered all, &c., and the contrary in some particulars ought to be shewn on the other side; *per curiam*.

Co. Lit. 303.b.
(b) As to levy
a fine. Cro.
Jac. 560.

Where the covenants are matters of record (b), the performance must be shewn specially; because it must appear to be done by the record, and is not to be tried by a jury on the general issue.

2 Roll. R. 159.
2 Co. 4. Man-
ner's case, and
the like point
in Winch, 9.
Cro. Jac. 363.
364. Leon. 71.
March, 121.
Keilw. 80.

If in debt upon an obligation conditioned that the plaintiff shall enjoy certain lands discharged, or otherwise saved harmless (c) from all incumbrances, the defendant pleads that the plaintiff had enjoyed the lands discharged and kept indemnified from all incumbrances; this plea is naught; for being in the affirmative it ought to have shewn how: but if he had pleaded in the negative, *non fuit damnificatus*, it had been otherwise.

(c) If the condition be to save harmless from all bonds entered into for the obligor, *exoneravit et indem. conservavit* is no plea without showing how. Cro. Eliz. 916. adjudged, but that he need not show from what bonds he saved him harmless; ||and where a condition is to acquit plaintiff from any damage by reason of such bond or other particular thing, there *non damnificatus* generally is a good plea. Carth. 575.;|| and Cro. Eliz. 433. *per Gaudy*, there is a diversity when the condition is to discharge from a particular thing, and when from a multiplicity of things, for in the last case it

it is sufficient to plead generally. [If to debt upon bond conditioned to indemnify the plaintiff, the defendant plead *quod indempnem conservavit*, without saying how; this is well enough, if not shewn for cause of demurrer. *White v. Cleaver*, 2 Stra. 681. *Sed vide* *Hillier v. Plympton*, 1 Stra. 422.] || In all cases of conditions to indemnify and save harmless, the proper plea is *non damnificatus*, and, if there be any damage, the plaintiff must reply it. *Cro. Jac.* 363. 634. 2 Rep. 4. a. 1 Lev. 194. 2 Wills. 126. 5 Term R. 309, 310.; and the case in *Cro. Eliz.* 916. (*suprà*) is distinguishable; for there the condition was to *discharge* from all obligations, and, in such case, the plea must shew the manner of the discharge; besides, in that case the plea was *affirmative* that defendant *did save harmless*, and then he must shew *how*: and so where the bond was conditioned for payment of a sum of money at a day certain, *non damnificatus* was held a bad plea, though it appeared that the bond was given by way of indemnity. *Holmes v. Rhodes*, 1 Bos. & Pull. 658.||

Where the bar is in the negative it is impossible for the plaintiff to go to an issue, for a negative cannot be proved; and therefore the plaintiff must assign a breach, by replying in the affirmative, on which issue may be properly taken: as if a condition of a bond is that the defendant shall not deliver possession to any person but the lessor, or to such persons as shall lawfully evict them, the defendant pleads he did not deliver the possession to any but such as lawfully evicted him; here it comes on the plaintiff's side to assign a breach, and shew that he delivered the possession to some person that had not lawfully evicted him; because, the condition being in the negative, the defendant's plea must necessarily be in the negative also, and the plaintiff, to assign a breach, must assign a fact directly opposite to such negative condition.

So if an obligation be to perform an award, and the defendant plead no award made, it is not sufficient for the plaintiff to shew an award made in his replication, unless he shews also a breach; because the defendant's plea is in the negative, and the plaintiff, by replying in the affirmative, does not shew the obligation to be broken; for the shewing such an award leaves it uncertain whether it was performed or not; and his having shewn that there was an award subsisting, does not make it appear that he was entitled to the money, unless he also shews that the award was broken.

Carth. 116., where the court said it was not law, and not taken to be so at the bar, at the time judgment was given. And Serjeant Williams observes, that the true distinction between those cases where it is necessary to assign a breach in the replication, and where not, seems to be taken by *Holt C. J.* in *Meredith v. Allen*, 1 Salk. 138. "That in all cases (that of a bond for performance of an award excepted) if the defendant pleads a special matter that admits and excuses a nonperformance, the plaintiff need only answer, and falsify the special matter alleged; for he that excuses a nonperformance supposes it, and the plaintiff need not shew that which the defendant has supposed and admitted; but if defendant pleads a performance of the condition, though it be not well pleaded, the plaintiff, in his replication, must shew a breach, for then he has not a cause of action, unless he shews one." See 1 Will. Saund. 103. c. note (4).||

The condition of a bond was, that the obligor should render an account of the goods of *William Narril* deceased, which came to his hands, and make an equal dividend between him and the obligee; the defendant pleads, no goods came to his hands; the plaintiff must reply what goods came to his hands, and farther assign the breach that he did not account for them: because the plaintiff, by replying the goods came to the defendant's hands,

Lev. 83.
Pullen v.
Nicholas.

Vide title
Arbitrament.
|| But Saunders thought this replication good, and, according to his opinion, the case was denied to be law in *Meredith v. Allen*,

1 Saund. 102.
Hayman v.
Gerrard.

leaves

||*(a)* The case of an award is an exception to the rule that if a plea leaves it on his own shewing indifferent to the court whether he be entitled to the penalty of the obligation or not, unless he goes farther and shews that the defendant did neither account nor divide them. *(a)*

contain matter of excuse, which *admits non-performance* of the condition of the bond, the plaintiff need not assign a breach in his replication; and the reason given for the difference is, that an award may be good in part and void in part, and therefore it is incumbent on the plaintiff to show a breach thereof, that the court may judge, whether he has well conceived his action or not—for perhaps he has brought his action for breach of that part of the award which is void, and consequently has not any cause of action. *Per Jones arguendo*, 1 Saund. 102.; and this reasoning is recognized in 1 Salk. 138., and Willes R. 12.||

Serra v. Fyffe,
1 March, 441.
which seems to
overrule
1 Price, 109.

|| Where the bond was conditioned to render an account of all monies received, and to pay them over, the plaintiff, to a plea of general performance, replied that the defendant refused to render an account of all monies received, without averring that any monies had been received; such replication was holden bad on special demurrer.||

Cro. Jac. 359.
2 Buls. 267.
S. C. Halsey
v. Carpenter.
(b) If the con-
dition be to
surrender a
copyhold, the
defendant

If in debt upon an obligation *(b)*, conditioned to pay 30*l.* to *A. B.* and *C. tam cito* as they shall come to the age of twenty-one years, the defendant pleads that he paid those sums *tam cito* as they came of age, this is no good plea; for the time, place, and manner of performance, ought to be shewn in certain, so that a certain issue might be taken upon it. Adjudged upon a special demurrer.

must not plead generally that he hath surrendered it, but must shew when the court was held. Winch, 11. adjudged.—If the condition be, that the obligee shall enjoy an office according to letters patent, the defendant must not plead *in hæc verba*, but shew the effect of the letters patent, and the enjoyment accordingly. Hob. 295.

2 Mod. 33.
Duck v.
Vincent.

If in debt upon an obligation conditioned to perform covenants, one of which was for the payment of money upon the making an assurance, the defendant pleads that he paid the money such a day, but saith not when the assurance was made, this is naught; for it ought to appear that the money was immediately paid pursuant to the covenant.

Cro. Eliz. 749.
Mints v.
Bethel.

In debt upon an obligation, conditioned that the defendant at all times, upon request, should deliver to the plaintiff all the fat and tallow of the beasts which should be killed or dressed by the defendant, his servants or assigns, before such a day; the defendant may plead, that upon every request to him made he did deliver to the plaintiff all the fat and tallow of all beasts, &c. without shewing how many beasts were killed or dressed, or what quantity of fat he delivered: for if the pleadings were not so contrived as to pursue the covenants, the defendant would be obliged to fill the pleadings with multitudes of useless deliveries, which might not be controverted by the plaintiff; whereas the plaintiff, by assigning a particular breach in the non-delivery at any one time, may bring the whole matter in question.

Cro. Eliz. 749.
cited between
Sands and
Maleverer.

But here we must take notice of another distinction, *viz.* That when the condition consists of matters to be done that lie within his own knowledge, though they consist of great variety, yet the defendant cannot plead generally, but must shew the particular perform-

performance of all matters in his plea; as if the condition be that the defendant, bailiff of the plaintiff's manor, should render an account of all the rents of the manor he has received before such a day; if the defendant plead he has accounted for all the sums before such a day, it is ill; but he must shew the particular sums, because it lies within his own knowledge only. (a)

account thereof? ¶ In these cases of bonds conditioned for the accounting and all monies by agents and receivers, performance is now always pleaded in the condition, and the plaintiff assigns a specific breach. 1 Bos. & Pull. 640. 2 New R. 176. 5 East, 485. 6 East, 507.¶

So if the condition be that the defendant shall deliver briefs to all churches within such a time, and shall collect the money given upon them and shall deliver it over to the plaintiff; there, the defendant cannot plead generally that he has delivered the briefs, collected the money, and delivered it over to the plaintiff; but he must particularly shew what briefs were delivered, what sums were collected, and that he delivered them over to the plaintiff, because such particular facts lie within his own knowledge only. (b)

churches, collected all the money, amounting in the whole to so much, and no more, and that he delivered the same to the plaintiff. If not true in either of the particulars it might easily be falsified by the plaintiff: he might say he did not deliver briefs to all churches, for that he omitted such a church; or that he did not collect the money, but omitted to collect such a sum; or that he collected more than alleged, to wit, so much, and did not deliver the whole to the plaintiff; or that he did not deliver the money collected to the plaintiff, or any part; or not all, only so much.

¶ And so on the other hand less particularity is required when the facts lie more in the knowledge of the opposite party than of the party pleading.

Com. Dig. Pleader, (C) 26. 9 Rep. 60. b. 8 East, 80.

This rule is exemplified in the case of alleging title in an adversary; a more general statement is allowed in such case than when title is set up in the party himself. (c)

So in an action of covenant, the plaintiff declared that the defendant, by indenture, demised to him certain premises, with a covenant that he, the defendant, had full power and lawful authority to demise the same, according to the form and effect of the said indenture; and then the plaintiff assigned a breach, — that the defendant had not full power and lawful authority to demise the said premises, according to the form and effect of the said indenture. After verdict for the plaintiff, it was assigned for error, that he had not in his declaration shewn what person had right, title, estate, or interest in the land demised, by which it might appear to the court that the defendant had not full power and lawful authority to demise. But, upon conference and debate amongst the justices, it was resolved that the assignment of the breach of covenant was good; for he has followed the words of the covenant negatively; and it lies more properly in the knowledge of the lessor, what estate he himself has in the land which he demises, than the lessee, who is a stranger to it. (d)

So where the defendant had covenanted that he would not

(a) *Sed qu.*

If he may not say he received divers sums, to the amount of such a sum in gross, and that he rendered an

account thereof? In these cases of bonds conditioned for the accounting and all monies by agents and receivers, performance is now always pleaded in the condition, and the plaintiff assigns a specific breach. 1 Bos. & Pull. 640. 2 New R. 176. 5 East,

Sid. 215.

Woodcock's

case. (b) *Qu.*

See note preceding.

A much shorter

issue might be

taken. Suppose

he pleaded he delivered

briefs to all

churches, collected

all the money, amounting

in the whole to so much,

and no more, and that

he delivered the same to the plaintiff.

If not true in either of the particulars

it might easily be falsified by the plaintiff:

he might say he did not deliver briefs to all churches,

for that he omitted such a church;

or that he did not collect the money, but omitted to collect such a sum;

or that he collected more than alleged, to wit, so much,

and did not deliver the whole to the plaintiff;

or that he did not deliver the money collected to the plaintiff, or any part;

or not all, only so much.

3 Term R. 766.

4 Term R. 77.

Hard. 459.

1 Salk. 355.

b. 8 East, 80.

(c) *Vide Ste-*

phen on

Plead. 373.

(d) 9 Rep. 60.

b.

carry

carry on the business of a rope-maker, or make cordage for any person, except under contracts for government. And the plaintiff in an action of covenant, assigned for breach, that after the making of the indenture, the defendant carried on the business of a rope-maker, and made cordage for divers and very many persons, other than by virtue of any contract for government, &c.; the defendant demurred specially on the ground that the plaintiff had not disclosed any and what particular person or persons, for whom the defendant made cordage, nor any and what particular quantities, or kinds, of cordage the defendant did so make for them, nor in what manner, nor by what acts, he carried on the said business of a rope-maker, as is alleged in the said breach of covenant. But the court held, — That as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed conusant of his own dealings, than of the plaintiff, there was no occasion to state them with more particularity, and gave judgment accordingly. (a) ||

(a) 8 East, 80.

Lutw. 419.

|| *Vide* p. 297. ||

If the condition be that the defendant pay the plaintiff all manner of costs and charges that *J. S.* shall charge the plaintiff with, for carrying on a suit; the defendant plead he did pay all manner of costs and charges; this is ill, because it relates to one single point, which may and ought to be shewn in certain, in order that the plaintiff may take issue upon it.

Jones v.
Williams,
Dougl. 215.

[If the condition of a bond be, that *A.* shall not embezzle any money that shall be intrusted to him, or that *in any way* shall come to his hands on account of his master, it is necessary to state in the breach, that a particular sum of money was embezzled, and how, or from whom it was received.]

Shum v.
Farrington,
1 Bos. & Pul.
640.; and
see Barton v.
Webb,
8 Term R. 459.

|| But where in debt or bond conditioned for *J. S.* rendering and paying to plaintiff a true and just account, payment, and delivery of all monies, bills, &c. which he should receive as his agent, the defendant pleaded performance in the words of the condition: replication that *J. S.* received divers sums of money amounting to 2000*l.* belonging and relating to the plaintiff's business, as his agent, and had not rendered to the plaintiff a true and just account, payment, and delivery of the said sum of 2000*l.*, or any part thereof. The defendant demurred specially to this replication, and shewed for cause that the plaintiff had not stated therein, from whom or in what manner, or in what proportion, the said sums amounting to 2000*l.* were received by *J. S.*; and in support of the demurrer the case of *Jones v. Williams*, Dougl. 214. was cited; but the replication was adjudged sufficient, and warranted by the rules of law and precedents. And the court seemed to overrule *Jones v. Williams*. ||

Sid. 334.
Church v.
Brunswick.

A bond to pay from time to time a moiety of all such monies as from time to time he should receive; payment of a moiety generally, without shewing the particulars in certain, was held a good plea, because it is of what he should receive from time to time; otherwise if these words had been omitted, because in that case there would be a stuffing of the rolls with the multitude of particulars.

In an action on the case against the defendant, who promised, that in consideration the plaintiff would discharge a third person then under arrest, that he would pay the money; it was alleged *in fact* that he *exoneravit*, &c.; this was held sufficient without shewing how; for that may be done by composition, &c., and without deed.

Cro. Eliz.
915. King v.
Hobs.

So in debt upon a bond conditioned to perform the award of *J. S.*, if it is awarded that a suit in Chancery by the defendant against the plaintiff shall cease, and the plaintiff stand acquitted *de quolibet materiâ in eâdem contentâ*, the defendant may plead *quod stetit inde quietatus*, without shewing how, or that he *in fact* discharged him; for it was not intended that an actual discharge should be given, but that by the arbitrament he should be acquitted.

Cro. Jac. 339.
Roll. R. 8.
2 Bulst. 93.
Freeman v.
Sheen.

In debt upon a bond, the condition whereof was to free and keep harmless the plaintiff of and from all costs and damages that may arise by reason of a lawsuit, &c., the defendant pleaded *non damnificatus* generally; and on demurrer to this plea it was held good (a), because the condition was to save the plaintiff harmless from something that was uncertain at the time of making thereof, *viz.* from the costs and charges of the suit, that no costs might be recovered against him; but if it had been to save harmless from a particular thing (b), there such a negative plea generally would not have done, because the defendant ought to shew how he had indemnified the other.

5 Mod. 243.
Harris v. Pett.
|| *Vide* 1 Saund.
117. n.
1 Bos. & Pull.
638. ||
(a) The particulars of the damnification should have been shewn by the plaintiff in his replication.
(b) *Vide infra*.

In debt on a bond conditioned to acquit, discharge, and save harmless a parish from a bastard child, the defendant pleaded *non damnificatus* generally; and on demurrer it was held, that being in the negative, he need not shew how; and it not appearing on the whole record that the parish was damnified, judgment was given for the defendant.

3 Mod. 252.
Mather v.
Mills.

|| But *non damnificatus* cannot be pleaded to debt on bond conditioned for payment of a sum of money at a certain day, although it appears by the condition that the bond was given by way of indemnity. ||

Holmes v.
Rhodes,
1 Bos. & Pul.
638.; *et vide*
1 Bos. & Pul. 640. n. (a).

In case upon an agreement, in which the defendant promised to assign all the profits which accrued by a voyage made by a ship, &c., the breach assigned was, that the defendant *non performavit agreementum predict.*: upon a verdict and judgment in C. B. for the plaintiff, error was brought in *B. R.*, where it was insisted that the breach was too general and uncertain; but *per cur.* — Had this been even on demurrer, it would have been good, but being after a verdict it is beyond question, for the plaintiff would not have damages given if he had not proved a good breach; and here the agreement is single, *ss.* to assign; so the nonperformance is in the non-assignment, and it being negative, and in the words of the agreement, the judgment was affirmed.

Skin. 354. pl.
15. Knight v.
Keech.

[In debt upon bond conditioned to perform articles, it appeared by the plea that the articles were an agreement that the plain-

Stibs v.
Clough, 1 Str.
227.

tiff should furnish the defendant with ale and beer to be sold in his house at such prices, and that he should take it of nobody else, but might be at liberty to take any other liquors (malt liquors only excepted); and what should not be paid for at breaking up the trade, and were undrawn, should be taken back. The defendant pleaded performance. The plaintiff replied, that by the same articles it was further agreed, that what should be drawn should be paid for, and that there was such a quantity of liquors unpaid for. On demurrer by the defendant, it was said, that by the breach it does not appear the liquors unpaid for were malt liquors; and as other sorts are mentioned, the plaintiff should have been more particular; especially in the case of a bond, where he is to subject the defendant to a penalty. And of that opinion was the court, who cited the case of the *African Company v. Mason*. That was a bond, conditioned, reciting that the defendant was their receiver at *Bristol*, if therefore he do well and truly account for all sums by him received, then the bond to be void; the breach was, that he received so much money, and did not account for it; and because it appeared by the recital in the condition to be only about transactions of a particular nature, the general assignment of the breach was holden ill. So is 2 Saund. 411.]

10 Mod. 227.
Gilb. R. 238.
S. C.

4. Of Surplusage and Repugnancy in Pleading.

Co. Lit. 303.
Plow. 232.
502. Co. 42.
19 H. 6. 30. 32.
Sand. 282.
|| 1 East, 219.
4 East, 400.
5 East. 443.
Doug. 667. ||

If either party, plaintiff or defendant, allege more than is necessary to introduce new matter repugnant and contradictory to what went before, in any point not material, this will not vitiate the pleadings, according to the maxim *utile per inutile non vitiatur*; and such redundant or repugnant part shall be rejected, especially after a verdict: so though there be a repugnancy in any material point, and this be not aided after verdict, yet if it appear that the verdict was given on a different part of the declaration, or if the plaintiff release such repugnant part, judgment shall be given for him.

1 Salk. 324,
325.

|| Where matter is nonsense by being repugnant to something precedent which is sense, there the sensible precedent matter shall not be defeated by the repugnancy which follows, but the subsequent repugnant matter shall be rejected; as in ejectment, where the declaration is of a demise on the 2d of *January*, and that the defendant *postea, scilicet* on the 1st of *January*, ejected plaintiff, here the *scilicet* may be rejected, being repugnant to the *postea* and the precedent matter.

Rex v.
Stevens and
Agnew,
5 East, 244.

But where a material allegation is sensible and consistent in the place where it stands, and is not repugnant to any *antecedent* matter, it cannot be rejected merely on account of there occurring *afterwards* another allegation inconsistent with it, and which latter allegation cannot itself be rejected; as where in an information on the 33 G. 3. c. 52. § 62. prohibiting the receiving of presents by *British* subjects *holding* office under his majesty or the *East India Company in the East Indies*; the information charged that the defendants being *British* subjects, on the first day

day of *January* 1794, and for a long time thence, next ensuing, to wit, *until* the 29th *November* 1795, held certain offices in the *East Indies*, and *during all that time* resided in the *East Indies*; it was moved, in arrest of judgment, that the word "*until*" must be considered *exclusive* of the 29th of *November* 1795, and consequently that there was no sufficient averment of the defendant's residing and holding office in the *East Indies at the time* when the offence was charged; to which it was answered by the counsel for the crown, that the words "*until the 29th of November 1795*" being laid under a *viz.* might be rejected as surplusage which would get rid of the inconsistency: but the court held, that the words being sensible precedent matter, could not be rejected in favour of the subsequent repugnant matter. However, they held the averment sufficient, on the ground that the word "*until*" might *include* the 29th *November* 1795.||

In debt on an obligation the defendant pleads payment of 50*l.*, 14 *Jun.* 11 *Jac.* according to the condition; the plaintiff replies *quod non solvit 50*l.* prædict.* 14 *August.* Ann. 11. *suprad.* *quas ad eundem hiem solvisse debuisset; et hoc, &c.*, the verdict found *quod non solvit prædict.* 14 *Junii* prout the defendant had alleged: the objection here was, that no issue was joined, because they do not meet in the time the money was paid; but the word *August* being plainly surplusage, (for when he said *quod non solvit prædict.* 14 *die,* it is a sufficient traverse without the word *August*, and *August* is plainly repugnant to the word *prædict.*, for *prædict.* refers to *June*;) such surplusage, being a repugnancy to what was before material, was idle and void.

In trespass the bill was filed *Hil.* 18 *Jac.*, setting forth that the defendant 2 *January* 17 *Jac.* beat the plaintiff's servant, *per quod* the plaintiff *servitium per magnum tempus, ss. a prædict.* 20 *Martii* *suprad.* *usque primum diem Martii extunc prox. sequent. perdidit*; on a *nihil dicit* a writ of enquiry was awarded, and 10*l.* damages; but the defendant had judgment, because the gist of the action is for the use of the plaintiff's service, and the battery is but inducement, and the loss of the service is not *ex necessitate rei* relative to the battery; for the servant might fall ill some time after the battery, and the plaintiff having laid a different month from the battery, there is nothing in the record to determine the court to the 20th of *January*, and to rectify the month of *March* as repugnant; and if the loss or the service stands on the month of *March* 17 *Jac.* until *March* following, it takes three months of the time elapsed after the time of the action brought for which the jury was not authorized to give damages.

But in debt upon a bond, conditioned, that if the plaintiff did not depart out of the defendant's service without his leave, &c., then if he paid the plaintiff 100*l.* within 28 days upon demand, the bond should be void; the defendant pleaded that the plaintiff 4 *Maii* 30 *Eliz.* departed out of his service, and without his leave; the plaintiff replied that 6 *Septemb.* in the same year she departed with leave, and that afterwards 4 *Octob.* she demanded the 100*l.*, which the defendant refused to pay, *absque hoc*, that she departed

Cro. Jac. 549.

Cro. Jac. 618.
Hanbury v.
Ireland.2 Leon.
Mornings v.
Warley.

departed without leave ; it happened that the demand was laid to be 4 *Octob.* and the writ was tested 18 *Octob.*, so that there were not 28 days between the demand and the action brought, yet the plaintiff had judgment ; though upon her own shewing she brought the action 14 days too soon ; for the issue was upon the departure, and the demand in the replication was altogether immaterial, and therefore was rejected as surplusage.

Yelv. 94.
Carth. 288.
289.; *et vide*
Lev. 194,
195. like
point; *et vide*
title *Eject-*
ment.

If in ejectment the plaintiff declares on a lease made to him the third of *May*, and that the defendant *posted*, ss. 1 *Maii* ejected him, this is good after verdict ; for by the *posted* it appears that the defendant committed a tort on the plaintiff's title, and when he lays a repugnant day, it is as if he had laid none ; and if no day be laid, it shall be intended after verdict that the tort was committed before the action ; for it would be very foreign after verdict, to intend that the action was brought by the spirit of prophecy for a wrong to be committed afterwards ; and besides, the jury could not take cognizance of any fact done since the action brought for that was not in issue.

Cro. Jac. 577.
Coddington
v. Wilkin.
Carth. 95.
S. P. ; *et vide*
Show. 28. where it is held that this would not be good on demurrer.

In trespass for entering his close 10 *Julii* 44 *Eliz.*, *contra pacem dominæ reginæ Eliz.*, *et domini regis nunc*, after verdict this was moved in arrest of judgment, and held that these words *domini regis nunc* were but surplusage.

Vent. 103.
Ward v. Rich.

If an action be brought, and the plaintiff conclude his declaration with a *contra formam statuti*, and there happen to be no act of parliament in the case, the words *contra formam statuti* shall be rejected as surplusage.

Salk. 212. pl. 2.
Ld. Raym. 149.
12 Mod. 122.
Com. 26. pl. 18.
Holt, 661. pl. 1.
Carth. 382.
5 Mod. 307.
Comb. 429.
S. C. Bennet
v. Talbot.

So in trespass for entering his close and treading down his grass and corn, and hunting there, the defendant being an inferior tradesman, *contra pacem domini regis, et contra formam statuti inde provis.* ; in this case, though several trespasses are alleged, the last of which only is within the statute, and the conclusion of the count is *contra formam statuti*, which in a grammatical construction goes to the whole count ; yet, as in law it goes only to the hunting, it therefore may be applied to the latter part, and rejected as to the rest for surplusage.

Stokes v. Ma-
son, 9 East,
424.; *sed vide*
Ld. Raym. 899.

¶ If an attorney of *B. R.*, in pleading privilege, state the custom incorrectly, the improper statement may be rejected as surplusage, provided sufficient appears to support the plea.

Sabine v.
Johnstone,
1 Bos. & Pull.
60.

If a replication to a plea in abatement of the writ, begin " that the said declaration ought not to be quashed," but conclude properly, it is well enough ; for such words may be rejected as surplusage.

Owen v. Nail,
6 Term R.
702.

It is sufficient to state in the condition of a bail-bond, the names of the parties, and the time and place of defendant's appearance. If the cause of action be added, it may be rejected as surplusage.

Buckley v.
Kenyon,
16 East, 159. ;

In covenant on an indenture of lease, the plaintiff well assigned a breach, that defendant had not yielded the monthly rent,

rent, &c. &c., and then alleged, that before the exhibiting of the bill, to wit, on the 1st November 1797, 900*l.* of the rent received, &c. was in arrear. This date being before the commencement of the lease, and therefore impossible, was rejected as surplusage, the breach being sufficient without it.

In a declaration on a promissory note, the words, "the defendant's proper hand being thereunto subscribed," may be rejected as surplusage, and need not be proved.||

[In an information upon a statute, if the prosecutor is not obliged to negative the exceptions in the statute, and yet negatives some of them, that part of the information shall be rejected as surplusage.]

|| If the convicting magistrate give a proper date to the time of the conviction upon the face of it, and afterwards add an impossible date to the time when he set his hand and seal to the conviction (being before the offence committed), the latter may be rejected as surplusage.||

In *assumpsit* for money had and received by the defendant for the plaintiff, *ad usum* of the defendant; and verdict upon *non assumpsit* for the plaintiff; on motion in arrest of judgment the court held, that these words *ad usum* of the defendant should be rejected, being insensible and repugnant; and then the promise is for money had and received by the defendant for the plaintiff, which is well.

[In an action of assault against *A.* and *B.*, if *A.* confesses, and *B.* pleads that he and *A.* is not guilty, and issue is joined, and *B.* is found guilty, the words referring to *A.* may be rejected.]

In covenant against an apprentice the plaintiff assigned for breach, that the apprentice, before the time of his apprenticeship expired, and *durante tempore quo servavit*, departed from his master's service; the defendant demurred and had judgment; because the declaration was repugnant, for it should have been *durante tempore quo servire debuit*.

So in trespass for taking and carrying away his timber and bricks *siper terram jacent. erga confectionem domus de novo ædificat.*; the court held this insensible; for they could not be materials towards building a house already built.

Trespass *quare clausum fregit et solum fodit.*; the defendant justifies, that he and his ancestors, and all those whose estate he had in a cottage, have used to have common of turbary to dig and sell *ad libitum*, as belonging to the house, &c. and adjudged an ill plea, being repugnant in itself; for a common appertaining to a house ought to be spent in the house, and not sold abroad; also, such a common as is abovesaid is an interest and a frank-tenement.

If an annuity, common of pasture, common of estovers, or the like, be granted for life of years, &c. the reversion may be granted without attornment; and therefore to plead it is surplusage, and more than needs; because in none of them is there any tenure, attendance, remainder, or payment out of land.

and see 2 New R. 255.

Booth v. Grove, Moo. & Malk. 182.

The King v. Hall, 1 Term R. 320.
|| 7 Term R. 27.||

Rex v. Picton, 2 East, 195.

Salk. 24. pl. 7.
Ld. Raym. 669. Comyns, 115. pl. 79.
12 Mod. 510.
Palmer v. Stavely, Mod. 42.
Sid. 3 b. 615.

Hill v. Fleming, Ca. temp. Hardw. 341.

Salk. 215. pl. 4.
Nevil v. Soper.

Salk. 314.
Lawley v. Arnold.

Noy, 145.
Valentine v. Penny,

Co. Lit. 312. a.

Cro. Jac. 282.
Bowles v.
Poor. Bulst.
135. S. C.; *et*
vide Hob. 208.
Moor, 887.
like point.

Saund. 298.
305.

Latch. 175.
Noy, 44.
Yelv. 5.

M'Quillin v.
Cox, 1 H. Bl.
249.

Lord v.
Houston,
11 East, 62.

Yelv. 5. Noy,
44. Latch. 175;
et vide
1 Saund. 282.
that the plain-
tiff may remit
such overplus
declared for.

See Stephen
on Pleading,
418, 419.

In an avowry for a rent-charge, the defendant made title to *Jan. Stiles*, with whom he married *anno* 1603, and because at *Mich.* 1597, 20l. was arrear, and not paid to him and his wife, avowed *Hil.* 7 *Jac.*; adjudged a good avowry; for the saying it was arrear to him and his wife was but surplusage, when the contrary appears, he not being married then.

If an acceptance of rent of an assignee be pleaded, *quod receperunt et acceptaverunt de prædict. J. S. redditum sicut fertur superius reservat.*, viz. *sex denarios de redditu prædict.*; this is repugnant, because it is in a point perfectly material; and it is repugnantly pleaded, because it is saying he received the whole rent, and yet received but part of it, which is in substance a different thing; and the *sex denar.* is no surplusage, because it is the certain sum that is alleged to be accepted, and therefore the acceptance is not in the form only.

If a man makes several demands in one declaration, and in the *toto se attingunt* miscasts the whole sum, and makes it more than what is contained in the several articles demanded; this shall not vitiate the declaration, because the casting up one total is mere surplusage, and that total not agreeing with the parts, such disagreeing surplusage cannot hurt; for it is plainly the mistake of the clerk in computing the demand aright, and not of the party in shewing any particular demand otherwise than he ought.

[So in debt on a simple contract the declaration hath been holden to be good, though the aggregate amount of the several sums in the different counts fell short of the sum demanded in the recital of the writ, and the breach was assigned in the non-payment of the sum demanded in the writ.]

¶ And the same has been determined in the Court of K. B. by bill; for in that case the proceedings being by bill, the words, "of a plea that he render £—" may be rejected as surplusage, there being no writ to which they have reference.¶

But if a man brings a plaint in an inferior court, and the declaration sets forth particular demands, which over-run the sum mentioned in such plaint, though never so little, and the jury give a verdict according to the sums mentioned in the declaration, this is erroneous; for the plaint in that court is in nature of a writ, and is the original and foundation of the whole proceedings; and if the declaration, verdict, or judgment, are for more than is contained in the writ or plaint, though it be never so little, by the same reason they may go to larger sums *in infinitum*, and then the plaint or writ would be no direction for the future proceedings of the court.

¶ The rules as to avoiding surplusage first prescribe the omission of all matter *wholly foreign* to the pleading, and also of matter which does not require to be stated, though not wholly foreign. They prescribe also the cultivation of *brevity* or avoidance of unnecessary prolixity in the *manner of statement*. A terse style of allegation, involving a strict retrenchment even of *unnecessary words* is the aim of the best practitioners in pleading, and is considered as indicative of a good school.

Surplusage

Surplusage is not, however, a subject for demurrer; the maxim being, that *utile per inutile non vitiatur*. (a) But when any flagrant fault of this kind occurs, and is brought to the notice of the court, it is visited with the censure of the judges. (b) They have also, in such cases, on motion, referred the pleadings to the master, that he might strike out such matter as is redundant, and capable of being omitted without injury to the material averments, and, in a clear case, will themselves direct such matter to be struck out; and the party offending will have sometimes to pay the costs of the application. (c)

(a) Co. Lit. 303, b.
(b) 1 Black. 270. Cowp. 727.
(c) Cowp. 727. Doug. 667. 1 Tidd, 552. (4th edit.) 1 Chitt. R. 449, 450.

This is not the only danger arising from surplusage. Though traverse cannot be taken (as elsewhere shewn) on an immaterial allegation (d), yet it often happens when material matter is alleged, with an unnecessary detail of circumstances, the essential and non-essential parts of the statement are in their nature so connected, as to be incapable of separation, and the opposite is therefore entitled to include under his traverse the whole matter alleged. (e) The consequence evidently is, that the party who has pleaded with such unnecessary parsicularity, has to sustain an increased burthen of proof, and incurs greater danger of failure at the trial.||

(d) Stephen, 256.

(e) Stephen, p. 261, 262.

5. *That the Pleading ought to be direct and not argumentative.*

Every plea must be direct (g), and not by way of argument or rehearsal.

stroys the plaintiff's action only argumentatively, is not good. Yelv. 223. ||But an argumentative plea is aided by verdict, or on general demurrer. See 2 W. Saund. 319. Com. Dig. Pleader (E), 3.||

Co. Lit. 303. a.
(g) A plea in bar, that de-

If a man be bound by obligation to warrant lands, and in an action on this bond the defendant plead that the plaintiff *pacifice gavisus est*, &c. this is naught, being only argumentative; for he should have pleaded, that he did warrant the lands, *et non damnificatus*.

Dyer, 42, 43.
2 Co. 3.; et vide 1 Lev. 194.

To say *quod indentura testatur quod dimisit* is an ill plea; for he ought to shew that he demised *de facto*.

Dyer, 118.

In a *formedon in reverter*, the demandant counts of a gift to baron and feme in tail, and that they are dead without issue, the defendant cannot plead that the gift was to them in fee (h), without traversing the gift in tail, being only argumentative.

2 And. 179.

A. is incumbent, and not B., without a traverse that B. is incumbent, being only argumentative, ss. A. is incumbent, ergo B. is not. 2 And. 179. — In trespass against divers defendants, they plead that one of the defendants was dead before the writ purchased; the plaintiff replies that he was alive; this is naught, without adding *et sic nient morte*: so if villeinage be pleaded, replication that he is frank-free, without adding *nient villein*, is naught. 19 H. 6. 4.

(h) So in a *quare impedit*, defendant cannot plead that

So if a *sci. fa.* be brought against a parson for the arrears of an annuity recovered against him, and the defendant plead that before the writ brought he had resigned into the hands of the ordinary, who accepted thereof; this is no good plea, for he ought to have pleaded that he was not parson the day of the writ brought.

7 E. 4. 16.
2 And. 179, 180.

4 Mod. 405.
Derrier v.
Arnaud.

In *assumpsit* the defendant pleaded, that the plaintiff was *alienigena in regno Franciæ sub ligeantia adversarii dom. regis, &c. oriundus*, and on demurrer to this plea, the exception to it was, that this was not a direct affirmative, that the plaintiff was *alienigena*, in that it should have been *natus*, and not *oriundus*; but some precedents being cited out of *Rastal*, where the word *natus* was supplied with *oriundus*, the plea was held good.

Lev. 121.

A plea, that he is now a subject, intended a natural one, and that he was always so.

Lev. 184.
Browning v.
Litton.

(a) *Super se assumpsit*, without saying to whom, where the law raises the promise, will be well enough, but not in the case of a special promise. Sid. 292. 2 Keb. 57. Cro. Eliz. 703.

In *assumpsit* against an executor on the promise of his testator he pleaded *non assumpsit*; and after verdict for the plaintiff it was objected, that it did not appear by the plea (a) who did not assume: but *per cur.* — It shall be intended of the testator, for here is no charge of any assuming by the executor.

Latch. 125.
Baker's case.

So in debt against an executor on the bond of his testator, the defendant pleaded *non est factum suum*; and it was adjudged that *suum* should be intended testator.

2 Salk. 686.
Henley v.
Walsh.

If a horse be taken as a stray, and the owner say, he demanded the horse *proferendo satisfactionem*, this is sufficient, and a direct affirmation, as in the case of *warrantizando vendidit*.

5 H. 7. 1, 2.
Dyer, 132.

If a man plead that he entered *come* or as heir to such a one, this is positive enough; so if a man justify as bailiff or servant, this is not barely argumentative, but as positive and direct as if he had alleged that he was heir, bailiff, or servant.

Sand. 169.
(b) The word *licet* is not a bare implicative, but is an express averment.

3 Leon. 67.
Plow. 127.

If the condition of a bond be to stand to the award of J. S. so that the award be made on or before the 16th of *March*, and no award be pleaded, and the plaintiff reply, that after the making the bond, and before the action brought ss. *prædict.* 16 *die Martii*, they made an award, the (b) *scilicet* is a direct affirmation that the award was made within the time limited by the condition, and may therefore be traversed.

— *Eo quod* is an affirmative: so is *et quia quod cum*, &c. and may be traversed. Lev. 194. 1 Saund. 117.

6. Negative Pregnant.

Co. Lit. 126. a.
303. a.
Doct. pl. 256.
2 Leon. 197.
Stile, 309.
Bro. tit.
Negative
Pregnant, 1.
Fitz. Issue, 88.
|| Com. Dig.
Plead. (R) 5, 6.
Archb. on
Pleading,

It has been laid down as a rule, that every plea ought to be direct, and not by way of argument; and that therefore issue cannot be joined on a negative pregnant, or an affirmative pregnant with a negative, *i. e.* such a negative as supposes or implies an affirmative, or such an affirmative as implies a negative; as *ne dona pas per le fait* implies a gift by parol, and therefore the issue ought to have been *ne dona pas modo et forma*. And this kind of pleading is held to be ill on a (c) demurrer; because the plea, &c. is not a certain affirmative or negative of any single point in question; but being only an error in phrase it is aided after verdict.

390. || [There seems to be this sort of affinity between an argumentative plea and a negative pregnant;

pregnant; that as the latter is a negative pregnant with an affirmative, so is the former an affirmative pregnant with a negative; and the cure for both is, in most cases, to add, or at least to substitute, a direct denial of the substance and gist of the plea or declaration which is to be answered. 3 Reeve's Hist. 455.] (c) There must be a special demurrer to a negative pregnant, that is, a negative plea which doth also contain in it an affirmative; and to an argumentative plea, that is a plea which concludes nothing directly, but only by way of argument or reasoning; for the court will intend every plea good till the contrary appears. Lil. Reg. 427. ¶ See 2 Will. Saund. 319. Com. Dig. Pleader, (E) 5.]

In trespass for cutting his trees, the defendant pleads, that it was by the command of the lessor to give them to a stranger; the plaintiff replies, that he did not cut the trees by his command; this was held a negative pregnant, and that he should have pleaded *ne commanda pas*. 21 H. 6. 46, 47. Doct. pl. 256.

After issue joined the defendant pleaded a release of the plaintiff *puis darrein continuance*, the plaintiff replied that it is not his deed *puis darrein continuance*; this is a negative pregnant, because it implies the deed to be his, though not executed at the time alleged by the defendant. 21 H. 6. 9. Doct. pl. 256.

In case against an host, for that the plaintiff's goods were embezzled by his default, he pleaded, that they were not lost by his default; this is a negative pregnant, and he should have pleaded the special matter. (a) 22 H. 6. 58, 59. Doct. pl. 256. [(a) More properly the general issue.]

In case for burning the plaintiff's house by the negligent keeping of his fire, the defendant pleaded that the house was not burnt by the negligent keeping of his fire; this is a negative pregnant. 28 H. 6. 7. Doct. pl. 256. *Quære*.

If a defendant plead that the cattle died in a pound overt by the default of the plaintiff, and the plaintiff reply that they did not die by his default generally, this is a good plea; but if he say that they did not die in a pound overt, this is a negative pregnant. 5 H. 7. 9. Doct. pl. 257.

In trespass the issue joined was that *J. N.* the defendant did not disseise the plaintiff to the use of *W. P. &c.*, and held a negative pregnant; but had he pleaded *non disseisivit modo et forma*, it had been good to all intents and purposes. 5 H. 6. 57, 58. Doct. pl. 257.

In a writ of entry *sine assensu capituli*, *ne alien pas* is a negative pregnant; so of an entry for the alienation of tenant for life. 36 H. 6. 26. Doct. pl. 257.

In trespass the defendant justifies, by reason that the particular tenant alienated the reversion in fee to him; the plaintiff traverses that he did not alien in fee: this is no good issue, but a negative pregnant; for if he alienated but for another's life, his entry is lawful. 22 H. 6. 58. Doct. pl. 257.

He in reversion brings a writ of entry *in casu proviso*, upon an alienation made by the tenant for life, supposing that he has aliened in fee, which is a forfeiture of his estate; the tenant comes and pleads that he hath not aliened in fee: this is a negative, wherein is included an affirmative; for though it be true that he hath not aliened in fee, yet it may be he hath aliened in tail, which is also a forfeiture of his estate. 2 Lil. Reg. 212.

If an executor pleads several judgments, and that he hath not assets *ultra*; and the plaintiff replies they are kept on foot by fraud, and the defendant rejoins they are not kept on foot by fraud, Carter, 221. Warcup v. Symonds adjudged.

(a) Where a plea, that a house, &c. was not burnt for good custody of his fire, is a negative pregnant. Bro. tit. Negative Pregnant, 3. Fitz. Issue, 88. — Saying that you accepted not the obligation in satisfaction, implies that he gave you the obligation, which is a negative pregnant. Stile, 309.

Cro. Jac. 87.
Min v. Cole. If an action of trespass be brought for entering into a man's house, and the defendant plead that the daughter licensed him to enter, by which he entered; the plaintiff reply, *quod non intravit per licentiam suam*; though this replication be a negative pregnant, (for it seems rather to confess the licence than to deny it,) yet the verdict having found the licence, the dubiousness of phrase is now removed, and the truth appears by the verdict.

Cobb v. Brian,
5 Bos. & Pull.
548. || So where to an avowry for 120*l.* rent in arrear, the plaintiff pleaded "that the said 120*l.* was not due," and the defendant joined issue thereon: at the trial it appeared that only 24*l.* was due; upon which the plaintiff objected that the evidence did not support the issue joined by defendant, yet it was holden, notwithstanding the objection was made at the trial, and the point reserved, that the verdict for 24*l.* cured the defect in the formality of the issue.||

Cro. Car. 512.
Gill v. Glass. So in debt for rent on a lease the defendant pleads *quod nihil habuit in tenementis tempore dimissionis*, and the plaintiff replies *quod habuit in tenementis*, without shewing what estate; though this had been bad on a demurrer, because, by not shewing what estate he had it is pregnant of this negative, that he had not such an estate by which he had power to demise, yet after verdict it is good, where the truth appears that he had such an estate that he could demise.

Lev. 83.
Pullen v.
Nicholas. In debt on an obligation to perform covenants in an indenture of lease made by the plaintiff to the defendant, whereby the defendant covenanted that he would not deliver the possession to any but the lessor, or to such persons as should law fully evict him; the defendant pleads that he did not deliver the possession to any but such as lawfully evicted him: and on demurrer to this plea it was objected that the same was ill, and a negative pregnant; and that he ought to have said, that such a one lawfully evicted him, to whom he delivered the possession; or that he did not deliver the possession to any: but the court held the plea pursuing the words of the covenant good, being in the negative; and that the plaintiff ought to have replied, and assigned a breach; and therefore judgment was given against him.

7. What Things must be pleaded according to their Operation in Law.

Co. Lit. 193.b.
200. b. Sid.
452. 2 Sand.
96. Vent. 78.
Raym. 187. The grant or conveyance of one joint-tenant to his companion must be pleaded as a release; for one joint-tenant cannot enfeof his companion, because they are already both seised *per mie et per tout*; and this manner of conveyance passing by livery cannot operate so as to give him what he already has: but, though a release

a release be the proper conveyance from one joint-tenant to another, yet if the jury find that the one joint-tenant did grant or convey to another, this amounts to a release; for they having found the substantial part, the court is to apply the words according to the operation they have in law: but every such conveyance must be pleaded as a release.

So if tenant for life grant his estate to him in reversion, this is a surrender, and must be pleaded accordingly, being the operation it hath in law. 4 Mod. 151. Comb. 190.

If *J. S.* plead the grant of a rent from his father in this manner, viz. that in consideration of love and affection, and 5*l.*, he *concessit et assignavit*, &c., and there is neither attornment nor enrolment of the deed; this cannot pass as a grant at common law, nor as a bargain and sale for want of enrolment; and though it (a) amount to a covenant to stand seised, being in consideration of love and affection, yet it ought to have been (b) so pleaded, being the operation it hath in law. 2 Vent. 149. 260. 266. Leade v. Baker and March. 4 Mod. 149. 3 Lev. 241. S.C. || 2 Saund. 97. b. n. (2). 1 Marsh. R. 217. ||

(a) A man may bargain and sell to his son, but then the consideration of money ought to be expressed, and it ought to have all the other circumstances of a bargain and sale; yet if it hath not, and the consideration of love and affection is expressed, it will amount to a covenant to stand seised. 7 Co. 40. Bedel's case. 2 Co. 24. Cro. Eliz. 394.; *et vide* Vent. 137. Lev. 56. Mod. 173. Cross v. Scudamore. (b) The word *dedi* or *concessi* may amount to a grant, to a feoffment, to a gift, lease, release, confirmation, or surrender; and it is in the election of the party to use it to which of these purposes is most agreeable to his interest, and therefore he may plead it as either. Co. Lit. 301. b. 4 Mod. 150. cited.

All necessary circumstances implied by law in a plea need not be expressed; as, in pleading a feoffment, livery and attornment are implied; *secus*, in a grant. Co. Lit. 303. Yelv. 135. Plow. 149, 150.

In pleading a countermand to a submission to arbitration, it need not be alleged that the party gave notice to the arbitrators, for without that it is no countermand; and therefore if no notice be given, issue may be joined upon the point, *quod non revocavit*. 8 Co. 82.

If a disseisee plead that he could not enter for fear, he must shew some just cause of fear, that the court may judge of the reasonableness of an apprehension of danger to his person; but in a special verdict, if the jurors find that the disseisee did not enter for fear of corporal hurt, it is sufficient, and it shall be intended that they had evidence for what they find. Co. Lit. 353. b.

The defendant made consuance as bailiff to *Jane Griffith*, that *Robert Griffith* was seised in fee, and devised to *Thomas Griffith* in tail, and that a common recovery was suffered against him, to the intent that *Jane* should have a rent of 40*l.* per annum after the death of *Thomas*; and that there was a deed for the recovery declaring the uses, &c., which was held to be ill pleaded; for he should not have set forth the deed, but have pleaded according to the construction of law, that the recovery was to such uses at the time. Comb. 403. Ld. Raym. 154. 2 Salk. 676. pl. 3. Carth. 411. Trygarn v. Fletcher

The admittance of a copyholder, as well upon a descent as surrender, may be pleaded as a grant, to avoid the inconvenience which would follow if the copyholder should be forced in pleading to shew the first grant; for that was either before the time of 4 Co. 22.

(a) That he was seised and (a) then the custom fails. memory, and so not pleadable, or within the time of memory, and (a) then the custom fails.
secundum consuetudinem manerii does not necessarily import a copyhold. 3 Bulst. 230. Roll. R. 211. 2 Vent. 144.

4 Co. 22. b.

So he may allege the admittance of his ancestor as a grant, and shew the descent to him, and that he entered, without shewing any admittance of himself.

4 Co. 22.

(b) Without shewing of whose grant, Cro. Jac. 103. adjudged

But he cannot plead, that his father was (b) seised in fee at the will of the lord by copy of court-roll of such a manor, according to the custom of the manor, and that he died seised, and it descended to him; for in truth his interest in judgment of law is but a particular interest at will.

naught upon a general demurrer, Cro. Car. 190. *per totam curiam*; though the son had there shewn, that after the descent he was admitted; but by three judges, it is but a fault in form, and the issue being taken upon a collateral matter, and found for the plaintiff, it is helped by the statute of jeofails. — But if *A.* pleads the grant of the reversion of a copyhold after the death of *B.* tenant for life, he need not shew the beginning of the estate of *B.*, nor by whom granted; for it is not the title of *A.*, but matter of inducement only. Cro. Jac. 51. 2 Vent. 182.

Hard. 366.

2 Lev. 194.

vide title

Leases.

If one license another to enjoy such a house or land till such a time, this amounts to a present and certain lease or interest for that time, and may be pleaded as such, though it may be also pleaded as a licence; and if it be pleaded as a lease for years, and traversed, the lessee may give the licence in evidence to prove it.

And. 307.

Cro. Eliz. 352.

Roll. Abr. 939.

Dowse v.

Jeffries.

If an obligee in a bond covenants not to sue the obligor, this amounts to a release, and may be pleaded as such; but, if the covenant is that he will not sue him before such a day, this rests only in covenant, and the party, if sued, can only have an action of covenant.

Noy, 5. Show.

521. S. C.

cited.

A. having a rent-charge issuing out of three acres, *B.* purchased two acres thereof, and *A.* covenanted and granted to and with *B.* not to distrain in these two acres for the rent. *Glanvil*, contrary to *Anderson*, held it a release; and the court held, that if it be a release, the tenant of the other acre may plead it, for thereby the rent was extinct.

Lit. R. 190.

Everard v.

Herne.

If two are bound in an obligation, and the obligee releases to one of them, provided the other shall not take benefit of this release, the proviso is void, and the other shall take advantage of the release if he can get it to shew.

Cro. Car. 551.

March, 95.

Dennis v.

Pain. ||Dean

v. Newhall, 8 Term R. 168. *acc.*||

If two are jointly and severally bound in an obligation, and the obligee by a deed covenants and agrees not to sue one of them, this seems to be no release, but that he may sue the other.

Carth. 63, 64.

2 Salk. 573.

pl. 1. Show.

46. Ailoffe v.

Scrimshire.

[1 Term R.

446.]

If the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in suit; this is only a covenant, upon which an action will lie, but it cannot be pleaded in bar of the bond: but where the covenant is, that the obligee will not at any time hereafter put the bond in suit; such covenant is pleadable in bar as a release; and in the argument of this case it was allowed by all, that if a letter of licence contains the following words, *viz.* that if the creditor sues within

within such a time his debt shall be forfeited, such licence is pleadable in bar.

8. *Of Colour in Pleading.*

Colour is a feigned matter, which the defendant or tenant useth in his bar when an action of trespass or an assize is brought against him, in which he gives the demandant or plaintiff a shew that he hath a good cause of action, whereas in truth he hath not, but only a colour and face of a cause; and it is used to the end that the determination of the action should be by the judges, and not by the jury, and therefore colour ought to be matter of law, or doubtful to the *lay gents*.

In an assize, when the defendant pleaded only a colourable bar, that is, such a bar as shewed some title in the demandant, they proceeded to take the assize at large, which was in this manner: the assize shewing no title in the plaintiff, the defendant would shew his own enfeoffment or investiture, but because such feoffment was only evidence that there was no disseisin, it would amount to the general issue without colour; and therefore the defendant urged, that the plaintiff obtained by virtue of an investiture, on which the ceremony of livery had never passed, and the validity of such investiture, being a question of law, was not to be answered by the jury, and therefore the plea of his own investiture, which alone would have been only evidence of no disseisin, joined to the plaintiff's title, which turned on a question of law, drew the cause from the jury to the court; and this obliged the plaintiff to shew by what investiture he claimed, and then the assize was taken at large on the title of the plaintiff; which was done that the plaintiff's title might appear on record, and the plaintiff be confined to give evidence touching that title, that the jury might not wander from that evidence; and that, if they did, they might the more easily be convicted in an attainder.

In an assize, if the tenant pleads that he demised the lands to the demandant for years, this is no good plea; because the complaint is of a disseisin of a freehold, and the tenant gives the demandant no colour to have an assize. Keilw. 103.

If in an assize the tenant pleads in bar that his father was seised and died, and that he as son and heir entered, and gives colour to the demandant; and he replies, that he himself was seised till by the father of the tenant disseised, and that he made continual claim, and after the death of the father re-entered, and was seised till, &c. it is a good replication, and yet his title is founded on his own possession only. Keilw. 103.

In trespass, if the defendant justifies the taking of the cattle damage feasant, he need not give any other colour to the plaintiff; for by this justification he acknowledges the property to be in him. Co. Ent. 652.
Doct. pl. 73.

¶ In trespass *quare clausum fregit*, where the defendant justifies under a possessory title derived from another, as, e.g., under a demise, it is necessary to give colour to the plaintiff, otherwise the plea amounts to the general issue; for it shews the right of possession Com. Dig.
Pleader (3 M)
40, 41.
7 Term R.
354. 8 Term

to

R. 406.

1 East, R. 215.

Welsh v. Nash,

8 East, 394.

to be in the defendant and not in the plaintiff; but as this defence may be given in evidence on the general issue, it is not very frequently pleaded. However, where a damage to personal property is to be justified, as cutting and removing posts, rails, &c. there it must be specially pleaded, and colour given.||

Dyer, 365.

Co. Ent. 79.

Rast. Ent. 254.

(a) In eject-

In ejectment the plaintiff's title in his declaration must be answered; and it is not sufficient barely to give colour, as in trespass, or an assize. (a)

ments the modern practice is, to plead the general issue, the defendant entering into a rule to confess lease, entry, and ouster, by which means the title only is in question between the parties.

10 Co. 88.

Colour ought to have the following qualities: 1st, It ought to be a matter doubtful to the jury; as where the defendant says that the plaintiff comes by colour of a deed of feoffment, where nothing passed by the deed; this is a good colour, being a doubt to the *lay gents* whether the land passed by this feoffment without livery. 2dly, It to have continuance, though it wants effect; as, where the defendant gives colour by colour of a deed of demise to the plaintiff for the life of *J. S.*, who before the trespass, was dead; this is not any colour, for this doth not continue; but he ought say, that he claims by virtue of a deed of demise made to him for his life where nothing passed by that. 3dly, It ought to be such colour as, if it were effectual, would maintain the nature of the action as, in assize, to give colour of freehold, &c.

Rast. Ent. 277.

Co. Ent. 673.

10 Co. 90.

In trespass if the defendant pleads a fine *sur consuance de droit*, levied by the ancestor of the demandant, he shall not give colour although this be but executory: otherwise, if he pleads that his ancestor granted the reversion after an estate for life or years.

10 Co. 90.

Doct. pl. 77.

The reason why colour shall be given in a writ of entry, *sur disseisin*, writ of entry in nature of an assize, in assize, trespass, &c. is to make certain issue; but when the special matter of the plea totally bars the plaintiff, no colour is necessary; and therefore in pleading a warranty, an estoppel, or fine with proclamations, no colour is necessary.

22 H. 6. 50.

When a man pleads to the writ, or to the action of the writ, no colour shall be given.

Doct. pl. 77.

Where the defendant entitles himself by act of parliament, no colour is to be given.

10 Co. 90.

Doct. pl. 77.

Where letters patent are pleaded, the defendant ought to plead colour by former letters patent in this form, *scilicet colore quarundam literarum patentium fact. prædict.* the plaintiff, &c., *ubi nil transivit*, and not that the plaintiff claims *colore concessionis sive dimissiones*, &c.

Doct. pl. 78.

10 Co. 91.

He who justifies for wreck, waifs, strays, need not give colour.

So he who justifies for tithes shall not give colour; for although any person severs them from the nine parts, yet they belong to the parson.

22 H. 6. 50.

18 E. 4. 3.

10 Co. 89. b.

That if in

In trespass, if the defendant pleads that the freehold is in *J. S.*, or that *J. S.* is seised in fee as of his demesne, and that he by the command of *J. S.*, &c., he need not give colour; for though the

the fee or the freehold be in *J. S.*, yet the plaintiff might have an interest for years, as a lease in the premises. But where the defendant makes a special justification in him in whose right as servant, &c., there he ought to give colour; as if he pleads that *J. S.* was seised, and enfeoffed him, in whose right, &c., there he ought to give colour; for in this case it cannot be presumed that the plaintiff has any interest in the land.

trespass the defendant justifies as servant to *J. S.* he need not give colour. *Lutw. 1343; et vide Cro. Eliz. 76.*

In forcible entry the defendant may plead that he was seised until disseised by the plaintiff, and this is good without giving colour.

Rast. Ent. 62. 21 H. 6. 39.

In assize the defendant justifies by virtue of a lease for years, he need not give colour, inasmuch as he does not plead in bar of the assize, nor does he take the freehold on himself.

Dyer, 246.

In trespass the defendant pleads that the plaintiff claims *colore feoffamenti*, by which nothing passed, this is not good colour, for he ought to have pleaded *colore chartæ feoffamenti*.

2 Roll. R. 140.

Where the defendant derived a title to himself by divers mesne conveyances, and gave colour to the plaintiff by one who was last named in the conveyance, this was held naught, and that he should have given colour by him who was first named in the conveyance.

2 Roll. R. 140.

In trespass for entering the plaintiff's house, and taking and carrying away his goods, the defendant pleaded that, before the trespass supposed, one *A.* was possessed of the said goods, and the said goods being in the house of the plaintiff, the said *A.* sold them to the defendant, by force whereof he was possessed, and being so possessed came to the plaintiff's house, &c. and by assent and licence of the plaintiff's wife he entered into the house, and carried away the goods; and this plea was held naught, there being no colour given the plaintiff, and the licence given by the wife not material, nor sufficient for justifying an entry: but in this case it was held that the want of colour is but matter of form, which must be taken advantage of on demurrer. (*a*)

3 Leon. 266. Taylor v. Fisher.

||(a) Want of giving colour is aided after verdict by *32 H. 8. c. 30. vide 1 Saund. 228.*||

In trespass for taking and carrying away a hundred loads of wood the defendant justifies, for that *J. S.* was possessed of them *ut de bonis propriis*, and the plaintiff claiming them by colour of a deed of gift afterwards made, took them, and the defendant retook them; and it was thereupon demurred, because the colour given to the plaintiff is a good title for the plaintiff, and confesseth the interest in him; for colour ought to be such a thing which is a good colour of title and yet is not any title; as a deed of a lease for life, because it hath not the ceremony of livery; so the grant of the reversion is not good without attornment: but a deed of goods and chattels, without other act or ceremony, is good; so of colour by a lease for years, or by letters patent.

Cro. Jac. 122. Radford v. Harbyn.

9. *Of Pleading Non-tenure, and Disclaiming.*

The plea of *non-tenure*, or that the defendant holdeth not the lands mentioned in the plaintiff's count or declaration, is chiefly used

Doct. pl. 129. Bridg. 72, 75. Dyer, 227.

¶ *Vide* Archb.
on Pleading,
281, 282. ||
(a) So, in
debt on a lease,
non tenure is a good plea.

used in (a) real actions, and is said to be general or special: general, where the party denies ever to have been tenant to the lands in question; special, where he alleges that he was not tenant at the time of the writ purchased.

4 H. 6. 5. Doct. pl. 129.

(b) 36 H. 6.
6 Mod. 181.

At common law (b), if the tenant had pleaded *non-tenure* as to part it would have abated all the writ; but by the statute of 25 E. 3. c. 16. it is enacted, that by the exception of *non-tenure* of parcel, no writ shall be abated, but only of that parcel whereof *non-tenure* was alleged.

Doct. pl. 128.

(c) Pleading
non-tenure
at the time
of the writ
purchased is
sufficient,

When the tenant pleads *non-tenure* to the whole lands demanded, he need not set forth who is tenant; but when he pleads *non-tenure* as to part, he must set forth who is tenant of the other part, and must (c) aver that he himself was not tenant *die impletrationis brevis*.

sufficient, without adding *nec unquam postea*. Doct. pl. 128. — with what certainty, Mod. 181.

Cro. Eliz. 235.
Leonard v.
Bacon.

If issue be joined on a plea of *non-tenure*, and it be found by verdict that before the writ purchased the tenant enfeoffed divers persons with an intent to defraud him who had cause of action, and notwithstanding still took the profits; this finding is sufficient to entitle the demandant, the feoffment being void by the statute 13 Eliz. c. 5. (d)

Mod. 181.
Fowle v.
Doble.

If a formedon be brought of 140 acres lying in three villis, and the tenant plead *non-tenure* of 100 acres, he need not set forth in which of the villis the 100 acres lie.

6 Co. 10. a.
Doct. pl. 129.

If on a plea of *non-tenure* for the whole the writ abate, the demandant shall not have a new writ by journies accounts; otherwise if it abate only on a plea of *non-tenure* for part.

36 H. 6. 2.
Doct. pl. 128.

In a *præcipe*, after joint-tenancy pleaded, the defendant, to another writ, cannot plead *non-tenure*, for by his former plea he hath affirmed himself to be tenant; but had the first writ been brought against a husband, and the second against the husband and wife, she might have pleaded *non-tenure*, being a stranger to the first action.

Doct. pl. 129.
10 H. 6. 22.

In a writ of entry in the nature of an assize against husband and wife, the husband says, that the wife was not tenant of the land the day of the writ purchased, *nec unquam postea*, and held a good plea.

Mod. 250.

As to *non-tenure's* being a plea in bar or in abatement, this difference hath been taken, viz. that *non-tenure*, which goes to the *tenure*, as when the tenant denies that he holds of the demandant, but says that he holds of some other person, is in bar; but *non-tenure*, that goes to the *tenancy* of the land, as where he pleads that he is not tenant of the land, goes in abatement only.

2 Roll. R. 54.
Roll. R. 302.
Cro. Eliz. 872.
6 Mod. 226.
2 Ld. Raym.
854. Salk.

A general *non-tenure* is not a good plea to a *scire facias* upon a judgment in a personal action, because it falsifies the plaintiff's return; but in a *scire facias* to have execution of a judgment in a real action one may plead *non-tenure* against the return of the sheriff, because of the high regard the law has to the freehold.

40. pl. 9. 2 Salk. 679. pl. 7.

But

But a special *non-tenure* may be pleaded to a *scire facias* upon a judgment in a personal action; as, to a *scire facias* on a judgment for debt or damages against tenant for years, he may plead that he has only a term for years. Owen, 154. | 3 Lev. 205.

In a formedon in reverter, if the tenant pleads *non-tenure* generally, the demandant may maintain his writ, that he is tenant, though he can recover no damages; adjudged by all the court, and that *Lit. and Co.* (a) were not to be intended of a simple plea of *non-tenure*, but of *non-tenure* with a disclaimer, as the pleadings were usually in *Littleton's* time; for upon the simple plea of *non-tenure*, supposing the tenant hath no freehold but a reversion in fee, the demandant shall not be restored to the fee, for nothing is disowned by the simple plea of *non-tenure* but only the freehold, which may be true, and yet he may have the reversion in fee; but when the tenant disclaims, or pleads *non-tenure* and disclaims, the demandant shall be restored to the whole, because he hath disclaimed the whole. 3 Lev. 330. Hunlock v. Peter. (a) Co. Lit. 102. 361.

10. *Pleading Hors de son Fee.*

Hors de son fee is an exception to avoid an action brought for rent-services, &c. issuing out of lands by him who pretends to be the lord; for if the defendant can prove that the land is without the compass of his fee, the action falls. Doct. pl. 216. Bro. tit. Hors de son Fee. And. 227.

If the writ comprehends certainty of title, as in *mort'd'ancestor*, formedon in the descender or remainder, *hors de son fee* is no plea; otherwise in a writ of entry *sur disseisin*; or in an assize of rent; but in an assize, if the party makes title, *hors de son fee* is no plea. Bro. Hors de son Fee, pl. 9. 5 E. 4. 6. 27 H. 8. 7. Dyer, 311.

In trespass or rescue *hors de son fee* is no plea, without shewing of whom the land is held. 6 E. 4. 4. Doct. pl. 216.

In a cessavit *hors de son fee* is no good plea, because the tenure is traversable. 2 Inst. 296.

If a stranger claims seignior, and distrains, and avows for the services, the tenant may plead that the tenancy is *extra feodum*, &c. of him, that is, out of the seignior, or not holden of him; but he cannot plead *extra feodum*, &c. unless he takes the tenancy upon himself. Co. Lit. 1. b. 1 Mod. 104. cited, and there said by the C. J. that this rule is to be intended in cases of an assize, and so were all the books cited in Co. Lit. for proof of this opinion. 9 Co. 34. b.

In an avowry the tenant cannot plead *ne unques seise* of such services generally, because he leaves no remedy for the lord either by avowry, or by writ of customs or services; and therefore, if he is a tenant in fee-simple, he ought either to disclaim or plead *hors de son fee*. 9 Co. 34. b.

If in trespass (a) for taking goods the defendant justifies by command of the lord of the manor, of whom the plaintiff held by fealty and rent, and that for nonpayment of the rent he took them *nomine districtionis*; the plaintiff may reply, that the *locus in quo est extra, absque hoc, quod est infra feodum*, &c.; adjudged upon a special 2 Mod. 103, 104. Sherrard v. Smith. (a) So, in an avowry a stranger may a special

plead generally *hors de son* a special demurrer, it being shewn for cause that the plaintiff
fec, and so had not taken the tenancy on himself.
 may tenant for years. 2 Mod. 104. *per cur.*

11. Estoppels in Pleading.

Co. Lit. 352. a. There are three several kinds of estoppels, by matter of record, by matter in writing, and by matter in *pais*. 1st, By matter of record, *viz.* by letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittance. 2dly, By matter in writing, as by deed-indented, by making an acquittance by indenture or deed poll, by defeasance by indenture or deed-poll. 3dly, By matter in *pais*, as by livery, by entry, by acceptance of rent, by partition, by acceptance of an estate.

Co. Lit. 352. Every estoppel, because it concludes a man to allege to the truth must be certain to every intent, and is not to be taken by argument or inference.

affirmation of that which makes the estoppel. Co. Lit. 305.——Estoppels are odious in law; and although all parties to an indenture are bound by the words thereof, because they agree to it, yet that must be intended of material words, and not of all minute and descriptive words and circumstances.——A matter alleged that is not traversable shall not estop; and the party must conclude his plea or replication relying on the estoppel, otherwise he will not have the benefit of it. 1 Saund. 326. n. (4.) As where in debt for rent on a demise by indenture by one who has nothing in the land, the defendant pleads *nil habuit in tenementis*; if the plaintiff replies that he had a sufficient estate to make the demise, he loses the benefit of the estoppel; but if he replies that the lease was by indenture, and concludes *unde petit judicium*, and the defendant shall be admitted to plead the plea against his own acceptance of the lease by indenture, defendant shall be estopped. Lord Raym. 105. 1 Salk. 277. 6 Term R. 62. Co. Lit. 352. a. An estoppel is not taken notice of unless relied on in pleading. Mod. 201. An estoppel cannot be pleaded with a traverse. 2 Mod. 37.

9 H. 6. 60. By matter of (a) record all parties are estopped, so that a man
 (a) If a deed shall not be received to take an averment (b) directly contrary to
 be enrolled of a record.
 record the

party is estopped to say that it is not his deed, or that it was not acknowledged by him. Leon. 184. 3 Leon. 84. Comb. 248.; *et vide* title *Bargain and Sale*. (b) If one of my name levies a fine of my land, I may confess and avoid the fine by shewing the special matter which stands with the fine. Cro. Eliz. 531.; *et vide* tit. *Fines*.——Where one shall be estopped to say that a writ issued after the *teste*. Lutw. 334.——But whether it may not be so found by verdict, *vide* Lev. 173. Sid 271. 1 Keb. 930. 2 Keb. 52. Bayley v. Bunning. [In the case of Combe and Pitt, it is settled that the actual day of suing out the writ may be shewn in pleading. 3 Burr. 1423. &c.]——Whether the defendant shall be estopped to say that the plaintiff's testator was dead when a writ was sued out in his name. Lutw. 254.——Where one shall be estopped by praying oyer of a record or deed. Lutw. 1644. Salk. 7. pl. 17.

Co. Lit. 352. b. When the truth is apparent in the same record, the adverse party shall not be estopped to take advantage thereof, for he cannot be estopped to allege the truth when it appears of record.

Stile, 395. If *A. B.* is outlawed by the name of *A. B. Esq.* and comes in
 Bayle v. *gratis*, and reverses it for want of proclamations, he shall not be
 Scarborough. estopped to say afterwards that he was a knight and no esquire.

(c) 7 Mod. 38. If one puts in bail by a wrong name (c), he shall be concluded
 Salk. 3. pl. 7. thereby, as was agreed *per cur.* in the case of (d) *Smith v. Villars*;
 S. C. and in a civil action he need not join in the recognizance; and in
 (d) But then in the case of the Earl of *Banbury*, who was indicted by the name
 it must be of *George Knowles, Esq.* though by the course of the court he
 pleaded as an ought to have joined in the recognizance; yet because if he had
 appearance. entered

entered into by one by the name of *G. K.* it would have been an estoppel upon him, he was indulged to bring others who gave bail for him by the name of *G. K. Esq.* for their act could not conclude him (*a*).

Where one brought a writ of error upon judgment in dower against him, and assigned for error that he was within age (*b*), and appeared by attorney, and issue being joined upon the nonage, and found for the plaintiff in error, the defendant therein would have stayed judgment, because in the assignment of error it was alleged that 7 *Sept.* 20 *Car.* 2. he was of the age of fourteen *et non amplius*, and the writ of error was brought 4 *July* 26 *Car.* 2. and in *Michaelmas* term following, and error assigned by attorney, when he could not be of the age of twenty-one, according to his own allegation; but the substance of the issue being whether he was within age, and the *viz.* no material part of the issue, it was held no estoppel.

Matters alleged by way of supposals in counts shall not conclude or estop, otherwise it is after judgment given; and though after nonsuit the supposal in the count shall not conclude, yet the bar, title, replication, or other pleading of either party, which is precisely alleged, shall conclude after nonsuit. (*c*) never instituted the suit; and does not a plaintiff frequently submit to a nonsuit for the purpose of bringing another action, in which the former record cannot be given in evidence? — Lord *Coke* can only mean in those cases where a nonsuit is peremptory, which are very few, as in appeals in *favore vitæ*, &c. &c. and in attain, &c. after appearance.

¶ Where a verdict has been found on any fact, or title, distinctly put in issue in an action, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, respecting the same fact or title.

But the estoppel should be specially pleaded; for if the defendant gives the former verdict in evidence on the general issue, it is not conclusive, but only evidence to go to the jury.¶

Regularly, a stranger shall not be bound by nor take advantage of an estoppel.

Privies in blood, as heir, privies in estate, as the feoffee, lessee, &c., privies in law, as lords by escheat, tenant by the curtesy, tenant in dower, the incumbent of a benefice, and others that come under by act in law or in the *post*, shall be bound by and take advantage of estoppels.

Where the record of the estoppel runs to the disability or legitimation of the party, there all strangers shall take benefit of that record, as, outlawry, excommungement, profession, attainder of *præmunire*, bastardy, mulierty, and it shall conclude the party, though they be strangers to the record.

But of a record concerning the name of the person, quality or condition, no stranger shall take advantage, because he shall not be bound by it.

¶ A defendant is however estopped by the recognizance of bail entered into for him by the name in which he is sued, from pleading a misnomer, although he himself be no party to the recognizance.

Salk. 8. pl. 19.
¶ (*a*) *Sed vide infra*, et 2 New R. 453.¶

2 Jon. 170.
Skin. 10. pl. 10.
Raym. 456.
Morgan v. Vaughan.
(*b*) If infant plaintiff appears by attorney and has verdict, judgment not to be reversed.
21 Jac. 1. c. 13.

Co. Lit. 352.
(*c*) If plaintiff is nonsuit, is he not in the same situation as if he had

Co. Lit. 352.
(*c*) If plaintiff is nonsuit, is he not in the same situation as if he had

Outram v. Morewood,
5 East, 436.

Vooght v. Winch,
2 Barn. & A. 662.

Co. Lit. 352. a.

Co. Lit. 352. a.

Co. Lit. 352. a.
Keilw. 180.

Co. Lit. 352. a.
Keilw. 96. 180.

Meredith v. Hodges,
2 New R. 453.

Bonner v.
Wilkinson,
5 Barn. & A.
682.

So where the defendant described himself in a bond as *T. B.* of *C.* in the county of *N.*, and in an action on the bond was outlawed, it was held, that he was estopped by his description in the bond from assigning, as error to reverse the outlawry, that he was not of *C.* in the county of *Northumberland*, and that there was no such place as *C.*||

2 Leon. 11.
vide Vent. 84.
Vaugh. 82.

If *A.* leases by indenture to *B.*, to begin after the expiration of a lease to *D.*, in covenant brought by *B.* against *A.*, he is estopped to say there is no such *D.*; and though the common rule is, that a recital is not an estoppel, yet where the recital is material, as here, it is otherwise.

Allen, 79.
Newton v.
Weeks.

If by indenture between *A.* and *B.* reciting that *A.* was seised in fee of certain lands, *A.*, in consideration of a marriage to be had between her son and *B.*, grants a rent out of those lands to *B.* to begin after the death of her son, and covenants to pay it; in an action against *A.* upon this covenant she cannot plead that she had nothing in the land at the time of the covenant, but that a stranger were seised thereof, both because she was estopped by the deed, and the covenant extends to it as an annuity.

Hil. 7 G. 1.
in *B. R.*
Atkinson v.
Coatsworth;
et vide
Show. 58.
Carth. 76.

If *A.* being a lessee for years makes an under-lease to *B.* by indenture, and *B.* covenants with *A.* to perform all the covenants in the original lease to be performed by *A.* his executors, &c., in an action upon this covenant *B.* will be estopped to say there are no covenants in the original lease.

Holt, 210. pl. 1.

Roll. Abr.
408. 872.
Juel's case,
Cro. Eliz. 577.
L. P. Sand.

If the condition of an obligation be to perform all covenants contained in such an indenture, in debt upon the obligation the defendant (*a*) cannot say there is no such indenture, because he is estopped.

316. Mod. 15. L. P. ||*Hosier v. Searle*, 2 Bos. & P. 299. || (*a*) But he may say there are no covenants. Mod. 15. — But then he will confess the obligation to be single, and the plaintiff upon demurrer setting out the covenants shall have judgment. Lev. 5. adjudged; et vide Lev. 45. Raym. 27. 1 Saund. 317. ||As to the estoppel of a tenant from pleading *nil habuit in tenementis*, vide ante p. 253. note.||

Roll. Abr. 872,
873.

If the condition of an obligation hath reference to a particular to be done, or in which a generality is to be done, the obligor shall be estopped by it to say, that there is no such particular thing; as, if the condition of an obligation be to release all the right that he hath for life in *Black Acre*, he shall be estopped to say, that he hath not any right for life in *Black Acre*, because this contains a particular.

(*b*) For this
diversity vide
Cro. Eliz. 362.
Owen, 110.
Poph. 114.
Moor, 405.
Brownl. 117.
Yelv. 226.

But, if the condition of an obligation contains (*b*) a generality, a man shall not be concluded to say, that there is no such thing; as, in debt upon an obligation, of which the condition is to perform all agreements now set down by *J. S.*, the defendant may say, that no agreement was then set down by *J. S.*, because this comprehends a generality.

2 Bulst. 19. Latch. 125. Cro. Jac. 375. Dal. 28. Show. 59.

Dyer, 3.
Savil. 90.
(*c*) So, if the

If the condition of an obligation be to pay (*c*) all sums of money in which *T. S.* stands bound by his deed obligatory to
T. H.

T. H. of and for the behoof of the children of *W. S.* according to the will of, &c., he shall be estopped to say, that *T. S.* never stood bound by any deed obligatory for the use of the children of *W. S.*

condition be to pay all such sums as he was bound to pay by his being general.

several obligations, according to *Moor*, 25. pl. 79., but in *Dal.* 28. it is a *qu.*

In debt upon a bond conditioned to pay (*a*) all legacies that *J. S.* had given by his will, the defendant shall be estopped to say, that *J. S.* made no will; but he may say that *J. S.* gave no legacy by his will.

Moor, 420. pl. 578. *Paramour v. During*, || See 1 Will. bequeathed to *Godb.* 177.

Saund. 215. note 2. || (*a*) Where the condition was to give *J. S.* all the goods him by his father, the defendant shall be estopped to say he had no goods bequeathed.

In debt upon an obligation conditioned for payment of 37*l.* for rent reserved on a demise of copyhold lands for 40 years, according to such articles indented, the defendant shall be estopped to say he had nothing in the lands demised; though objected, if he had nothing in the land then he ought not to be paid the rent.

Cro. Eliz. 362. *Poph.* 114. *Moor*, 405. *Owen*, 110. *S. C.* *Stroud v. Willis*.

In an action upon a bond conditioned to pay 10*d.* weekly for keeping a bastard, according to an order made by the justices, the defendant is estopped to say, there is no such order.

Noy, 79. *Latch.* 125. *Germin v. Randall*.

In debt upon a bond, conditioned that (*b*) whereas *A.* had commenced several suits in the *K. B.* against *B.*, if *B.* should appear, and make answer thereto, then, &c. the defendant cannot say that *B.* appeared, and was ready to answer, but there was no action there depending against him, for he is estopped so to say.

Cro. Eliz. 756. *Dyer*, 196. *S. C.* in margin. *Willoughby v. Brook*.

was recited that *J. S.* claimed to have a lease, and the condition was to save harmless from all claims of *J. S.*, the defendant could not plead *J. S.* had no lease. 3 *Leon*. 108.

(*b*) Where it harmless from

In a debt upon a bond, conditioned that whereas the plaintiff had carried 12,000 billets for the defendant to *D.*, if the defendant should pay the plaintiff after the rate of 17*s.* per 1000; then, &c. the defendant cannot plead that the plaintiff did not carry 12,000 billets to *D.*, for he is estopped to deny it.

Allen, 52. *Stile*, 105. *S. C.* *Hart v. Buckminster*.

If in an action upon a bond against one as executor of *Edmund Shephard*, upon *oyer* prayed it appears that the words are *me Edvardum* (*c*) *S. teneri*, &c. and that he subscribed it by the name of *Edm. S.* (which was his true name), and upon *non est factum testatoris* pleaded it is found to be the deed of the said *Edm. S.*, yet the plaintiff shall not have judgment, the truth appearing on the record; for *Edward* and *Edmund* are two distinct names, and the (*d*) subscription by the name of *Edm.*, being no part of the bond, is not material.

Cro. Jac. 640. *Godb.* 285. *S. C.* *Mauby v. Shephard*, (*c*) The declaration might have been with an *alias*, or that *Edmund* by the name of *Edvardum*

bound himself, or he may be estopped. *Vide infra.* (*d*) That if a man binds himself by a wrong name, he shall be estopped to avoid it. *Vide Dyer*, 279. *Leon*. 322. *Moor*, 897. *Cro. Jac.* 261. 558. *Lutw.* 894. and title *Misnomer*.

If *A.* gives a bond by the name of *B.*, and is sued by the name of *B.* and pleads the misnomer, the plaintiff may reply that he made the bond by the name of *B.*, and estop him by demanding

Salk. 7. pl. 17. *Linch v. Hook*.

judgment, if against his own deed he shall be admitted to say his name is *A*.

Bonner v.
Wilkinson,
5 Barn. & A.
682.

¶ So where in an original the defendant was described as *T. B.* of *C.*, in the county of *N.*, and upon a writ of error being brought to reverse the outlawry, the error assigned was, that *T. B.* was not before, or at the time of the original writ of, or, commorant in *C.*, and that there was not any town, hamlet, or place of the name of *C.* in that county; plea to this assignment of errors, that plaintiff prosecuted his writ with intent to declare on a bond of defendant, in which he was described as *T. B.* of *C.*, in the county of *N.*:—held that this was an estoppel.¶

Mich. 59 Eliz.
Prat v. Phan-
ner.

If *A.* enters into a bond to *B.*, conditioned that *A.* shall use and maintain *C.* his wife; in an action upon this bond *A.* shall not be estopped to say that *B.* was married to *D.* (who is yet living) before she married *A.*, and so *A.* cannot use and maintain her as his wife, for he confesses and avoids, because she might notwithstanding be called in common speech or named his wife in writing.

Mich. 11 G. 1.
in *B. R.*
Skipwith v.
Green.

If, in an action for *5l.* by the lessor upon a covenant to pay so much for every acre of meadow ploughed, he lays the ploughing of an acre of lands called *Lane's Meadows* (there being other meadows leased), the defendant may plead that the lands there called *Lane's Meadows*, are not meadow, but time out of mind arable: for though all parties to an indenture are bound by the words thereof, yet it must be intended of material words, and not such as are descriptive only; and if the closes had been leased as containing 500 acres, yet the defendant would not have been estopped to say there were not so many.

Lev. 45. Sid.
44. Raym.
21. S. C.
Palmer v.

If one gives an acquittance under his hand and seal (*a*) for rent due at a day, he shall be estopped thereby to demand rent due at a day before.

Stannage, and 5 Co. 65. Dyer, 271. And. 14. Bendl. 186. Moor, 87. L. P. (*a*) If not under his hand and seal it is no estoppel, but evidence only. Comb. 59.

Lev. 43.
(*b*) May have
covenant
after. Comb. 59, 60.

But yet if one avows for rent due at a day, he shall not be estopped to (*b*) avow for rent due at a day after.

Comb. 446.
ruled by Holt
at Guildhall.

If upon a writ of error it be assigned for error, that the plaintiff died before the trial, and issue thereupon taken, the plaintiff in error, by his pleading to the action, is estopped to give in evidence that the plaintiff died before the action brought; but the defendant in error pleading *quod adhuc in plenâ vitâ existit, et hoc*, &c. lets the plaintiff loose from the estoppel.

Fairtitle v.
Gilbert,
2 Term R.
171.; *et vide*
2 Bos. & Pull.
219.

¶ In general a grantor is estopped by his deed to say that he had no interest; but that principle does not apply where the grantor is a trustee for the public: therefore, where a public turnpike-act authorized the trustees to mortgage the tolls, and expressly declared that there should be no priority among the creditors of the trust, and the trustees mortgaged the tollhouses without any authority under the act, in ejectment brought by the mort-

mortgagee, it was held that they were not estopped by their deed from shewing that the act gave them no such power.

Where by articles of agreement, reciting that plaintiffs were the assignees of a patent for a machine, plaintiffs covenanted that defendant might use it in a particular manner during the term of the patent, and defendant in consideration thereof covenanted not to use any other machine; in an action against the defendant, on his covenant for using other machines, the defendant was not estopped from pleading that the invention was not new, and that it was not discovered by the patentee: for though the recital in the deed would probably have estopped him from denying that plaintiffs were in possession of a patent, he could not be estopped from shewing that it was void, and therefore that the consideration for his covenant had failed.||

Hayne v.
Maltby,
5 Term R.
438.

12. *Pleading with a Profert, and demanding Oyer: And herein,*

1. In what Cases there must be a *Profert* or *Monstrans de Fait*.

Where the plaintiff declares upon a deed, or the defendant pleads a deed, it must regularly be with a *profert in curiâ* (a), to the end the adverse party may at his own charge have a copy of it, without which he is not bound to answer. And the (b) reason why deeds must be shewn or produced to the court is, because it is the proper office of the court to judge of the sufficiency of them, to see that they are duly executed, and without rasure or interlineation, and whether they are absolute, conditional, or revocable.

[(a) The general rule was understood to be as here stated, that a deed could not be pleaded without a *profert*. But it hath lately been adjudged,

that an instrument may be pleaded as lost by time or accident, or as destroyed by fire, or the like, without *profert*; for *lex non cogit ad impossibilia*, and no human prudence can render deeds of perpetual existence. 3 Term R. 151.] || But the excuse of *profert* is traversable, and must therefore be according to the fact; as that the deed is lost or destroyed, or in possession of the other party. 2 H. Bl. 259.; and it is necessary to state the parties, although the deed is not producible. 10 East, 55.; and the averment of loss, &c. refers to the time of pleading; and therefore, if the deed is found before the trial, it may be given in evidence. 2 Camp. 557. Where a *profert* or excuse are unnecessary they will be considered as surplusage, and will not entitle defendant to *oyer*; but where necessary, if the party make a *profert*, he must produce the deed, or he will be nonsuited, and it will not suffice to shew it lost or destroyed. 4 East, 585. 2 Lil. Reg. 210. 382. (b) 6 Co. 36. 10 Co. 93. Hob. 235. Style, 459. 2 Salk. 49s. pl. 5. 2 Ld. Raym. 1076. Salk. 76. pl. 1s. 6 Mod. 244.

A deed, therefore, that is requisite (c) *ex institutione legis* must be shewn in court, though it concerns a thing collateral, and conveys or transfers nothing; as, in case of attornment by a corporation, which must be by deed, there the deed must be shewn: *secus*, where it is *ex provisione hominis*; as, where the condition of a lease is, that the lessee shall not assign but by deed, and not by parol, there he may plead the assignment, without shewing the deed; an assignment by parol being sufficient, had it not been provided against by covenant.

6 Co. 38.
Bellamy's
case, Bulst.
119. Cro.
Car. 143.

(c) But though a thing will pass without deed, yet, if the party pleads

a deed, and makes title thereby, he must come with a *profert*. 2 Mod. 64.

In (d) all cases where a thing cannot be demanded but by deed, the deed must be produced.

Style, 459.
per Glin C. J.

motion for a prohibition granted on letters patent, the suggestion need not be with a *profert*. 2 Show. 313.

(d) But in a

6 Co. 58.

Cro. Jac. 102.

5 Lev. 205.

But of things executed, or estates determined, a deed need not be shewn; as, a licence which is executed, though of its own nature it cannot be without deed.

Cro. Jac. 372.

Bateman v.

Woodcock,

Roll. R. 221.

S. C.

So if, in trespass against a bailiff, he justifies by virtue of a warrant, without any *profert* thereof, this is sufficient; for the warrant, being executed and returned to the sheriff, is determined: but it is said to be otherwise in a justification for a rent-charge or such things as have continuance.

Roll. R. 221.

*per Coke and**Dodderidge;**et vide Dyer,*

29. pl. 194. Like point.

So the grantee of the next avoidance to a church, having presented, need not shew the deed of grant to him, being a matter executed.

5 Lev. 205.

Ailsbury v.

Harvey.

So where in replevin the defendant justified by a condemnation before the justices of peace upon the statute of excise, for the non-entry of strong waters, and a warrant made thereupon to levy 20s. set for a fine; and exception was taken thereto, because there was no *profert hic in curiâ* of the warrant; the court said, the statute does not require that the warrant be under hand and seal, but only in writing, and no writing is to be pleaded unless it be a deed: and they held further, that this being executed need not be shewn.

Co. Lit. 225.

Jenk. 305.

Cro. Car. 209.

5 Co. 75.

Also a person who comes in by act or operation of law, need not produce the deed, or plead with a *profert in curiâ*; as, tenant in dower: so, of tenant by statute staple or merchant, who may take advantage of a rent-charge without shewing the deed.

Co. Lit. 225. b.

So if a guardian in chivalry in right of the heir had entered for a condition broken, he might have pleaded the estate to have been on condition, without shewing any deed; because his interest was created by law.

Co. Lit. 226. a.

But the lord by escheat, though his estate be created by law, shall not plead a condition to defeat a freehold without shewing it; because the deed belongs to him.

Co. Lit. 226. a.

(a) 10 Co. 94.

S. P. and may

detain them

for his life.

So tenant by the curtesy shall not plead a condition made by his wife, and a re-entry for a condition broken, without shewing the deed; for though his estate be created by law, yet the law presumes that he (a) had the possession of the deeds and evidences belonging to his wife.

Cro. Car. 209.

Gray v.

Fielder.

In debt upon an obligation assigned by the commissioners of bankrupts, without shewing the obligation; upon which there was a demurrer; it was adjudged to be good enough, because the party came in by act in law, and had no means to obtain it without shewing the obligation in court.

3 Wils. 1.

[For the same reason, the indorsee of a promissory note indorsed over by an administrator, need not make a *profert* of the letters of administration.

Br. Oy. de

Rec. pl. 10.

In replevin, the defendant avowed for rent devised to him in mortmain by the custom of *London* by testament. *Fulthorp* demanded oyer of the testament. *Per Strange* — It belongs to the executor; as a feme, who demands dower of the rent granted to her baron, shall not shew the deed, for it belongs to the heir.]

Where

Where a man is a stranger (*a*) to the deed, and doth not claim any thing comprised in the grant, nor any thing out of it, or claim any thing in right of the grantee, as bailiff or servant, there he shall plead the patent or deed, without shewing it. *(a)* 10 Co. 94. laid down as a maxim. One need not produce a deed in pleading, which is made to a third person, and which he has no means to come by. 2 Show. 418. 5 Lev. 83. Moor, 870. Plow. 149.

Grantee of the next presentation was outlawed, and the church became vacant; the lord of the manor, who was entitled to the goods and chattels of persons outlawed, brought a *quare impedit*; and it was resolved, that the plaintiff being in *in le post*, and not (*b*) privy to the grant in any wise, need not shew the deed of grant to the person outlawed. Hob. 302. Holland v. Shelley. *(b)* He who is privy, as lessee for years, feoffee, &c. cannot plead

a deed without shewing it. Bro. Monstrans, pl. 61. Co. Lit. 267. 317.

Where a person pleads, that he claims by virtue of a feoffment to uses, or that *J. S.* being seised in fee, covenanted with *A.* and *B.* to stand seised to the use of such and such persons, and that the lands came and belong to him by virtue of such covenant, he need not produce the deed; for the deed doth not belong to him, though he claims thereby, but to the covenantees: also, he is in by force of the statute of uses, by operation of law; as tenant in dower, tenant by statute-staple, &c. are. Cro. Car. 441. Stockman v. Hampton. But for this *vide* Dyer, 227. Cro. Jac. 217. Jon. 377. Noy, 145. and Carth. 316. S. P. deter-

mined for the following reasons. 1st, Because the deed doth not belong to him who is only *cestui que trust*. 2dly, Because he hath no remedy in law to get possession of the deed. 3dly, He is in merely by operation of law, and not in the *per*. || It is settled that *profert* is not necessary of deeds operating under the statute of uses. 1 Saund. 9. n. (1.) 3 Term R. 156. 8 Term R. 573. 2 Bos. & P. 387.]]

In debt against an executrix for 10*l.* the plaintiff declared upon an obligation, conditioned to pay 5*l.* to *A.* to the use of *M.* his daughter, at a time limited in a certain indenture; the defendant pleads, that the indenture was made between her testator and one *J. S.*, by which the plaintiff enfeoffed *J. S.*, to the use of the testator and his heirs, and that the testator covenanted to pay 5*l.* to the plaintiff within two months after the death of *W. R.*, which *W. R.* is yet alive; the plaintiff demurred, because the defendant did not produce the indenture: but the court held, that the plea was good without it, because the defendant was a stranger to the deed; and it does not belong to her, but belongs to the feoffees, and she has no means to enforce them to produce it, and the court will not impose an impossibility: that she was still more entitled to favour, being an executrix. Lutw. 481. Crotch v. Crotch.

Where a man justifies under a deed only as servant, and claims no title himself, nor hath any interest therein, but the title and interest is his master's; yet he ought to shew the deed, for it is the substance of the title, and without shewing it he cannot justify. Cro. Jac. 292. 2 Lil. Reg. 202.

So where the defendant justified as a servant to the queen's patentee for years, and by his command, but did not bring into court the patent, the plea was held naught; for that he deriving his title from the patentee, not by act in law, but by his command, he ought to shew the patent, as well as he who claims under Cro. Jac. 317; *et vide* Style 15.

under the patent by assignment; but he who claims interest under an act in law (because he had no means to compel the patentee to shew it) may justify without shewing it.

Cro. Jac. 560.
2 Lil. Reg. 202.

So where a servant justifies for tythes by lease, yet, coming in by title and privity, he ought to shew it as well as his master; and he cannot plead the entry into another's soil without making a good title there, which ought to be by shewing the lease.

Co. Lit. 226. a.

(a) If the party who would plead the deed has it not, he ought to move the court, and the court will order him the deed, or a copy of it. Sid. 50. ||As to cases where the courts will order one party to produce deeds or writings at the instance of the other, *vide* Tidd's Prac. (7th ed.) 609, 610.||

In an assise the tenant pleads a feoffment of the ancestor of the plaintiff unto him, &c. and the plaintiff saith the feoffment was on condition, &c. and that the condition was broken, and pleads a re-entry, and that the tenant entered and (a) took away the chest, in which the deed was, and yet detains the same; he shall not in this case be enforced to shew the deed.

Sand. 8, 9.

Jevons v.
Harridge.

(b) He cannot plead performance without shewing it.

Allen, 72.
Vent. 57.

Mod. 266.

(c) That if it be lost, the court will compel the party to shew his counterpart, and he to plead thereto, otherwise they will grant an imparlance. Cro. Jac. 426. Sid. 386. 2 Keb. 450.

In debt upon a bond, conditioned for the performance of the covenants in an indenture, the (b) defendant ought to shew the indenture; and the entry always supposes it to be brought into court by him, though the court will sometimes (c) compel the plaintiff to give a copy thereof to the defendant, if he swears he never had a part thereof, or hath lost it; but this is done *ex gratiâ curiæ*, and not *ex debito justitiæ*. But where in such action, after oyer of the bond and condition, it was entered upon the roll, that the defendant prays oyer of the indenture, *et ei legitur*, This indenture, &c. and the defendant pleaded, &c., it was adjudged upon a general demurrer, that this manner of pleading was good in substance, though not formal; for it shall be intended the true indenture, and that it was in court, though by the record it did not appear to be so. But *per curiam* — If it had been on a special demurrer, it had been naught.

6 Mod. 257.
per curiam.

When one is bound by bond to perform covenants in an indenture, in an action upon the bond, the defendant, in order to discharge himself, ought to shew the deed to the court, that they may see what the covenants are; for he cannot shew that he has performed all, without shewing what he was to perform; and therefore he ought to recite the indenture, whereof he is supposed to have a counterpart in his plea; but if he never had a counterpart, or had lost it, upon oath thereof the court will compel the plaintiff to give him a counterpart, in order to set it out for his defence.

Salk. 215. pl. 5.
Hill v. Aland.

(d) But perhaps if there was good reason to suspect a forgery, the court

But, where an action was brought upon a special agreement contained in a note, and a rule was made to shew cause why the plaintiff should not give the defendant a copy; upon cause shewn the rule was discharged; because the contract upon which the action was founded was a parol contract, of which the note was only evidence, and therefore the defendant ought not to have a copy. (d)

might make a rule compelling plaintiff or his attorney to leave it with the Master for inspection, or

or to produce it to defendant and his witnesses, that they might inspect it. || In *Chetwind v. Marnell*, 1 Bos. & P. 272. the court refused to order the plaintiff to produce a bond suspected to be forged, for inspection by an officer of the stamp duties, as it might be compelling him to produce the means of convicting himself of a capital felony.||

[If a man who ought to shew a deed do not shew it, but only a confirmation, it is not good. *Quod nota bene.*] Bro. Monstr. pl. 154.

Where a deed is only inducement to the action, it need not be pleaded with a *profert*. 2 Bulst. 228. Style, 193. 264. Cro. Eliz. 217. 8 Term R. 573.||

Jon. 377. Cro. Jac. 43. 70. Cro. Car. 442. Roll. R. 13. 328. || 8 Term R. 573.||

As, where a lessee for years claimed a way to his house by a *que estate*, without shewing the deed; this was held sufficient by three justices against one, because the lessee has not the deed; and it is but a conveyance to the action, which is grounded on the disturbance done to him in his possession: but, if he had claimed a rent or common in gross, which could not pass without deed, it had been otherwise; for there he could not shew *que estate*, without shewing the deed, how he came by the estate. Palm. 387. Cro. Jac. 673. Slackman v. West. 3 Mod. 52. S. C. cited; and for which vide Yelv. 201. Brown. 220. Cro. Jac. 171. 2 Mod. 277.

[If a plaintiff describe himself as administrator, where he has no occasion to do so, a *profert* of the letters of administration is unnecessary.] Dougl. 5. n.

|| And if plaintiff sue on a note indorsed to him by an administrator, he need not make *profert* of the letters of administration, for he is not entitled to the custody of them; but they must be proved at the trial.|| Willes, 560.

It was formerly, and before the statute 16 & 17 Car. 2. c. 8. held, that the not pleading a deed with the *profert* was matter of substance, and that such omission made the judgment (a) erroneous. Vide Cro. Jac. 32. Cro. Eliz. 217. Hob. 301. Moor, 885. Cro. Car. 190.

(a) Where the want of a *profert* was made good or dispensed with by the plea of the adverse party. Hutt. 54.

But now by the 8th chapter of the said statute it is enacted, "That after verdict judgment shall not be stayed or reversed for default of alleging the bringing into court any bond, bill, or other deed mentioned in the pleadings, or of any letters testamentary, or of administration." Since this statute it hath been (b) held only matter of form.

And by the 4 & 5 Ann. c. 16. "No advantage or exceptions shall be taken for want of a *profert in cur.*, &c., but the court shall give judgment according to the very right of the cause, without regarding any such omission and defect, except the same be specially and particularly set down and shewn for cause of demurrer."

In a *scire facias* by an executor, the clause of *profert hic in curiâ literas testamentarias* may be inserted in the middle as well as in the conclusion of the writ. Carth. 69. Bosworth v. Ridgley.

[Where the probate of a will is lost a *profert* may be made of an exemplification of it.] Shepherd v. Shorthouse, 1 Stra. 412.

|| Regularly where a man pleads letters patent to himself, or another to whom he is privy, or under whom he justifies, he ought to shew them to the court. 10 Rep. 88. 92. Moor, 849. Dy. 29. b.

Roberts v.
Arthur, 2 Salk.
497.

But by the operation of the 3 & 4 Edw. 6. c. 4., explained by 13 Eliz. c. 6., an exemplification only of the letters patent need be brought into court, and not the letters patent themselves.

By 10 Ann. c. 18. § 3. where an indenture of bargain and sale is pleaded with a *profert in curiâ*, the party may shew forth a copy of the enrolment; and such copy, examined with the enrolment, and signed by the proper officer, and proved on oath to be a true copy, shall be of the same effect as the original. ||

2. Of demanding Oyer.

Bro. Oyer de
Faits, 15.
(a) To demand
oyer of an

Oyer (a) of a deed or record is always to be had by him who is to be charged by it, and not by him who pleads it; and he who pleads or declares upon it must shew it. (b)

obligation, is not only for the defendant's attorney to desire the plaintiff's attorney to read the obligation to him, as the word seems to import, or to have a sight of it, but that he may have a copy of it, that his client may consider by it what to plead to the action. 2 Lil. Reg. 226. — [And the party of whom oyer is demanded is bound to carry it to the adverse party. 2 Term R. 40.] — (b) But the defendant may, if he pleases, plead without demanding oyer of it; and if he once plead, he cannot after waive his plea and demand oyer. 2 Lil. Reg. 226. — Where there ought to be oyer, the party, if he has demanded it, is not bound to plead without it. 6 Mod. 28. [2 Stra. 1186. 1 Wils. 16. Where a deed is in the hands of a third person, the court will oblige him to give oyer, and produce it. 2 Stra. 1198.]

6 Mod. 303.

(c) If the de-
fendant would
take advantage

If a man (c) enters into an obligation by a wrong name, no advantage can be taken thereof, without demanding oyer of the deed.

of a wrong original, he must demand oyer of it. 4 Mod. 246. [But it is now settled, that if the defendant demand oyer of the original writ, the plaintiff is not bound to attend to it, but may proceed as if no such demand had been made. Boats v. Edwards, Dougl. 227. Ford v. Burnham, Barnes, 340.] || 3 Bos. & Pull. 398. 7 East, 383. ||

Keb. 513. For
according to
Hutt. 35. they
cannot plead
and shew the
counterpart; ||

Articles of agreement indented were pleaded, and replication was, that in the said articles it is further covenanted, without demanding oyer of the deed; and the court held it ill pleading, and gave judgment *nisi*.

and see 1 Stra. 227. What is said in the text must be understood as confined to cases in which the party pleading a deed is bound to make *profert* of it. ||

Pasch.

26 Car. 2.

in C. B. Mat-
thews v. Al-
derton. [A
party is not
obliged to give
oyer of letters
patent. 1 Term R. 149.] ||

In trespass the defendant justifies for common, and sets forth letters patent of the king *hic in curiâ prolat.*; which plea the plaintiff accepts, without demanding oyer of the letters patent, but after he demanded oyer of them; but denied *per curiam*; and the prothonotaries said that he is not obliged to shew them, if not required at the acceptance of the plea.

|| See 1 Will. Saund. 189. note 2.; nor of a private act of parliament, Doug. 476. ||

5 Co. 76.

Lutw. 1644.

2 Lil. Reg.

267.; || 1 Term
R. 149. ||

((d) That is, if

Oyer of the deed cannot be demanded but during the time it is in court, and that is all the term wherein it is produced, and then it may be entered *in hæc verba*; and there may be a demurrer or issue upon it; but it cannot be done of another term, because the deed is then out of the court. (d)

it be not denied; for, in that case, the law doth adjudge it to be in the custody of the party to whom it belongs: but if it be denied, then it shall remain in court until the plea is determined; and if it eventually turn out not to be the plaintiff's deed, it shall be destroyed. See the above authorities

authorities and Co. Lit. 231. b. But letters testamentary, or of administration, are not supposed to remain in court all the term; for the plaintiff may have occasion to produce them elsewhere. 2 Salk. 497. 12 Mod. 590. S. C.]

If the defendant pleads a former action depending in the same court in abatement, and the plaintiff craves oyer of the record, if it is not given in convenient time, *viz.* the next day, the plaintiff may sign judgment. Carth. 452. Ld. Raym. 347. Theobald v. Long, and Carth. 517.

S. C. where this is said to be the quickest method of proceeding.

[If the defendant plead a judgment or other matter of record in the *same* court, he must give a note in writing of the term and number-roll whereon such judgment or matter of record is entered and filed; or in default thereof the plea is not to be received. But in strictness oyer is not demandable of a record; and, it seems, not of an act of parliament. Keilw. 96. Carth. 454. 1 Ld. Raym. 347. 550. 2 Stra. 825. R. T. 5 & 6 G. 2. B. R. 1 Term R. 149. Dougl. 476.]

The time allowed for the defendant to give oyer of a deed, &c. to the plaintiff is two days exclusive after it is demanded. If it be not given in that time, the plaintiff may sign judgment as for want of a plea. (a) If given, the plaintiff shall have the same time to reply after it is given as he had at the time it was demanded. (b) Carth. 454. 2 Term R. 40. (a) 6 Mod. 122. (b) R. T. 5 & 6 G. 2. B. R. ||Tidd's Prac. 588. (9th ed.)||

If in debt on a bond for performance of an award the defendant pleads no award, and the plaintiff sets forth an award, with a *profert hic in curiâ*, and the defendant craves oyer, and then demurs for variance between the award set out in the replication and the oyer, and the variance appears material, the defendant must have judgment; otherwise if the variance had been as to those parts in which the award was void. And though in debt on an award the plaintiff need not set forth more than makes for him, yet it is otherwise in debt on a bond; for there the plaintiff must reply the whole award; and if such replication be without a *profert* the defendant may reply *nul tiel agard*. Salk. 72. pl. 9. Ld. Raym. 715. Foreland v. Marygold, adjudged; *et vide* Style, 459. See 12 Mod. 534.

After imparlance oyer cannot be demanded, because the imparlance is to another term: but if it be by bill in B. R. (c) it may, though not in the Common Pleas. Lil. Reg. 267. 6 Mod. 27. 235. 2 Show. 310. pl. 321.

[(c) This must be understood of a *special* imparlance to another day in the same term.] ||Tidd, 587. (9th ed.)||

When oyer of a deed is prayed, it is intended that the deed is in court, and the *ei legitur*, or reading of it (d), is the act of the court. Sid. 308. (d) 2 Lutw. 1644. *contrd.*

When a deed is pleaded with a *profert hic in curiâ*, the very deed itself is by intendment of law immediately in the possession of the court; and therefore when oyer is craved, it is of the court, and not of the party; and (e) after oyer is craved the deed becomes parcel of the record, and the court must judge upon the whole (g); and the demand of oyer is a kind of plea (h), and may be counterpleaded. 3 Salk. 119. pl. 2. (e) When upon oyer of the deed it is entered, the whole case appears to the court as fully

if the deed had been in the plea. Hob. 217. Show. Parl. Ca. 221. [(g) And this, though it were not strictly demandable at the time of granting it. Dougl. 460. (h) As it is a kind of plea, it should regularly be made before the time for pleading is expired. Fowler v. Dyer, Mich. 20 G. 3. Tidd's Pr. 347.]

Carth. 513.
 ||Sec 4 Barn. &
 C. 741.||

1 Will. Saund.
 289, 290.

Cook v. Re-
 mington,
 6 Mod. 257.
 6 Mod. 237.

Trin. 27 Car.
 in *B. R.*;
 Mayor and
 Commonalty
 of London
 v. Goree.
 2 Lev. 142.
 3 Keb. 491.
 S. C.

[(a) It seems,
 however, that
 the plaintiff, if
 he would con-
 test the oyer, may either counterplead it, or strike out the rest of the pleading and demur; on
 which the judgment of the court is, either that the defendant have oyer, or that he answer
 without it. On the latter judgment the defendant may have a writ of error; for to deny oyer
 where it ought to be granted is error, but not *e converso*. 2 Salk. 497. 2 Ld. Raym. 970.
 2 Stra. 1186. 1 Wils. 16.]

Weavers'
 Company
 v. Forrest,
 2 Stra. 1241.
 Simmonds v.
 Parminster,
 1 Wils. 97.
 Wallace v.
 Duchess of
 Cumberland,
 4 Term R. 370. Slater v. Horne, E. 34 G. 3. *B. R.* Tidd's Prac. 509. S. P. See also Barnes,
 527. S. P. ||The party praying oyer is entitled to a copy of the attestation, and the names of
 the witnesses, Willes, 288.||

See 2 Will.
 Saund. 367.
 note 1.

Browning v.
 Wright,
 2 Bos. & Pul
 13.

If the defendant prays oyer of the bond and condition, and it is entered *in hæc verba*, the condition becomes parcel of the plaintiff's declaration, and it is not part of the defendant's plea.

||The bond and condition are considered distinct, the bond being complete without the condition; therefore there may be oyer of the one without the other.

And praying oyer of one does not entitle the party to oyer of the other, but it must be demanded of both, if wanted.

And in this respect the condition or indorsement of a bond differs from a condition or indorsement on a deed: for the indorsement on a deed made at the time of its being executed is part of the deed, and, therefore, there can be no complete oyer of the deed without the indorsement.||

Debt for the duty of scavage, and declares upon a patent of Edward IV., defendant imparls, and after demands oyer of the letters patent; upon which the plaintiff demurs. *Per cur.*—The demurrer is ill; for the defendant having demanded oyer, &c., he ought either to have it, or to be ousted of it by the rule of court; but there cannot be a demurrer upon the demand; he ought to have counterpleaded the demand of the oyer, and the judgment of the court would have been, that he should answer *sine auditu*, &c., and it was resembled to an *aid prier*, in which the plaintiff cannot demur, but must counterplead. (a)

[It hath been said, that the defendant is not bound to set forth the oyer in his plea; and that if he do not, the plaintiff may pray an enrolment, and so make it part of his replication. But it is now holden, that if the defendant, after praying oyer of a deed, do not set forth the whole of it, the plaintiff may sign judgment as for want of a plea, or the court will quash it, for that by craving oyer the defendant undertakes to set out the whole *verbatim*; and if he do not so the plea is bad.]

||If any part of the deed in the declaration be omitted, which the defendant conceives, would, if shewn, induce the court to construe the deed in his favour in point of law, and decide against the plaintiff, the proper mode is for the defendant to pray oyer of the deed, and after setting it out *in hæc verba* to demur: by so doing the defendant is enabled to compare one part of the deed with the other, and from the whole context to explain and shew the intention of the parties, or the legal effect of the deed.

Thus, where (among many other instances that might be given), in covenant by vendee against vendor, who had covenanted that he had a good right to convey, the declaration stated an eviction of

of the plaintiff by a stranger, and it appeared by the partial statement of the deed in the declaration that the vendor had covenanted against the acts of strangers, and the court would have been of that opinion if the defendant had pleaded some collateral matter, and afterwards moved in arrest of judgment; but as, from comparing the whole deed together, it was clear that the vendor had only meant to covenant against the acts of *himself and his heirs*, therefore, to enable the court to construe the covenant according to such intention of the party, the defendant set forth the whole deed on oyer, thereby making it part of the declaration, and then demurred, and so took the opinion of the court on the construction of the covenant.

Where plaintiff declares on a deed, and defendant craves oyer of the deed, sets it out, and pleads *non est factum*, the deed becomes a part of the declaration; and the only question at the trial is, whether the deed set out was executed by the defendant.

If the defendant set out the deed on oyer, and then demur, he cannot take advantage of a variance in an *immaterial* part between the deed stated in the declaration and that set out on oyer, even though the variance might be such as would be available on *non est factum*.||

[Where the defendant in an action on a bond, after craving oyer, and setting it out truly, pleaded payment, on which the plaintiff took issue, and served the defendant's attorney with a rule to abide, &c., and gave notice of trial; and afterwards the defendant returned the paper book, setting out a false oyer of the bond, and pleading as before, on which the plaintiff enrolled the true condition, and demurred; the court ordered all the proceedings to be struck out, that the plaintiff should have judgment, and the defendant's attorney should pay all the costs.]

Snell v. Snell,
4 Barn. & C.
741.; and see
5 Taunt. 707.

Ross v.
Parker,¹ Barn.
& C. 358.

Ferguson v.
Mackreth,
Hil. 24 G. 5.
B.R. cited in
4 Term R. 371.
note.
||See further,
as to oyer,
1 Chitt. on
Plead. 369.
Stephen on
Plead. 86.||

13. *Pleading a Recovery in a former Action.*

It is a maxim in law, *quod nemo bis vexari debet si constat curiæ quod sit pro unâ et eâdem causâ*; so that regularly a bar in a real or personal action by judgment, confession, verdict, or demurrer, is a perpetual bar, and may be pleaded to any new action of the same or like nature.

But herein there is a diversity between real and personal actions; for though in the latter, as debt, account, &c., the bar is perpetual; yet in real actions there is this distinction, that a bar in one real action is not a bar to an action of a higher nature (a); and therefore if a man is barred in an assise of *novel disseisin* he may have a *monstrans de droit, assise de mort d'ancestor, aye, besail, entry sur disseisin a son ancestor*; and this is said to be in favour of inheritances.

Morewood, 3 East, 357., that "what Lord Coke says, that in personal actions concerning debts, goods, and effects (by way of distinction from other actions), a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever, *quoad their subject-matters*; and the general rule is, that an allegation or record, upon which issue has been once taken and found, is, between the parties taking it and their privies, conclusive, according to the finding thereof, so as to estop the parties respectively from again litigating that fact once so tried and found." *Ibid.*||

6 Co. 7.
Hob. 4, 5.
Vent. 170.

6 Co. 7.;
et vide tit.
Ejectment
||(a) It was
observed by
Lord Ellen-
borough, in
giving judg-
ment in
Outram v.

So,

5 Co. 33. a.
2 Mod. 43.
Bro. Estoppel,
217.
4 Co. 43.

So, if a man is barred in a *formedon in descender*, he may bring a *formedon in remainder* or *reverter*.

If a man is barred in an action of trespass for the taking of goods, this cannot be pleaded in an appeal of robbery, being of a higher nature.

Noy, 82.
Lane, 144.
Markham v.
Cobb.

Where *A.* robbed *B.* of 3000*l.* of money in bags, for which he was afterwards indicted and convicted, and afterwards *B.* brought trespass against *A.* for taking the said monies, who pleaded the indictment, by the *procurement* of the plaintiff, and the conviction in bar, but did not shew that the plaintiff had given evidence for the conviction; for this reason the bar was held insufficient; for otherwise he shall not have restitution, and the allegation of *procurement* is not sufficient; *et ea de causâ* judgment was given for the plaintiff, and not for the matter in law, for that was against him.

Roll. Abr. 353.
Strong v.
Watts.

(a) So, a recovery or bar in an *assumpsit* will be a good bar in debt

If a man grants a rent to another, payable at a certain day, and covenants to pay the rent accordingly, if the grantee afterwards recovers in an action of covenant for the nonpayment of the rent (*a*), this will be a bar for an action after for the rent (*b*); for in the action of (*c*) covenant he shall recover all the rent in damages.

for the same thing. 4 Co. 94. Yelv. 84. Cro. Jac. 110. Cro. Eliz. 240. (*b*) But in *assumpsit* the defendant cannot plead an account brought for the same money to which he had rendered his law; because damages are recovered in *assumpsit*, but not in an account. Moor, 458. But *quære*; *et vide* Cro. Jac. 110. (*c*) So where an action is brought upon a special *assumpsit* to pay . Cro. Car. 415. Cro. Eliz. 57.

5 Co. 32, 33.
Robinson's case. Cro.
Jac. 15. S.C.
by the report of which it appears, that he did not know that he was executor; and there said, that the rule in personal actions, once barred and always barred, must be intended where

If *A.* and the other executors of *B.* bring debt upon a bond, and the defendant pleads, that before the purchase of this writ, the said *A.* as administrator to *B.*, brought debt upon the same bond against the defendant, who then pleaded that *B.* made executors, who administered, &c., and the plaintiff then replied, that administration was committed to him *pendente lite* between the executors; upon which the defendant then demurred; and it was adjudged for him; and so now pleads this matter by way of estoppel, and demands judgment if, as executor, he shall have an action upon the same bond against the same defendant: this is no good plea; for by the first judgment the plaintiff was only barred as to the action of the writ, *viz.* to have one as administrator; but this mistake of his action is no bar or estoppel to bring his true action.

it is a bar to the right, not where the action is only misconceived. — And so in 6 Co. 8. where the S. C. is cited, and 2 Mod. 319. — So where judgment is given upon the manner, not the matter of the plea. 2 Lev. 210. — If a man brings trespass for taking his horse, and is barred in that action, yet if he can get the horse into his possession, the defendant is without remedy; for notwithstanding the recovery the property is still in the plaintiff. 2 Mod. 319. *per cur.*

Cro. Jac. 75.
Brown v.
Wotton,
Yelv. 67.
Moor, 762. S.C.
(a) So, though he had him

If in trover for plate the defendant pleads that the plaintiff had before brought his action for the same plate against *J. S.*, and had judgment to recover 20*l.* damages, and (*d*) had *J. S.* in execution for the same, and avers it to be the same conversion, &c. this is a good plea; for by the judgment the damages which were before uncertain are reduced to a certainty, and therefore he

he shall not demand the uncertainty again; and by the judgment the property of the goods is altered. not in execution; for by the judgment
ment transit in rem judicatam. Yelv. 68. — And where and how the defendant may enforce the plaintiff to enter up his judgment, to the end he may plead it to another action, *vide* Latch, 216.

But a judgment in debt against one obligor, upon a joint and several obligation, and the body taken in execution, is no plea to an action brought against the other obligor. Cro. Jac. 75.; for this *vide* tit. *Obligation.*

If a man hath judgment in C. B. upon an obligation, he shall not afterwards bring an action of debt upon the same obligation, as long as the said judgment remains in force; for by this judgment the specialty is turned into a matter of record. 6 Co. 44. Higgin's case.

Otherwise, if in the county court by *justices*, for that court not being of record, he may, upon the same obligation, have debt in a court of record. 6 Co. 45. a. Where a judgment in a foreign attachment shall be pleaded in bar to other actions, *vide* Roll. Abr. 555. and tit. *Custom of London.*

[Neither can the pendency of an action in an inferior court be pleaded to an action brought in one of the courts at *Westminster* for the same thing.] Sparry's case, 5 Co. 62. *Dudfield v. Warden*, Fitzg. 313. *Vide etiam supra*, Vol. I.

If in debt on a bond the defendant pleads, that the plaintiff brought an action in *London* upon the same bond, to which the defendant there pleaded *non est factum*, and it was found for him; upon which it was entered, that the defendant should recover damages against the plaintiff, *et quod eat inde sine die*, this is no plea, because the judgment was not *quod querens nil capiat per breve*, and so no judgment was given so as to bar the plaintiff in another suit. Cro. Jac. 284. Brownl. 81. *Levell v. Hall.*

If in debt against executors they plead a judgment obtained against one of them as administrator, this is a good bar; for though he might have pleaded in abatement to the first action, yet he was not obliged so to do, and this recovery against him was upon the right of the debt. Lev. 261. *Parker v. Amys.*

If in action upon the case the declaration is insufficient, and the defendant pleads an ill plea, but judgment is given against the plaintiff upon the insufficiency of declaration, but by mistake entered *quia placit prædict.*, &c., *bonum et sufficiens in lege existit*, &c., *ideo consideratum*, &c., *quod querens nil capiat per billam* (a), whereas it ought to have been entered *quod defendens eat inde sine die*, and the plaintiff brings a new action, and declares a right, and the defendant pleads the former judgment, reciting the record *verbatim*, this is no good plea; for, without question, the plaintiff having only committed a mistake in his declaration, he may set it right in a second action. Mod. 20. *Leppin v. Kedgwin.* (a) Where judgment is given for the tenant or defendant upon a plea in bar, or to the writ, &c. the judgment is all one, viz. *quod eat inde sine die*, and shall have reference to the nature or matter of the plea, and so be taken to go in bar, or to the writ. Co. Lit. 363. 8 Co. 68.

But if a declaration be faulty and the defendant take no advantage thereof, but plead a plea in bar, upon which the plaintiff take issue, and the right of the matter be found for the defendant, Mod. 207. *per cur.* Skin. 120. pl. 15. S. P. In some cases, the

where the merits are really with the plaintiff, and he hastily demurs to a good plea, conceiving it to be bad, the court will, before judgment, give him leave to withdraw his demurrer, on payment of costs, and take issue on the plea.

the plaintiff shall have no other action, for he is estopped by the verdict. So if a declaration be faulty and the plaintiff demur to the plea in bar, by which he confesses the fact, if well pleaded, he is estopped thereby, and shall have no other action. But if the plea is not good it can be no estoppel, but the plaintiff may have another action.

Cro. Car. 35.
Laicon v.
Bernard,
Hutton, 81.
S. C. adjudged
by three
judges against
Yelverton.

If in trover for certain sheep the plaintiff declares that the 25th day of *March* in the year, &c. he was possessed thereof, and lost them, and that the same the last day of *April* in the same year came to the hands of the defendant, who the same day converted, &c., and the defendant pleads, that the plaintiff had before brought trespass against the defendant, and *J. S. quare ceperunt et abduxerunt* the said sheep, and thereupon counted of a taking the 14th of *April* in the same year, to which the defendants then pleaded a judgment against *J. N.* who was possessed of the said sheep, and that by virtue of a *feri facias* thereupon the said sheep were sold to the defendant, &c.; whereupon issue being joined it was found for the plaintiff, and 2*d.* damages given, upon which the plaintiff had judgment for the said 2*d.* damages, and 6*l.* costs, and avers the taking and driving, for which the said recovery in trespass was had, and the conversion in this action to be all one, &c.; and to this plea the plaintiff replies and confesses the said action, and recovery of the 2*d.* damages, &c., but says the said 2*d.* damage was not given for the value or conversion of the said sheep, *absque hoc*, that the said taking and driving, whereupon the said judgment was had, is the same trespass *quoad* the conversion of the said sheep of which the plaintiff now declares; this is a good replication, and the plaintiff shall recover; for the damage being so small, cannot be presumed to be given for the value of the said sheep; for if so, the plaintiff must for 2*d.* only lose his property in the said sheep; therefore it shall be presumed, and may be averred, that this damage was given for the chasing and driving, and that the plaintiff had the sheep again, and after lost them, &c., and the rather because in time the conversion is supposed so long after the chasing and driving.

Style, 3, 4. 201.
Watson v.
Norbury.

If in an action upon the case the plaintiff declares against the defendant, that he falsely and maliciously did procure a commission of bankrupt to issue out against the plaintiff, &c., by virtue whereof the defendant broke his shop, and took away his goods and shop-books, whereby he was discredited and lost his trade, to his damage, &c.; and the defendant pleads, that the plaintiff had brought an action of trespass for breaking his shop, taking his goods, &c., and upon that action had recovered damages, &c.; this is no good plea, for this action is not brought for the same thing as the former was, in which no damages could be recovered for the scandal, upon which this action is grounded.

If in trover for certain goods the defendant pleads, that the plaintiff had brought trespass *vi et armis* for the same goods, and upon not guilty pleaded a verdict and judgment was thereupon given for the defendant, &c.; this is no good plea, because this action will in many cases lie where trespass will not; and so it may be very well presumed, that the plaintiff at first only mistook his action, and brought trespass where his evidence would serve in trover only.

But it hath been since held, that if in trover for certain goods the defendant pleads, that the plaintiff had before brought an action of trespass *quare vi et armis ceperunt et asportaverunt* against the same defendants for the same goods, to which the defendants then pleaded not guilty; and upon a special verdict, which the defendants in their plea set forth *verbatim*, the court then gave judgment, that the plaintiff *nil capiat per billam*, and that the defendants *irent inde sine die*, and avers the goods in both declarations to be the same; and the taking and carrying away, &c. supposed in the said action of trespass, and the coming to the hands of the defendant, &c. in this declaration, to be the same, and the cause of action the same, &c.; this is a good plea; for though trover will lie in many cases where trespass will not, yet upon the matter here disclosed in pleading it appears the plaintiff was before barred, not by mistake of his action, but upon the rights and merits of the cause.

[So, to an action of *indebitatus assumpsit* for the value of goods, a judgment for the defendant in trover for the same goods may be pleaded in bar, provided it appear, by proper averments in the plea, that the question between the parties was the same in both actions. So, *e converso* (a), a recovery in *indebitatus assumpsit* for the value of the goods may be pleaded in bar to an action of trover for the same goods. In these cases the principal consideration is, whether it be precisely the same cause of action in both, which may appear either by proper averments in a plea, or by proper facts stated in a special verdict or a special case. One great criterion of this identity is, that the same evidence will maintain both the actions.]

case. 2 Stra. 733. 3 Burr. 1353. 1 Show. 146. *Secus*, to debt, *qui tam*, 1 Stra. 701, 702. or on bond. ¶ And in trespass a former recovery must be pleaded. 3 Burr. 1353.; but in *assumpsit* it may be given in evidence. 2 Stra. 733. A verdict for defendant in a former action, which if pleaded in bar would be an estoppel, when given in evidence under the general issue is not conclusive against the plaintiff, but only evidence to go to the jury. 2 Barn. & A. 662.¶

¶ Where the plaintiff in a former action declared on a promissory note, and for goods sold, &c., and on executing a writ of enquiry gave no evidence as to the goods, and took his damages only on the note, it was held that this was no bar to his afterwards suing for the goods sold, &c.

So, where a rector sued the executor of his predecessor for dilapidations in the chancel of the church, it was held no bar to the action that the rector had before sued the defendant, and recovered damages for dilapidations in the rectory-house, outhouses, &c. &c.

Raym. 47.
3 Mod. 1, 2.
2 Mod. 318.
Put v.
Rawstern.

2 Vent. 169.
Letchmere v.
Toplady,
1 Show. 146
S. C.

Kitchen v.
Campbell,
2 Black. R.
827.
3 Wils. 304.
S. C.
(a) 2 Ld.
Raym. 1216.
That a former
recovery may
be given in
evidence on
the general
issue to an
action on the

Seddon v.
Tutop,
6 Term R. 607.

Young v.
Mumby,
4 Maul. & S.
183.; and see
1 Camp. 252.

Where

Where the declaration in the second action is framed in such a manner that the causes of action may be the same as those in the first suit, it is incumbent on the party bringing the action to shew that they are not the same.

Lord Bagot
v. Williams,
5 Barn. & C.
235.
5 Dow. & Ry.
85. S. C.

The plaintiff declared for money had and received: the defendant pleaded a judgment recovered for 4000*l.*, in an inferior court in *Wales*, for the same causes. The plaintiff replied, that the causes were not the same. It appeared that the defendant had received, as plaintiff's steward, large sums of money on his account, to a greater amount than the sum for which plaintiff declared in the inferior court; and that plaintiff, believing that defendant had no available property beyond that amount, took judgment by default, and verified for only 3500*l.* The court held, that all those sums, which *plaintiff knew* to be due from defendant, when he commenced the first suit, were to be considered as causes of action for which he had before recovered judgment. ||

2 Brownl. 49.
Stiles v. Baxter.

If *A.* says *B.* is perjured, and thereupon *B.* brings his action, and *A.* justifies, and issue is thereupon taken and found for the defendant, and judgment thereupon given, and after *A.* again publishes the same words of *B.*, and thereupon *B.* brings another action, and *A.* pleads the first judgment in bar, this is a good plea.

3 Lev. 248.
Gardiner v.
Helvis.

If an alderman of *N.* brings an action for these words, *he is a rascally alderman, a factious alderman, a lampooner*, and avers, that a lampooner is there understood of a libeller, and the defendant pleads a former action brought for the same words, and laid in the same manner (saving only that in the first action no interpretation is given to the word *lampooner*), in which action the plaintiff was barred, this is a good plea; for the plaintiff having been once barred, shall not entitle himself to a new action by a new interpretation of the same words.

Salk. 10. pl. 3.
Ld. Raym. 370.
Johnson v.
Long. Carth.
456. S. C.
adjudged, be-
cause the
plaintiff had
not laid any continuance of the nuisance in his declaration.

In case for erecting a nuisance 2 *die Feb.* the defendant pleaded a prior action brought for erecting a nuisance 20 *die Martii*, and a recovery thereupon, and avers these to be the same nuisance and erection; plaintiff demurred, and judgment against him, for he may have an action for the continuing of the same nuisance, but can never have a new action for the same erection.

Salk. 11. pl. 5.
Fetter v. Beale,
Ld. Raym. 339.
692. 12 Mod.
542.

But, though an action will lie for continuing a nuisance, yet it hath been held, that in assault, battery, and maihem, if the plaintiff in his declaration recites a judgment in a former action for the same battery, and shews that he has since sustained consequential damages by a piece of his skull's coming out; yet this will not entitle him to a new action; for *per Holt C. J.*, every new dropping is a nuisance; but here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages which the jury must be supposed to have considered at the trial.

(K) *Duplicity in Pleading: And herein,*1. *The Reason why Duplicity is a Fault, and the Manner of taking Advantage thereof.*

THE plea, says my Lord Coke, that contains duplicity or multiplicity of distinct matter to one and the same thing, whereunto several answers (admitting each of them to be good) are required, is not allowable in law; and this rule, says he, extends to pleas perpetual or peremptory, and not to pleas (a) dilatory, for in their time and place a man may use divers of them. Also where the tenant or defendant may plead the general issue, there, upon the general issue pleaded, he may give in evidence as many distinct matters to bar the action or right of the demandant or plaintiff as he can: also a special verdict may contain double or treble matter, and therefore in those cases the tenant or defendant may either make choice of one matter, and so plead it to bar the demandant or plaintiff, or plead the general issue, and take advantage of all; or he may plead to part one of the pleas in bar, and to another part another plea; and his conclusion of his plea shall avoid a doubleness; and hereby neither the court nor the jury is so much inveigled as if one plea should contain divers distinct matters: and if the tenant make choice of one plea in bar, and that be found against him, yet he may resort to an action of a higher nature, and take advantage of any other matter.

must be taken upon a single point, yet it is not necessary that such single point should consist only of a single fact. For instance, the point of the plea may be, that the defendant is entitled to common; but to establish this point several facts may be necessary, as, that the cattle with which he is to use the common must be his own cattle, must be levant and couchant, &c. *Robinson v. Rayley*, 1 Burr. 516.] ||See post, p. 340|| — (a) But where the defendant pleaded ten outlawries on mesne process in disability, to which the plaintiff demurred for duplicity it was held that the plea was naught; and the diversity between a plea in bar and abatement as to duplicity being urged, it was answered by the court, that there was a difference between a plea of an outlawry in disability and other pleas in abatement; and that this plea was ill for duplicity, because the plaintiff is disabled as well by one outlawry as by all the other nine, to which several answers are required. Carth. 8, 9.

The reasons why duplicity in pleading is a fault are, that the party being effectually barred by one single point, it is unnecessary and vexatious to put him upon litigating any other; and though he might take issue on any one point, yet must he be at a loss which the material point is, so as to traverse the same, and thereby put an end to the cause; whereas the party pleading such double matter must be presumed consant of his own strength, and therefore ought to put his defence on that single point, which will put an end to it. Besides, the jury ought not to be charged with multiplicity of things, when finding any one of them contrary to their evidence lays them liable to the severity of an attain.

Also, from the expense and vexatiousness attending it, a person is no more allowed to plead and demur to the same fact than he is to plead double; for the duplicity herein draws the

Co. Lit. 304. a.
Doct. pl. 135.
||See Stephen
on Pleading,
271. 279.||
[Duplicity is,
where distinct
matters, not
being part of
one entire
defence, are
attempted to
be put in issue.
But this does
not preclude a
party from in-
troducing
several matters
into his plea,
if they are
constituent
parts of the
same entire
defence. For
though it be
true, that issue

5 H. 7. 7.
Doct. pl. 135.
Plow. 194.
Yelv. 15.
Roll. R. 112.
Vent. 47, 48.

Vide under the
division *De-
murrer; et
vide* 11 Co. 52.

matter to a different *examen*, since the demurrer is to be tried by the court, and the fact by a jury.

2 Vent. 212. So where one confesses and avoids, and likewise traverses the
5 Mod. 318. same point, this is in nature of a double plea, and therefore
Co. Ent. 504. naught.

2 Roll. R. 506. But though duplicity in pleading be a fault, yet must the same
Lutw. 4. be taken advantage of on a special demurrer, that is, the party
5 Mod. 251. must shew wherein the doubleness consists; and it is not suffi-
Ld. Raym. 352. cient to demur *quia duplex et caret formâ*, &c. but he must lay
Comb. 65. his finger on the very point that is so.
Poph. 115.

Lev. 76. Salk. 219. pl. 5. 2 Ld. Raym. 798. 2 Salk. 678. pl. 5. 7 Mod. 71.; *et vide* title
Demurrer more authorities to this purpose.

1 Vent. 272. If a plea is pleaded which is double, and the adverse party
demurs not for the doubleness, he is obliged to answer both
parts.

2. What shall be said Duplicity in Pleading.

Sid. 175. In trespass for assault and battery, defendant justifies by a
Keb. 661. *molliter manus imposuit* for due correction of the defendant as his
Bleke v. servant, and pleads over, that since that time the plaintiff *exoneravit*
Grove. ||See *et relaxavit* (without saying *per scriptum*) to the defendant the said
Com. Dig. matter; to this plea it was demurred for doubleness specially;
Pleader, (E) 2. || and the opinion of the court was, that it was double; for though
(a) Matter of surplusage shall never make a plea double.
1 H. 7. 16.
Dyer, 42. b.
Doct. pl. 138.
S. P.

Raym. 50. In an action of false imprisonment the defendant justifies by
Keb. 125. 164. force of a *latitat* out of *B. R.* by force of which he took him;
Beesly v. the plaintiff replies that he did it *de injuriâ suâ propriâ*, &c.: it was
Walker. moved that this was naught after a verdict, and not helped; but
(b) For this the court held it well after a verdict, but that upon a demurrer
vide Hob. 244. it would be naught, as being multifarious, jumbling (b) matters of
Hutt. 20. record and matters of fact together, and putting both into the
Sid. 314. ||The mouths of the *lay gents*.
replication is bad in such
case, not for putting several matters in issue (for that is often done where *de injuria*, &c. is
replied), but because it puts in issue the writ which is matter of record. See 6 Co. 67. a. Com.
Dig. Pleader, (F) 19. 20. ||

5 H. 7. 7. In debt on an obligation the defendant pleaded, it was on
Dyer, 242. a. condition that he stood to the award of certain persons, so that
Doct. pl. 136.; it were delivered in writing, and said that no award was made or
||*et vide* delivered in writing; and this plea was held naught for duplicity,
2 Moo. 25. || for the award might be made in one county, and might be de-
livered in another, and so the same jury not proper judges of both
these facts.

Plow. 140. In debt upon an obligation, if the defendant says that the
19 E. 4. 4. obligation was made by duress of imprisonment, and by menace
But, if an of imprisonment, this is a double plea.
executor *plene*
administravit, and so *riens in mains*, this is not double, being only an inference necessarily fol-
lowing

lowing from his plea. 1 H. 7. 15. 18 H. 8. 4. Dyer, 243.—In debt for rent *nihil debet* and *nihil habuit in tenementis* held to be double and repugnant. *Vide* 4 Mod. 254.

In a *scire facias* on a fine, as heir to two parceners, the tenant pleaded in bar a fine levied by the two parceners with warranty, and he relied on the warranty; and that plea was held double, and he forced to rely on the warranty of one. Co. Lit. 504. Hob. 29.

So, if one have divers warranties, and they fall by descent on one person, heir to both, yet he must be vouched as heir to one only; for as to the demandant, the voucher is a kind of plea in bar, and ought to be single; for the demandant may counterplead the possession of the vouchee and his ancestors, which he cannot do if they be divers; and as to the vouchee, the voucher is a kind of demand or suit, and ought to be single; for the vouchee may counterplead the lien, which he cannot do if they be divers. Co. Lit. 304. Hob. 29.

In debt on a penal bill of 7*l.* for the payment of ten shillings at one day and ten shillings at another, and so till the whole was paid; the plaintiff assigns the breach, that the defendant did not pay on the said several days, &c.; the defendant pleads an insufficient plea, the plaintiff replies, and the defendant demurs generally: in this case it was held, that no exception could be taken on the general demurrer to the declaration for the doubleness, but judgment should go against the defendant for the insufficiency of his plea. 2 Vent. 198. 222. Saund. 338.

In covenant on a lease, wherein the lessee covenanted to pay his rent yearly by equal portions at *Michaelmas* and *Lady-day*, the breach assigned was, that he did not pay the rent due at the aforesaid several feasts during the term; and though it was objected, that the breach was not well assigned, but ought to have been so particularly, yet it was resolved to be well enough, for perhaps it was never paid at any of the days; and this differs from the case last above-mentioned, for there, the assignment of nonpayment at any one of the days was sufficient to entitle him to the penalty of the bill. Lev. 79.

In debt against an executor who pleads several judgments had against him, &c. the plaintiff replies to each severally, that it was had by fraud to bar him of his debt: The replication is clearly double, because if he had avoided any one of the judgments he should have had a general judgment against the defendant, his plea being entire (*a*); yet in this particular case this pleading is allowed, for he may be mistaken in one; and in this case he has it in his election to plead fraud to them all severally, or to any of them, omitting the others; and if payment of several obligations had been alleged, the plaintiff might traverse the payment of each severally, or any of them; and though he mistake some of the sums to which he pleaded *non solvit*, yet it shall not hurt; for it is no more than if he had said nothing to them; and in the case of several judgments the plaintiff may reply, that one was obtained by fraud, that satisfaction is acknowledged on record on another, and so avoid each by a different plea. 2 Saund. 48, 49. Trethewy v. Ackland, Lev. 281.; *et vide* 1 Mod. 35. 2 Mod. 56. 2 Keb. 591. 2 Sand. 356. 4 Mod. 54. 63. Carth. 195. (*a*) This is called an anomalous case against the rules of law, which condemn double pleading; but in this case it hath several times been allowed. 2 Sand. 48. Comb. 444. *Ld. Raym.* 265. *Salk.* 298. pl. 10. *Carth.* 429. 12 Mod. 153. ||See Williams' note 2. 1 Saund. R. 337. a.||

1 East, 369.
372.

¶ And in a plea of set-off the defendant may rely on a debt of record and a debt of simple contract, though one creates an issue to be tried by the court, and the other an issue to be tried by the country; and the plaintiff in such case may reply as to the record *nul tiel record*, and as to the residue *nil debet*.¶

Plow. 194.
Doct. pl. 156.

If a man pleads two things where he is compellable to shew both, this does not make his plea double.

2 Lev. 82.
Vent. 236.

As, where to a plea in abatement in trover that another action depends by *B.* and *C.* for the same cause, the plaintiff replied that they are both dead; this replication is not double, for he must shew the death of both to enable him to bring the action alone.

Keilw. 68.
Stile, 82.
(a) For this
vide Sid. 5.
Skin. 583.

If there are three in execution jointly at the suit of *A.* and all escape, the plaintiff may declare for the escape of all, and it will not be double, though the escape of any one of them will be (a) sufficient to entitle him to the action.

and title *Escape*.

Moor, 25.
pl. 85. Dame
Audley's case.
Dalis. 50.
pl. 9. S. C.
¶ See Stephen
on Plead.
p. 274.¶

In detinue by Dame *Audley* the defendant pleads, that after bailment of the goods to him by the plaintiff she married Lord *Audley*, and that during such marriage the Lord *Audley* released to him all actions, &c. It was objected that this plea was double, *viz.* property in the husband by the intermarriage, and a release by him; but it was resolved not double, because he could not plead the release without shewing the marriage.

Vin. Abr.
Double Pleas,
(A) 7. citing
2 Ed. 4. (B).

¶ No matters, however multifarious, will operate to make a pleading double that together constitute but one connected proposition, or entire point. Thus, in an action for assault and imprisonment, if the defendant plead that he arrested the plaintiff on suspicion of felony, he may set forth any number of circumstances of suspicion, though each circumstance may be alone sufficient to justify the arrest: for all of them taken together do but amount to one connected cause of suspicion.

Robinson v.
Raley, 1 Burr.
316.

This qualification of the rule against duplicity applies not only to pleadings in confession and avoidance, but to traverses also: so that a man may deny, as well as affirm, in pleading, any number of circumstances that together form but a single point or proposition. Thus, in an action of trespass for breaking the plaintiff's close and depasturing it with cattle, the defendant pleaded a right of common in the close for the said cattle, being his own commonable cattle, levant and couchant upon the premises. The plaintiff in his replication traversed, "that the cattle were the defendant's own cattle, and that they were levant and couchant upon the premises, and commonable cattle." On demurrer for duplicity, it was objected that there were three distinct facts put in issue by this replication, any one of which would be sufficient of itself: but the court held that the point of defence was, that the cattle in question were entitled to common; that this point was *single*, though it involved the *three several* facts—that the cattle were the defendant's own, that they were levant and couchant, and that they were commonable cattle: that the replication traversing these facts, in effect, therefore,

fore, only traversed the single point, whether the cattle were entitled to common, and was, consequently, not open to the objection of duplicity. ||

3. *Of Pleading double by Leave of the Court.*

This depends on the statute 4 & 5 Ann. c. 16. for amendment of the law, by which it is enacted, "That any defendant or tenant in any action or suit, or any plaintiff in replevin in any court of record may, with leave of the same court, plead as many several matters thereto as he shall think necessary for his defence; and if any such matter shall on demurrer joined be judged insufficient, costs shall be given at the discretion of the court; or if a verdict be found upon any issue in the said cause for the plaintiff or demandant, costs shall also be given in like manner, unless the judge who tried the said issue shall certify that the said defendant, or tenant, or plaintiff in replevin had a probable cause to plead such matter, which upon the said issue shall be found against him."

4 & 5 Ann. c. 16.

||As to the motion to plead double, the drawing up the rule; the costs, &c. see Tidd's Prac. 657, 658. (9th edit.)||

In the construction of this branch of the statute the following opinions have been holden:

That a person cannot plead and demur to the same part of the declaration; also, that pleading double is at the peril of the pleader; and if the court give him leave in cases where they have no power by the act so to do, the other party may demur. (a) is not to move the court to discharge the rule.

Cases in Law and Equity, 281. 527.

(a) *Qu.* If the proper method

It is held, that these double pleas must be to the plaintiff's declaration, and that therefore the defendant cannot rejoin two several matters to the plaintiff's replication.

T. 5 G. 2.

in *B. R.*

Warren v.

Ives. 2 Stra.

908. S. C.—Whether to a writ of error to reverse a common recovery the defendant may plead double. Cases in Law and Equity, 526. *Dubitatur.*

It was moved, that an executor being likewise heir at law might have leave to plead double, viz. *solvit ad diem*, and *riens per descent*, to an action of debt upon a bond; but the court refused the motion, without an affidavit that he had *riens per descent*, and said, that there is the same law in case of an administrator, who shall not be allowed to plead *plene administravit*, and no assets, without affidavit. (b)

Trin. 2 G. 1.

in *B. R.*

Carrington v.

Warren.

(b) The com-

mon plea of

plene adminis-

travit, as now

used, includes

an allegation that the defendant hath not, nor at the commencement of the suit had, any assets, and the whole makes but one plea, and is not double.

So, in covenant for nonpayment of rent, as assignee of several terms, the plaintiff set out his title under several deeds, and the defendant moved to plead eight pleas; but, because he had not an affidavit to prove them material to the merits of the cause, the motion was denied. And here the court observed, that this statute was not designed to put the plaintiffs under unnecessary difficulties in proving issues foreign to the merits of the matter in question: and though they are to allow any person that asks the favour of pleading double to use the benefit of the act, yet are they to see the design of it is not abused in multiplying fruitless and impertinent issues.

Hil. 7 G. 2.

in *B. B.*

Sir Charles

Peers v.

Whale.

It hath been frequently insisted upon, that a defendant could not within this act plead contradictory and inconsistent pleas; as *non assumpsit* and the statute of limitations, &c. But the court observing, that if the benefit of the statute was to be confined to such pleas as are consistent, it would hardly be possible to plead a special plea and a general issue, the one always denying the charge, the other generally confessing and avoiding it; and as the statute itself makes no distinction herein, hence it hath been held,

Hil. 8 G. 1. in That in debt for rent the defendant may plead a tender and
B. R. Cary v. eviction.
 Jenkins. 1 Stra. 496. S. C.

Isaac and Sir So, an action upon articles under hand and seal relating to
 William Gordon, in *Seacc.* *South Sea* stock, defendant had leave to plead *non est factum*, *non obtulit*, *non dedit notitiam secundum the proviso* in the deed, and that the deed was not registered.

Mich. 2 G. 2. So, not guilty and *son assault demesne* was pleaded by leave of
 in *B. R.* Smith the court. (a)
 v. Smallwood.

(a) And is now the common practice without exception.

Trin. 3 G. 2. So, in debt upon a bond, the defendant was permitted to plead
 in *B. R.* *non est factum* and bankruptcy.
 Atkinson v.
 Atkinson, 2 Stra. 871. S. C. and Mich. 8 G. 2. S. P. between Phillips and Wood. 2 Stra. 1000., S. C.

Hil. 4 G. 2. In an action on the case against the post-master-general, it
 in *B. R.* De- was allowed him to plead *non culp. et non culp. infra sex annos.*
 costa v. Car-
 teret, 2 Stra. 889. S. C. Fitzgib. 189. S. C. Barnard. K. B. 407. S. C.

Trin. 5 G. 2. In trespass the defendant had leave to plead a licence and jus-
 in *B. R.* tify the cutting down some boughs, because they hung over his
 Bohun v. gardens; though it was objected, that these pleas were inconsis-
 Morgan. tent, the licence being a tacit or implied acknowledgment that he had no right to cut the boughs, whereas the justification asserts one.

Trin. 5. G. 2. In debt upon a bond given by a woman, conditioned that she
 in *B. R.* Dunv. should marry the plaintiff, if he requested, within ten days after
 Vauacher, his return from sea, leave was given to plead *non est factum*, and
 2 Stra. 908. that she was never requested.
 S. C.

Mich. 6 G. 2. in In debt for rent upon a parol demise, defendant had leave to
 B. R. Semin- plead *nil habuit in tenementis et non dimisit.*
 ing v. Bygrove.

MacLellan v. [A defendant shall not be allowed to plead *non assumpsit*, or
 Howard, *non est factum*, to the whole declaration, and a tender as to part;
 4 Term R. 194. for one of these pleas goes to deny that the plaintiff had any
 Jenkins v. cause of action, and the other partially admits it.
 Edwards,
 5 Term R. 97.

Anderson v. Neither shall he be allowed to plead several matters, which
 Anderson, require different trials, as, in dower, *ne unques accouple en loyal*
 2 Black. R. *matrimonie*, and a mortgage, or *ne unques seisie que dower*; for the
 1157. Hillier first matter is triable by the bishop, and the others by a jury; and
 v. Fletcher, if the former be found against the defendant, the judge cannot
 Id. 1207. certify that he had a probable cause of pleading it.
 Robins v.
 Crutchley, 2 Wils. 118. Semb. *contr.*

¶ A defendant will not be allowed to plead *non assumpsit* and the stock-jobbing act, or *non assumpsit* and alien enemy; and a plea of tender to one count, and alien enemy to another, cannot be pleaded together; nor can alien enemy be pleaded together with a special justification in trespass inconsistent with it. And in a late case the court refused to permit the defendants (assignees of a bankrupt), to plead *non est factum*, and also that the premises did not come to them by assignment.¶

1 Bos. & P. 222.
2 Bos. & P. 72.
10 East, 526.
12 East, 206.
Whale v. Lenny,
5 Bing. 12.;
and see
5 Bing. 42.
4 Bing. 525.
5 Bing. 635. 2 Bing. 525.

This statute of the 4 & 5 Ann. does not extend to any action, or information, upon a penal statute.]

Ca. temp. Hardw. 262. 2 Stra 1044. S. C. Law v. Crowther, 2 Wils. 21. Lookup v. Frederick, Barnes, 365. Heyrick v. Foster, 4 Term R. 701.

Morgan v. Luckup,

¶ And the king is not bound by this statute, and where he is plaintiff the defendant cannot plead double without leave of the Attorney-General.

Willes, R 533.

Under special circumstances, and where the defendant is obviously using the rule of the court for the purpose of mere delay, the court will rescind the rule, and oblige the defendant to abide by one of his pleas.

13 East, 255.

By stat. 32 Geo. 3. c. 58. it is enacted, that it shall be lawful for the defendant to any information in the nature of a *quo warranto* for the exercise of any office or franchise in any city, borough, or town corporate, to plead, that he had first actually taken upon himself, or held or executed the office or franchise, which is the subject of such information, six years or more before the exhibiting of such information; which plea shall and may be pleaded either singly, or together with, and besides such plea as he might have lawfully pleaded before the passing of the act, or such several pleas as the court on motion shall allow. In the construction of which statute it has been holden, that the legislature intended to give a defendant, in such a proceeding, the liberty of pleading several pleas, whether with or without the plea of the statute of limitations; the concluding words of the act being "or such "several pleas," &c. (a)

52 G. 3. c. 58.

(a) 8 Durnf. & East, 467.

But this statute, as well as the 9 Ann. c. 20. § 4., &c. is confined to corporate offices (b), and it does not apply where there is a continuing incompatibility, as where a burgess has accepted the office of town-clerk, which he still exercises. (c) And for preventing the vexation and expense occasioned to defendants in informations in the nature of *quo warranto*, by the practice of raising issues upon various matters distinct from the ground on which the information was granted by the court, it is a rule (d) that the objections intended to be made to the "title "of the defendant, shall be specified in the rule to shew cause; "and that no objection, not so specified, shall be raised by the "prosecutor on the pleadings, without the special leave of the "court, or of some judge thereof."¶

(b) 9 East, 469. but see 5 Barn. & Ald. 771.
1 Dow. & Ry. 458. S. C.; and see further, as to pleading several pleas, 1 Chitt. Pl. 540. S. C. Stephen on Plead. 288.
(c) 2 Chit. R. 571.
(d) R. H. 7 & 8 G. 4. K. B.

6 Barn. & A. 267. See Tidd, 656. (9th ed.)

(L) Departure in Pleading.

2 East, 4. 12. **A** DEPARTURE in pleading is, when the second plea contains matter not (a) pursuant to the former, and which does not fortify the same; and when the rejoinder contains matter subsequent to the bar, and not fortifying the same, this is regularly a departure.

Plow. 105.
Co. Lit. 504.
Doct. pl. 119.
||See Com Dig. Pleader, (F) 7.
(F) 11. Vin. Ab. tit. Departure. 1 Arch. Plead, 247. 253. Stephen on Plead. 405. || (a) But, where a man pleads any thing which he could not have shewed at first, it shall never be reckoned a departure: so, where he fortifies it in the same manner that he pleaded it; but, if he fortifies it in another manner, as by a special custom, it will be a departure. For this *vide* Yelv. 14. Dyer, 253. Style, 260. Jon. 262. Leon. 156. 2 Leon. 199. 3 Leon. 3. 203. Cro. Car. 557. Finch. 592.

Doct. pl. 120.
Plow. 104.

In an assize the tenant pleads a descent from his father, and gives colour, the demandant entitles himself by a feoffment from the tenant himself, the tenant cannot say that the feoffment was on condition, and shew the condition broken; for that were a departure, as containing new matter, and subsequent to the matter of his bar; but in assize, if the tenant plead in bar, that *J. S.* was seised, and enfeoffed him, the plaintiff shews that he himself was seised in fee till *J. S.* disseised him, who enfeoffed the tenant; the tenant may plead a release of the plaintiff to *J. S.*, for this fortifies his bar.

Co. Lit. 504.

If a man plead an estate generally, as a feoffment in fee, he, without a departure, cannot maintain it in his second plea by matter tantamount; as, by a disseisin and release, or by a lease and release, or a gift in tail and a recovery in value; nor, when a man pleads an estate made by the common law, can he make it good by an act of parliament in his second plea.

Lev. 81.

Keb. 376. 469.
512.

So, when a matter is pleaded at a common law, he cannot maintain it in his replication by custom; as, in covenant on an indenture of apprenticeship to serve seven years, and breach assigned, that he did not serve, &c., the defendant pleads infancy; the plaintiff replies the custom of *London*; and adjudged a departure.

3 Lev. 48.

Nor can action at common law be made good in the replication by statute, as, in trespass for taking his beasts, the defendant justifies as damage-feasant; the plaintiff replies he drove them out of the county; and adjudged a departure; for driving out of the county was not prohibited by the common law, but by the statute of *Marl.* (52 H. 3.) and 1 & 2 Ph. & M. c. 12.

Lev. 81.

But, if one pleads a statute, the other says it is repealed, he may reply that it is revived by another; for this fortifies the first matter.

Co. Lit. 504. a.

If a man pleads performance of covenants, the plaintiff replies, he did not do such an act according to the covenant; the defendant says, he offered to do it, and he refused; this is a departure, it being one thing to do a thing, and another, that he offered to do it, but he refused.

Vent. 121.
3 Lev. 5.

Debt against a clerk upon an obligation conditioned to perform covenants, one of which was to account for all money he should receive;

receive; the defendant pleads performance; the plaintiff replies, that such a day such a sum came to his hands, which he had not accounted for; the defendant rejoins, that he accounted *modo sequente*, viz. that thieves broke into the counting-house and stole it, and that he acquainted the plaintiff, *et hoc paratus est*, &c. And on demurrer it was resolved, that the rejoinder was no departure, for though it contained new matter, yet it was pursuant to the former; for shewing that he was robbed, amounted to giving an account. 2dly, That the rejoinder, though an express affirmative, viz., that he did account, in contradiction to what was said in the replication, viz. that he did not account, was yet good with an averment, without concluding to the country; for new matter being alleged in the rejoinder, the plaintiff ought to have liberty to come in with a sur-rejoinder and answer it, viz. by traversing the robbery.

Debt on an obligation for performance of covenants, one of which was, to return certain goods from *D.*, the defendant pleads performance; the plaintiff assigns a breach in not returning such goods; the defendant rejoins he had no order; and held a departure, for there was no mention of order in the covenant: but, it seems, had the covenant been to return them on order, the plea had been good; for then the covenant was not to be performed without order, and *performavit omnia* may be taken, that he performed all that he ought to perform, he not having orders: 2 Lev. 67.

In debt upon an obligation for performance of an award, the defendant pleads no award; the plaintiff replies, and shews the award and breach; if the defendant rejoin, and shew that it is void, either because that there was an award of mutual releases to the time of the award, or that the award was all on one side, or that it was not made of all matters submitted, and whereof the arbitrators had notice, or the like, in all such cases the rejoinder is a departure; for no award pleaded is no award at all, either in fact or in law, which is not to be maintained by shewing the award to be void, but he should at first plead the award, and also the matter whereby it was void. Lev. 85. 127. 155. 500. Mod. 289. Roberts v. Marriot.

|| But where to debt on bond conditioned to perform an award, the defendant pleaded no award, and the plaintiff replied stating an award defectively, and the defendant rejoined setting out the whole award, from which it appeared that the award was not made conformably to the submission, and then demurred; it was held that there was no departure, for this rejoinder supported the plea, by shewing that there was no legal or valid award. Fisher v. Pimbley, 11 East, 188.

In debt for not performing an award, the defendant pleads no award; the plaintiff replies, and shews one, but does not shew where it was made; the defendant demurs; and resolved that that could not be objected after no award pleaded, for that were a departure. 5 Lev. 239. 241.

In debt on a bond, conditioned to save a parish harmless concerning a bastard child which the obligor was forced to father, he pleads *non damnificat*; they reply, that the child was ready to 2 Saund. 80. Sid. 444. Mod. 45.

to

2 Keb. 612.
619. Richards
v. Hodges.

to starve, and that therefore they put it out to nurse, which cost them 4*l.*; defendant rejoins, that he was ready to repay the money and save the parish harmless: upon this they demurred, and had judgment, because the rejoinder is a departure; for the defendant ought to have taken issue upon the child's being ready to starve: if the plaintiffs had once been at any expense about the child, and were thereupon actually damnified, the defendant being ready to repay the money will not save the condition of the bond.

2 Sand. 189.
Sid. 10.

In debt on a bond for performance of an award the defendant pleads no award; the plaintiff replies and shews it, and the breach; the defendant pleads, that it was not tendered: this is a departure; for though both be necessary by the condition of the bond to charge the defendant, *viz.* that an award be made, and that it be also tendered, yet he ought to rely on either one or other, either being sufficient to bar the plaintiff; then, when he chooses one in his plea, *viz.* that no award was made, he cannot after waive that in his rejoinder, and have recourse to the other, *viz.* that the award was not tendered.

Salk. 221. pl. 1.
Gargrave v.
Smith.

In trespass for breaking his house and carrying away his goods, the defendant justified as a distress damage-feasant; the plaintiff replied, that after the distress, *viz.* the same day, the defendant converted them to his own use; and on demurrer the replication was held no departure; for he who abuses a distress is a trespasser *ab initio*, and the converting is a trespass or trover, at election; and the bringing trespass determines his election, and the matter in the replication makes good that election; for it proves it a trespass as well as trover.

Niblett v.
Smith, 4 Term
R. 504.

¶ The plaintiff declared in replevin for taking his goods and chattels, to wit one lime-kiln. Avowry for rent in arrear. The plaintiff replied that the lime-kiln was affixed to the freehold, and, consequently, exempt from distress: on demurrer, the court held, that the plea in bar was a departure from the declaration.

Praed v.
Duchess of
Cumberland,
4 Term R. 585.

So, if to debt on annuity bond defendant plead, that no such memorial was enrolled as the statute requires, and plaintiff reply that there was a memorial containing the names of the parties, &c., the defendant cannot rejoin, stating a defect in the memorial; for such rejoinder departs from the plea.

Dudley v.
Watchorn,
16 East, 39.
sed vide
7 Barn. & C.
800.

Where, however, to *scire facias* on a recognizance, the bail pleaded that no *ca. sa.* was *duly* sued, &c. according to the practice of the court, and the plaintiff replied, shewing a *ca. sa.* into *Middlesex*, it was held no departure for the defendants to rejoin that the venue in the original action was in *London*; for that sustains the plea, and shews that no *ca. sa.* had *duly* issued.¶

Dyer, 31. b.
Doct. pl. 120.

In covenant for further assurances, &c. the defendant by protestation says that the plaintiff's counsel did not advise, &c. and for plea saith, that he was not required; the plaintiff replies that *J. S.* his counsel advised a release, and that he required the defendant to seal it, which he refused; the defendant rejoins that he did not refuse; this is a departure.

The

The defendant pleads in bar a lease for fifty years made by a corporation, and after in the rejoinder pleads the proviso in the statute 31 H. 8. c. 13., which makes such leases good for 21 years; it was held, that the pleading the proviso was a departure, as not enforcing that which went before in the bar. Dyer, 102.
Doct. pl. 121.

If it be pleaded, that the parties to a fine *nihil habuerunt*, which is denied, and the defendant rejoins that the party had only a use in the land; this is a departure. Dyer, 291.
Doct. pl. 121.

If in bar to an action on a bond, conditioned to save the plaintiff harmless, the defendant pleads, that he did save harmless, and the plaintiff in his replication shews a damnification, to which the defendant rejoins that he had not notice thereof, this rejoinder is a departure. Sand. 117.
Lev. 194.

If a man lay a day in his declaration that is not material, and the defendant by his plea make it material, and then the plaintiff in his replication vary from the day in the declaration, it will be a departure (a): otherwise, (b) if the day had not been material by the plea. 6 Mod. 115.
per Holt C. J.
[(a) This part
of the doctrine
in the text is
nothing more

than a loose *dictum* of my Lord Holt, and is contradicted by authorities. For if the time laid in the declaration is immaterial, there, though it becomes material by the defendant's plea, yet the plaintiff in his replication may depart from it; as in trespass, Co. Lit. 282. a. b. 1 Salk. 222. 2 Ld. Raym. 1015., or trover, Cro. Car. 245. 335. 1 Salk. 222., or upon a general *indebitatus assumpsit*, 1 Stra. 22. 2 Stra. 806. 1 Lev. 110. 1 Keb. 566. 578. 10 Mod. 251. Fort. 375., where the time becomes material by the defendant's plea of a release, tender, or the statute of limitations, &c. And in actions for a transitory trespass, where the defendant pleads a local justification, the plaintiff, in his replication, may vary from the place laid in the declaration. 1 Ld. Raym. 120.] (b) For this *vide* Cro. Car. 229. 2 Mod. 51. 1 Salk. 222. 5 Lev. 548. title Traverse. — And that a departure in such case may be cured by pleading over and verdict. Lev. 110. Raym. 86. Keb. 566. ||It is clear that the only mode of taking advantage of a departure is by demurrer. 2 Saund. 84. d.]]

||In *assumpsit* the plaintiffs, as executors, declared on several promises alleged to have been made to their testator in his lifetime; the defendant pleaded that she did not promise within six years before the obtaining of the original writ of the plaintiffs; years plaintiffs replied that within six years before the obtaining the original writ the letters testamentary *were granted* to them, whereby the action accrued *to them* the plaintiffs within six years: the court held this a departure; as in the declaration they had laid promises to the testator, but in the replication alleged the right of action to accrue to themselves as executors. They ought to have laid promises to themselves as executors in the declaration, if they meant to put their action on this ground.|| Willes, 27.

To an information exhibited against the defendant, for not taking upon him the office of sheriff of *Norwich*, the defendant pleaded the statute of 13 Car. 2. (st. 2. c. 1. § 12.) by which it is enacted, that a person elected into any office in a corporation shall be such as within one year before hath taken the sacrament according to the church of *England*, else the election shall be void, and averred that he had not taken the sacrament, &c. at any time within one year next before the election of him to be sheriff, &c., wherefore the election was void: the Attorney-General replied, and set forth that part of the act of uniformity, by which every Carth. 506.
The King v.
Larwood.
Ld. Raym. 29.
4 Mod. 269.
Salk. 167. pl. 1.
Skin. 574.

every person is obliged to take the sacrament three times a year according to the liturgy, &c. The defendant rejoined, and set forth the act of parliament for tolerating dissenters; to which there was a demurrer; and it was held, that the defendant's rejoinder was a departure from his plea.

Mich. 6 G. 2.
in C. B.
Owen v. Reynolds. See
2 Barnard.
K. B. 193.

In debt upon a bond, conditioned to indemnify the plaintiff from all tonnage of certain coals bought of the defendant due to *W. B.*, the defendant pleaded *non damnificat.*; to which the plaintiff replied, that for 5*l.* for tonnage of coals bought of the defendant the day of the date of the bond his barge was distrained, and that the defendant had not paid the said 5*l.*: the defendant rejoined, that no tonnage was due for the coals; to which the plaintiff demurred, supposing the rejoinder to be a departure from the plea; for the defendant having pleaded generally that the plaintiff was not damaged, and the plaintiff having assigned a breach, the matter of the rejoinder is only by way of excuse, confessing and avoiding the breach, which ought to have been done at first, and not after a general plea of indemnity; for rejoinders, it was insisted, should strengthen the bar, whereas this is a plain retraction of the plea, that denying the plaintiff has suffered any damage, this confessing and excusing it. On the other side it was insisted, that it was not necessary for the defendant to set out all his case at first, and it suffices that his bar is supported and strengthened by his rejoinder, which it was urged had been done in this case; for the plea being only to enforce the plaintiff to assign a breach, the defendant may come afterwards and shew the breach assigned is not within the meaning of the condition; as, here, the condition is to save the plaintiff harmless from all tonnage due to *W. B.*, plaintiff replies, his barge was distrained for tonnage, but does not aver it was due; then the defendant rejoins, there was no tonnage due, which being confessed by the demurrer, it is certain the plaintiff could not be prejudiced within the tenour of the condition, by which the defendant is obliged only to indemnify the plaintiff against such tonnage, so the plea is directly confirmed by the rejoinder; and of this opinion was the court. Another point was made in this case by defendant's counsel, *viz.* admitting there was a departure, yet if the plaintiff has assigned, for a breach of the condition what is really no breach, whereby it appears he has no cause of action, judgment shall be entered for the defendant; as, in this case, plaintiff has instanced a distress of his barge for tonnage of coals bought of the defendant the day of the date of the bond, and has not ascertained what the coals were, so that they do not appear to be the same coals as are mentioned in the condition, which the court cannot intend, though they are said to be bought upon the day of the date of the condition; for he might buy other coals for what appears to the contrary; and of this opinion also was the court.

(M) Repleader : And herein,

1. Of the Nature of a Repleader, and Manner of awarding it.

WHEN issue is joined on an immaterial point, or such a point as after trial thereof the court cannot give judgment, as being impertinent or uncertain, and not determining the right (a), the court regularly awards a repleader, or gives (b) judgment *quod partes replacent*; in which case the parties must begin again at the first fault which occasioned the immaterial issue. And herein it hath been held, that (c) if the declaration be ill, the bar ill, and the replication ill, the parties must begin *de novo*; but if the bar be good, and the replication ill, at the replication; and, if the bar and replication be both bad, and the replication is awarded, it must be as to both.

"determining the right;" for if the court see that by the verdict, as found, substantial justice hath been done, or if they see that the party's case itself cannot be amended, or would be at all material, if put in any shape whatever, in neither of these cases shall there be a repleader. For in no case will a repleader be awarded, but where complete justice may be answered. *Vide* Rex v. Philips, 1 Burr. 293. Rex v. Philips, 1 Stra. 594. Symmers v. Regem, Cowp. 510. Taylor v. Whitehead, Dougl. 740.] (b) The judgment to replead was, *quia videtur curie quod placitum prædictum et exitum superinde junctum est minus sufficiens in lege, ideo dictum est partibus quod replacent*; and it was objected, that it was not any judgment, but that it ought to have been *ideo consideratum est*, &c. But the court held it a sufficient award to replead, and that this was the form agreeable to the course of the court. Cro. Jac. 6. (c) For this *vide* Dyer, 117. 5 E. 4. 108. 19 E. 4. 1. Doct. pl. 511. Dal. 17. pl. 8. 76. pl. 2. And. 31. Raym. 458. 5 Keb. 664. Ld. Raym. 707. Salk. 173. pl. 2. 216. 2 Salk. 579. 6 Mod. 2. Cowp. 510.

If a repleader be denied where it should be granted, or granted where it should be denied, it is error.

Upon an issue joined in Chancery, on a *scire facias* upon a recognizance, the whole record was removed into *B. R.*, and, after a trial had there, the judgment was arrested, by reason of misawarding the *venire*; and the parties being desirous to replead, the question was, Whether the repleader should be in Chancery or *B. R.*? And it was held by the judges of *B. R.* that it should be in that court.

settled rule, not to suffer the Court of King's Bench to alter or amend any issue directed out of Chancery, but that for any irregularity herein application must be made to the Court of Chancery. *Vide* under title Courts, Jurisdiction of the Court of Chancery.

It is held, that there can be no costs to either party on a repleader (d), because it is a judgment of the court upon the pleading, and therefore differs from an amendment, which cannot regularly be without payment of costs.

[But since the practice of setting aside verdicts has prevailed, repleaders have been rarely granted, so that under the modern practice the courts can direct the costs to be paid by the party to whom the mistake in the pleadings is imputable.]

2. A Repleader in what Cases to be awarded.

Herein the general rule is, that if there be an immaterial issue, and thereupon a verdict, upon which the court cannot know for whom

22 H. 6. 18.
Doct. pl. 511.
2 And. 6. 7.
24. 25.
4 Leon. 19.
Skin. 570.
2 Lutw. 1622;
||and see Stephen on Plead.
119.||
[(a) Note:
The materiality of these words, "not

2 Salk. 579.
6 Mod. 2.
Roll. Rep. 287.
Bishop of Bristol v. Sir Stephen Proctor.
Dallis. 15. pl. 6.
Like point.
But I take it to be now the

2 Vent. 196.
2 Salk. 579.
(d) 6 Mod. 2.

1 Burr. 304.

Cro. Eliz. 227.
Doct. pl. 512.
2 Mod. 137.

140. Lev. 52.

— Where issue is joined upon a matter not triable.

Raym. 458.

Cro. Eliz. 151.

— Where the time is immaterial, and yet made

part of the issue. Latch, 92. 2 Saund. 318. 2 Lev. 12. Hard. 40. — For an issue on an immaterial traverse, Moor, 693. pl. 959. Cro. Eliz. 456. Winch, 76. Cro. Eliz. 228. Gouls. 59. pl. 15. Savil, 78. 1 Saund. 22. (e) If the plea on which the issue is joined have no colourable pretence in it to bar the plaintiff, or if it be against an express rule in the law, there the issue is immaterial, and so as if there was no issue, and therefore it is not aided by the statute: but if it have the countenance of a legal plea, though it want necessary matter to make it sufficient, there shall be no replender, because it is helped after verdict. Moor, 867. pl. 925.; *et vide* Lev. 52. Carth. 371. — Diversity where an issue is misjoined, and where there is no issue. 2 Roll. Rep. 187. Cro. Jac. 580. 2 Leon. 195. 3 Leon. 67. Godb. 56.

Cro. Jac. 5.

Cox v. Cropwell.

In trover against baron and feme upon a finding of the goods by the feme during coverture, and a conversion to her use, they pleaded *quod ipsi non sunt culpabiles*; which was held ill, because there was no tort supposed in the husband, and therefore a replender was awarded, and the plea made *quod ipsa non est inde culpabilis*.

Owen, 53.

House and

Elkin v.

Grindon, S. P.

said to have

been adjudged

between Bret

v. Shepherd,

the same term.

If in debt upon an obligation by the sheriffs of London against J. S. he pleads, that he being arrested by precept out of B. R., appeared at the day according to the condition of the bond, and thereupon issue is joined; in this case there shall be a replender; for the appearance being entered of record, as it ought to be, the same is triable by the record, and not by a jury.

Leon. 90.

Cro. Eliz. 539.

Archbishop of

Canterbury

v. Kemp.

In trover for divers trees, the defendant pleads that Queen Mary was seised in fee of the manor of D., where those trees were growing, and that she granted it to the defendant in tail, whereby he was seised thereof, and that J. S. cut the said trees, and granted them to the plaintiff, who lost them, and the defendant found them, and converted them, &c.; the plaintiff replies, *de injuriâ suâ propriâ*, &c., and thereupon issue is joined: it was held, that pleading *de injuriâ suâ propriâ* was ill, where the defendant makes justification by claiming an interest in the freehold to himself; but that where one claims not any interest, but justifies by command or authority derived from another, it is otherwise; wherefore a replender was awarded.

Cro. Jac. 239.

Watson v.

Thorpe and

his wife.

In battery the baron justifies, for that the plaintiff assaulted his feme, in aid of whom, &c. the feme by herself pleads and justifies *de son assault demesne*; the plaintiff saith *de injuriâ suâ propriâ absque tali causâ*; and both issues found for the plaintiff, and damages entirely given; and now alleged in arrest of judgment, that the trial was ill; for the feme by herself cannot plead, and the damages being entirely assessed, all was ill; and of that opinion was the court, and awarded that they should replead.

If in debt upon a bond, conditioned for the payment of 60*l.* upon the 25th of *June*, the defendant pleads payment of the said 60*l.* upon the 20th day of *June*, *secundam formam et effectum conditionis*; and thereupon issue is joined and a verdict found that he did not pay the said 60*l.* upon the 20th of *June*; the plaintiff shall not have judgment, for the issue is taken *dehors* the matter of the condition, and so void: and it might not be paid the 20th, and yet might be paid the 25th; but it is held that if it had been found for the defendant, *viz.* that the money was paid the said 20th day, perhaps the verdict would have made it good.

[A bond was conditioned for the payment of money *on or before* the 5th of *December*. Plea of payment on the 5th of *December*. Replication, issue, and verdict for the plaintiff. This was holden to be an immaterial issue, and a repleader was therefore awarded: though it would have been exclusive if found for the defendant; but did not conclude, when found for the plaintiff. And though this was a slip of the defendant, yet, as it did not determine the question, a repleader was awarded.]

Tryon v. Carter, 2 Stra. 994. 1 Burr. 302. It was said by Buller J. to be a rule, to which he could find no case of any exception, never to grant a repleader, when the issue found against the party tendering it. Dougl. 596.

¶ Where to an avowry for 120*l.* rent in arrear, the plaintiff pleaded in bar that the said 120*l.* was not due, and the defendant joined issue thereon, and at the trial it appeared that only 24*l.* was due; upon which the plaintiff objected that the evidence did not support the issue joined by the defendant; it was holden that the verdict for 24*l.* cured the informality in the issue.¶

In an action of debt upon a simple contract, payment was pleaded at *A.*: plaintiff traverses, that the payment was at *A.*: and a verdict, that the defendant did not pay at *A.* It was moved in a writ of error, that there ought to have been a repleader; otherwise, if the verdict had been found for the defendant: but the court affirmed the judgment.

If in debt upon a single bill the defendant pleads payment without an acquittance, and thereupon issue is joined, and found for the plaintiff, he shall have judgment; for though payment without an acquittance is no plea to a single bill, yet, because issue was joined upon an affirmative and a negative, and a verdict for the plaintiff, he shall have judgment. (a)

Debt for rent against lessee for years, defendant pleads, that before any rent due he assigned the term to another, of which plaintiff had notice; issue upon the notice, and verdict for the defendant, but no judgment was given, but a repleader awarded, in regard the issue was joined on a thing not material.

In debt on a bond against the defendant as executor, issue was joined, whether the defendant had assets, or not, on the 30th day of *November*, which was the day on which he had the first notice of the plaintiff's original writ; and it was found for the defendant, that then he had not assets; and this being held an immaterial issue, (for though he had not assets then, yet, if he had any afterwards,

Cro. Jac. 455.
Holmes v.
Brockett.

Tryon v. Carter,
2 Stra. 994.
1 Burr. 302.
It was said by
Buller J. to
be a rule, to
which he could
find no case
of any excep-
tion,

Cobb v. Bryan.
5 Bos. & Pul.
548.

Keb. 662.
Lucas v.
Harlow. *Qu.*

5 Co. 43.
Nichol's case.
(a) See the
stat 4 Ann.
c. 16. § 12.

Lev. 32.
Serjeant v.
Fairfax.

2 Mod. 139.
Read v. Daw-
son.

afterwards, he is liable to the plaintiff's action,) a replender was awarded.

Cro. Car. 78.
Purchase v.
Jago, Jon. 140.
Latch. 148.
Noy. 84. S. C.

If in debt upon an obligation, conditioned for the payment of 100*l.* upon the 31st day of *September* following, the defendant pleads payment the said 31st day according to the condition; and thereupon issue is joined, and found, that the money was not paid upon the said day, the plaintiff shall have judgment; for though the issue is upon an impossibility, there being no such day, yet the jury finding it not paid at the day, or at any time before, in effect find it was never paid, which is a good verdict.

2 Lev. 164.
Masters v.
Wood.

Trespass for battery and false imprisonment such a day and place; the defendant justified at another day and place by virtue of a writ and warrant from the sheriff, *absque hoc*, that he is guilty *aliter*, *vel alio modo*, *vel* at any other place; the plaintiff replied, that he is guilty *aliter et alio modo*, and at another place; whereupon issue was joined, and verdict for the plaintiff; but for the badness and uncertainty of the issue, upon motion in arrest, judgment was stayed, and a replender awarded.

2 Vent. 196.

In *assumpsit* against an administratrix, the defendant pleaded *quod ipsa non assumpsit* instead of the intestate; and after verdict a replender was awarded.

Roll. Abr. 200.
Yelv. 65.
Cro. Jac. 67.
S. C. and
Cro. Eliz. 752.
Style, 167.
Palm. 524.
L. P.

But, if on an issue tendered by the plaintiff the defendant joins the *similiter* by the plaintiff's name, or the plaintiff joins the *similiter* by the defendant's to an issue tendered by the defendant; this shall be amended, there being a negative and affirmative before between the plaintiff and defendant, which is the pattern from whence the joining of that issue is to be taken; and this being a plain mistake, as appears from the nature of the thing, of one man's name for another.

Vent. 122.
Reynell v.
Heal, 2 Keb.
788. S. C.
(a) *Qu.* As to
the law in this
case, the king not being a party to the suit, but the informer the only plaintiff, though he sue for the king and himself?

In an action upon a penal statute the defendant pleaded *non debet* to the informer *et de hoc ponit se super patriam*; and issue was joined *et prædict.* the informer *similiter*, without mentioning the king; and after a verdict for the plaintiff a replender was awarded. (a)

40 E. 3. 15.
Doct. pl. 513.
6 Mod. 3.

If the jury do not find assets to a certain value, the verdict is insufficient, and a replender shall be granted, and the issue tried by another inquest.

Plomer v.
Ross,
5 Taunt. 386.

¶ In debt on bond conditioned for performance of the covenants in an indenture, the defendants pleaded performance of each covenant specially, and also a general performance of all the covenants in the indenture. The plaintiffs in their replication took issue on the general performance, and concluded to the country, and then proceeded to suggest three several breaches of covenant; and the defendants by their rejoinder joined issue on the replication. The court held that the plaintiffs should have assigned breaches in their replication, that the issue tried was immaterial, and consequently a replender must be awarded.¶

3. Repleader, at what Time to be awarded.

It seems that at common law a repleader was as well allowed before as after trial, because a verdict did not cure an immaterial issue; but (a) it seems to be now settled, that no repleader ought to be allowed before trial, because the fault of the issue may be helped by the trial by the statute of jeofails. Salk. 579. (a) 5 Keb. 664. 6 Mod. 2. S.P., and that it is discretionary in the court, but not advisable, since the verdict may cure immaterial or informal issues. || A verdict does not cure an *immaterial* issue by the statute of jeofails, 52 H. 8. c. 30., any more than it did at common law; it only cures an *informal* issue, (as to which see 2 Will. Saund. 519. a. b.) The reason, therefore, in the text, for not granting a repleader till after trial since the statute is erroneous; and the learned editors of the last edition of Saunders, in a note vol. ii. 519. b., suggest as a reason for the change of practice, that before the statute, as the verdict could not have any effect upon the issue, a repleader might be awarded before trial, but that since the statute a verdict cures an informal issue, and therefore the court will not interfere until the result of a trial is seen, which may render a motion for a repleader unnecessary: but though this is a good reason for letting an *informal* issue go to trial before entertaining a motion for a repleader, it does not seem to be any reason for refusing a repleader before trial on an *immaterial* issue, which cannot be affected by the verdict.||

It is held by a multitude of authorities, that after a demurrer the repleader is not to be admitted, because by the demurrer the parties have put themselves on the judgment of the court. 5 Co. 52. Ridgeway's case. Doct. pl. 511. Poph. 42. Savil, 89. Latch, 148. Leon. 79. Moor, 461. pl. 644. 867. pl. 925. Roll. R. 271. And. 168. Lev. 142. 6 Mod. 102. — But in 5 Lev. 20. there is an instance of a repleader after a demurrer; and in 5 Lev. 440. it is said, that there was a repleader after demurrer and solemn argument; but these cases have of late been denied to be law.

It is said to have been usual in ancient times to award a repleader upon a writ of error in *B. R.* but it seems to be now agreed, that there can be no repleader upon a writ of error. 2 Sand. 519. 2 Lev. 12. 2 Keb. 789. 6 Mod. 102.

It is held, that no repleader can be awarded after a default. 2 Salk. 579. 6 Mod. 5. No repleader after a discontinuance. Comb. 525. Ld. Raym. 20. Salk. 219. pl. 4.

(N) Demurrer : And herein,

1. The Definition and Nature of a Demurrer.

A DEMURRER (b) in pleading (c) is an admission by the party of the fact charged in the count or declaration, plea, replication, &c. (d), and refers the law arising on such fact to the judgment of the court. Doct. pl. 115. Finch, c. 40. (b) Comes, says my Lord Coke, from the Latin word *demorari*, to abide in law. Co. Lit. 71. b. (c) As there may be a demurrer upon counts and pleas, so there may be of aid prior, voucher, receipt, waging of law, and the like. Co. Lit. 72. a. — For demurring on evidence, *vide infra*. (d) May be taken to the rejoinder, &c. and to a special as well as a general plea; for all parts of pleading to issue ought to be according to the rules of law; and if any part fail, the whole is naught, and may therefore be demurred unto. Co. Lit. 72. a. Lil. Reg. 435.

It is termed in some books an issue in law, and therefore in a declaration, plea, &c. there may be two independent issues, *viz.* a demurrer, which is the issue in law, determined by the court; and an issue in fact, determinable by the jury. But this must be understood as to distinct parts of the same declaration, plea, &c., for it is never allowed the defendant to plead and demur to the same fact, this being a duplicity that would draw the matter to Vol. VI. A a different

different judicatures, and would be vexatious and expensive, were it admitted; for in such case the party would demur specially to form, and if he was over-ruled there then he would deny the fact.

Cases in Law
and Eq. 280.
Halsv. v.
Jefferies.

(a) But the
defendant may
demur to one
count, and
plead to

So, on the statute 4 & 5 Ann. c. 16., which enables defendants by leave of the court to plead several pleas, &c., it hath been refused to allow a defendant to plead and demur to the same declaration; for a demurrer is so far from being a plea, that it is an excuse for not pleading; and it would be absurd for the party to plead, and at the same time pray that he might not plead. (a)

another, for separate counts are as several declarations. [And when there are several counts in a declaration, some of which are good in point of law, and the rest bad, the defendant can only demur to the latter; for if he were to demur generally to the whole declaration, the court would give judgment against him. 1 Saund. 286. 2 Saund. 380. 1 Wils. 248. But if a plea or replication, which is entire, be bad in part, it is bad for the whole. 2 Saund. 124. 1 Salk. 312. 1 Term R. 40. 3 Term R. 374.]

Co. Lit. 72. a.
125 b.
Doct. pl. 116.
Palm. 517.
S. P. because

If there be a demurrer to part, and an issue for part, the more orderly course is to give judgment upon the demurrer first; but yet it is in the discretion of the court to try the issue first if they will.

the jury can then assess the damages on the whole. — [In practice, it is usual and advisable to determine the issue in law first, for the following reasons: first, that the determination of an issue in law is generally more expeditious, and less expensive, than the trial of an issue in fact: secondly, that if the issue in law go to the whole cause of action, and be determined against the plaintiff, it is conclusive, and there is no occasion afterwards to try the issue in fact; whereas, if the issue in fact be first tried, and found for the plaintiff, he must still proceed to the determination of the issue in law, and if that be found against him, he will not be allowed his costs of the trial of the issue in fact: and lastly, that whether the demurrer goes to the whole or part of the cause of action, if the plaintiff proceed to argue it first, and the court should be of opinion against him, he may amend as at common law; but, after the cause has been carried down to trial, he cannot amend any farther than is allowable by the statutes of amendment. Tidd's Prac. (7th ed.) 775. || Although the plaintiff in ordinary cases has a right to marshal his own proceedings, provided he conforms to the rules of the court, yet if the court see that the ends of justice will be better answered by first determining the question of law on the demurrer, they will postpone the trial of the issue in fact. 13 East, 41. 47.]

Salk. 219. pl. 6.
per cur.

If there be a demurrer to part, and an issue upon other part, and judgment be given for the plaintiff upon the demurrer, he may enter a *non pros.* as to the issue, and proceed to a writ of enquiry on the demurrer: but without a *non pros.* he cannot have a writ of enquiry, because on the trial of the issue the same jury will ascertain the damages for that part to which the demurrer was.

2. The Manner and Form of Demurring; and therein, of joining in Demurrer, and waiving thereof.

Co. Lit. 7. b.
Yelv. 5, 6.
Where the
substantial
part of the de-
murrer was in,
though ill in
form, the

The words of a demurrer, when to the declaration, are *quia narratio, &c. materioque in eadem contenta minus sufficiens in lege existit, &c.*; and to a plea are *quia placitum, &c. materiaque in eodem contenta minus sufficiens in lege existit, &c. unde pro defectu sufficientis narrationis sive placiti, &c. petit judicium, &c.*; to which the adverse party replies, *quod narratio, or placitum prædictum, &c. materiaque in eodem contenta bon. et sufficien. in lege*

lege existunt, &c. et petit judicium, and thereupon the demurrer is said to be joined.

In some cases a man shall allege special matter, and conclude with a demurrer: as, in an action of trespass brought by *J. S.* for the taking of his horse, the defendant pleads, that he himself was possessed of the horse until he was by one *J. S.* dispossessed, who gave him to the plaintiff, &c.; the plaintiff saith that *J. S.* named in the bar, and *J. S.* the plaintiff, are all one person and not divers; and to the plea pleaded by the defendant in the manner, he demurred in law; and the court held the plea and demurrer good, and that without the matter thus alleged he could not demur.

In a *quare impedit* the patron pleaded one plea in bar, and the incumbent the same plea by himself; the Queen demurred thus, *Quoad separalia placita per def. separaliter placitat. dicta domina regina necesse non habet nec per legem terræ tenetur respondere: et per cur.*; the demurrer ought to have been several on each plea by itself.

If a defendant demur in abatement, the court will notwithstanding give a final judgment, because there cannot be a demurrer in abatement; for, if the matter of abatement be extrinsic, the defendant must plead it; if intrinsic, the court will take notice of it themselves.

After the plaintiff and defendant have joined in the issue, which is to be tried betwixt them, neither of them (*a*) can demur without the consent of the other; for by joining in the issue they have admitted the pleadings to be good, and sufficient to try the issue. received after issue joined. Cro. Eliz. 196. — But it hath been adjudged, that a demurrer to an indictment ought not to be received after verdict. Sid. 208.

So, it hath been resolved, that after a demurrer there cannot be a repleader; for the parties, by their mutual consent, having put themselves on the judgment of the court, cannot without leave of the court replead.

There cannot be (*b*) a demurrer to a demurrer; and if there be, it makes a discontinuance, for there is no difference between pleading over when issue is offered, and not joining in demurrer, but pleading over; both are alike, and make a discontinuance. murrer for the doubleness of it, for a demurrer ought to have formality and certainty in it to avoid barbarism, and inveigling of the court; but, if one that might demur do not demur to it, but join in the demurrer, he cannot demur afterwards, for he hath slipped his advantage. Lil. Reg. 458. — And in case of a demurrer to a plea in abatement, it is said, one may demur upon that demurrer. But *per Holt C.J.*, that is where the demurrer is not apposite; but, if the demurrer be proper and apposite, you must join. Comb. 306.

It is said, that there are the same rules for joining in demurrer as there are in pleading; and that in criminal cases, not capital, the course is to allow the party four days to join in demurrer; but it hath been held, that in capital cases the party must join in demurrer *instantèr*.

If demurrer be entered it cannot be waived, except both the plaintiff and defendant consent unto it, nor then without leave of the court; because by the demurrer both parties have submitted

court held is a demurrer. *Vide* 5 Mod. 132.

Co. Lit. 72. b.

Leon. 159.
The Queen v. Archbishop of Canterbury and others.

Salk. 220.
pl. 7. Docmiquie v. Davenant. *Vide* 2 Hawk. P. C. c. 52.

Show. 215.
Lil. Reg. 437.
(a) A demurrer to an appeal hath been received, that a demurrer

Cro. Eliz. 62.
318. 3 Co. 52. b.

Salk. 219. pl. 4.
Ld. Raym. 20.
(b) It is said, that one may demur to a demurrer

Skin. 217. pl. 1.
Vide Laver's trial, State Trials, vol. 6. 229.

Cro. Car. 515.
Jenk. 128.
5 Mod. 18.

the matters in law in question betwixt them to the judgment of the court.

A demurrer is not to be allowed unless it be signed by counsel. Lil. Reg. 436. But a demurrer upon a challenge to a jury is good without a counsel's or serjeant's hand; and as soon as it is agreed on at the bar, the same is to be entered up without further circumstances. 3 Leon. 222.

3. *What Facts are admitted by a Demurrer.*

Co. Lit. 72. a. It is laid down as a general and uncontested rule, that a demurrer admits all such matters of fact as are sufficiently pleaded. Dyer, 21. 5 Co. 69. Doct. pl. 119. Hob. 81. Sand. 353. Carth. 51. || Com. Dig. Pleader, (Q 5.) 1 East, 634. 1 Term R. 334. ||

34 H. 6. 5. And therefore if in waste the defendant demurs to the declaration, and it is adjudged against him, there shall issue no writ of waste, this being admitted by the demurrer; but a writ shall issue to enquire of the damages. Doct. pl. 117.

Hob. 56. But matters not sufficiently pleaded are not admitted by a demurrer: so in a demurrer upon a matter in law, says my Lord *Hobart*, though the parties will join upon some one point, upon which, if it stood alone, judgment should be given for the one party, yet, if upon the whole record matter in law appears why judgment should be given against the said party, the court must determine so; for it is the office of the court to determine the law upon the whole record, and the consent of parties cannot prejudice their opinions, nor discharge them of their office in that point.

If in covenant divers breaches are assigned, some of which are good and others ill, and the defendant demurs to the whole declaration, the plaintiff shall have judgment for (a) those which are well assigned, and for the others shall be barred. 2 Sand. 379, 380. (a) In trover for several things, and among the rest *de duobus fulcris*, the defendant demurred, and *Holt* C. J. refused to give judgment *quod nil capiat*, saying the plaintiff may take several damages, and release as to this, and then take judgment as to the rest, and all would be well. Salk. 218. pl. 1.

1 Saund. 286. || But where there are several counts, and some are good and (9.) 1 New others bad, the defendant should only demur to the latter; for if R. 45. he demur to the whole declaration judgment will be given against him, for the court cannot give judgment that the demurrer is in part good.

Powdick v. Lyon, 11 East, 568. So, if the sum demanded by a declaration in *scire facias* be divisible on the record, and there be no objection to one part of it, a demurrer which goes to the whole is bad.

1 Saund. 28. If a plea or replication, which is entire, be bad in part, it is bad (2.) for the whole.

2 Black. R. 910. But a plea of set-off wherein the demands are divisible, and in nature of several counts in a declaration, forms an exception to this rule. ||

4. *How far a Judgment on a Demurrer is peremptory.*

(b) So, where It seems to be agreed as a general rule, that a judgment (b) on a statute enacts, that a demurrer is as conclusive and binding, as if the same had been person convicted of such an offence shall forfeit so and so, a conviction on a demurrer hath been held sufficient. 11 Co. 58. Roll. R. 89.

But upon a plea to the jurisdiction, person, writ, and prior, view, essoin (*a*), voucher, and demurrer joined upon such plea or prayer, and ruled against him who demurs, there is only judgment to answer over.

||1 East, 542.|| (*a*) Dyer, 69. pl. 35. 341. pl. 5. — If after a demurrer a person shall have the advantage of his age, *quere* 3 H. 6. 46. Doct. pl. 116.

[But in other cases, the judgment is interlocutory or final, according to the nature of the action; if the action be for damages, in *assumpsit*, &c. it is interlocutory, and should be signed, on treblepenny stamped paper, with the judgments, after which the damages should be assessed, on a writ of enquiry, or reference to the Master; but in *debt*, &c. for a sum certain, the judgment is final, and there being no necessity for a rule for judgment (*b*), the plaintiff may immediately tax his costs, and take out execution.]

It seems to be the better opinion, that a general demurrer, concluding in bar of an appeal or indictment, or a demurrer to a plea in bar which admits the fact, or to a replication to such a plea, is peremptory and conclusive; so that if the indictment be good, judgment and execution shall go against the prisoner.

But it hath been adjudged, that if an appellee demur in law to an appeal by reason of the insufficiency of the declaration, or generally demur to the declaration, with a conclusion, *et petit judicium de narratione illâ, et quod narratio illa cassetur*, &c., such demurrer shall not conclude him from pleading over to the felony, either at the same time with the demurrer, or after it shall be adjudged against him.

But in criminal cases, not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise, the court will not give judgment against him to answer over, but final judgment; for it seems, that in such cases there can be no demurrer properly in abatement, except it be to a plea in abatement, or to a replication to such a plea.

5. Of the Difference between a general and special Demurrer.

A demurrer is said to be general or special (*c*): general, where no particular cause is alleged; special, where the particular thing objected to is pointed out, and insisted upon as the cause of demurrer. And herein it is said (*d*), that as a general demurrer confesseth all such matters of fact as are sufficiently pleaded, so he that demurs specially can take no advantage of any other matter of form than what he hath expressed in his demurrer; but he may of any other matter of substance.

in lege exist., &c. — A demurrer, because *incerta et caret forma*, is a general demurrer. Show. 242. Comb. 297. (*d*) 10 Co. 88.

And herein it is said, that the ancient practice was, to demur specially; and that the way was, when the pleadings were drawn at the bar, to make the exception immediately, and the other party might mend if he pleased, or might demur if he durst venture it; and Hale says, that though now they are put in paper, yet

Jenk. 506.
[Gilb. C.P. 53.
1 Ld. Raym.
551. Say R. 46.
2 Wils. 568.]

Tidd's Pr.
478, 479.

(*b*) 1 Str. 425.

Vide 2 Hawk.
P.C. c. 32.

Dyer, 38. Cro.
Eliz. 196.

Cro. Eliz. 196.
Rast. Ent.
160.

Co. Lit. 72. a.
(*c*) The words
of a general
demurrer are,
*quod breve, vel
narratio, vel
placitum, &c.
materiamque in
eodem content.
minus sufficien.*

Vent. 240.
— Good
rule to be ob-
served in de-
murrers,
always to shew

the cause of demurrer.

2 Bulst. 267.
per Coke.

Yelv. 58.

Cro. Jac. 15.

Bulst. 204.

2 Vent. 142.

3 Lev. 59.

6 Mod. 263.

3 Mod. 235.

2 Salk. 520.

Gilb. C.P. 114,

115. 2 Str. 846.

1 Barnard.

K.B. 215. 220.

2 Saund. 402.

2 Str. 735. 954.

976. Ca. temp.

Hardw. 42.

1 Burr. 321.

Dougl. 330.

Barnes, 9.

21. 25.

2 Burr. 756.

Tidd's Pr. 450.

Dougl. 385.

452.

Robinson v.

Rayley,

1 Burr. 321.

yet such a course should be observed, that persons may not be caught by demurrers contrary to the original intention of them.

But, as the law requires regularity in the proceeding, and that all parts of pleading should be according to approved precedents, it seems an established rule, not to admit the party to amend after a demurrer entered of record; though it hath been held, that if the plaintiff declares and the defendant pleads, and the plaintiff replies and the defendant demurs, and the plaintiff joins in demurrer, yet the plaintiff may move to amend on payment of costs, if the cause be still in paper. [Indeed, the very intent of requiring mistakes, in point of law, to be shewn for cause of demurrer, was, to give the party an opportunity of amending. And even where the proceedings are entered on record, and the demurrer has been argued, the court will give leave to amend, where the justice of the case requires it, and there is any thing to amend by. The court, however, will always take care, that if one party obtain leave to amend, the other party shall not be prejudiced or delayed thereby.] So, a party may withdraw a demurrer not entered of record, and move to amend.

[And leave hath been sometimes given to a party to *withdraw* his demurrer, after it has been argued, and to plead or reply *de novo*, in order to let in a trial of the merits. Thus, after a demurrer to the defendant's plea had been argued, and the matter stood over for the judgment of the court, a rule was made to shew cause, why the plaintiff should not have leave to withdraw his demurrer, and reply to the plea; which rule, no cause being shewn, was afterwards made absolute. But this is altogether discretionary in the court. Therefore, where to an action of debt on a bail-bond the defendant pleaded there was no bill of *Middlesex*, and the plaintiff demurred, the court, after delivering their opinion in favour of the defendant, refused to give the plaintiff leave to withdraw his demurrer, and amend; And by *Wright J.*—It is not usual to amend after a demurrer has been argued, and the opinion of the court is known: and it is certainly improper to give leave in the present case, it being an action against bail, whom the court is always inclined to favour.—So, where the defendant rejoined to several replications in trespass, and demurred to others, and a verdict was found for him upon the issues in fact, and contingent damages were assessed upon the demurrers, which were afterwards over-ruled, the court refused to let the defendant withdraw his demurrers and plead to issue: And by *Dennison J.*—Where the demurrer is first argued, before any trial of the issues, the court will give leave to amend; as in the case of *Giddins v. Giddins* (Say. Rep. 316.) But this is an attempt to amend issues in law, after a verdict has been found on the issues in fact, and contingent damages assessed, of which there never was an instance. And we do not know where it would end, nor how the cause could be again carried down to trial. The court cannot help seeing that this is upon record: here are verdicts,

||1 Kenyon,

335. S.C.;

and see

2 Chitt. R. 5.

Tidd. 710.

(9th ed.)||

verdicts, and contingent damages, found. The cases of amendment cited are, where the whole is supposed to be in paper: else the court could not have done it. We have no authority to do this, after it is plainly upon record.]

¶ After the court had given their opinion on the argument, an amendment was denied.¶

37. 2 Bos. & Pull. 402. 3 *Ibid.* 11, 12. 5 Taunt. 765. 6 *Ibid.* 248. 1 Marsh. 567.; but see 1 East, 572., where the amendment was allowed in case of a replication to a *sham* plea.

Also, where a person hath good cause of demurrer at the time of his demurring, no act of the other party afterwards will make it naught; as if, in debt for rent, the plaintiff declares for more than appears by his own shewing to be due to him, and for which the defendant demurs, the plaintiff cannot afterwards enter a *remittitur* for the overplus; for by this means the defendant, by relying on his demurrer, might be tricked in his defence.

But, for the better understanding the difference between a general and special demurrer, we shall briefly consider,

6. *What Things are good on a general Demurrer, that would be otherwise on a special one.*

Herein the established distinction is, that matters of substance, that is, the omission of such material things as are necessary to shew a right in the plaintiff, or material for the defendant in his plea, may be taken advantage of on a general demurrer; but matters of form merely must be specially alleged, and assigned as causes of demurrer. For the law, says my Lord *Hobart* (a), requires in pleading two things: 1st, That it be in matter sufficient; 2dly, That it be deduced and expressed according to the forms of law; and if either the one or the other of these be wanting it is cause of demurrer, with this distinction, which seems to be founded on the common law, and is fully explained and confirmed by the statutes 27 Eliz. c. 5. and 4 Ann. c. 16.

2 Roll. R. 506. Sid. 508. Sand. 9. 51. 98. 537. 2 Sand. 190. 5 Mod. 18. Salk. 291. pl. 5. (a) Hob. 232. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5.

By the 27 Eliz. c. 5. § 1. reciting, "That excessive charges and expenses, and great delay and hinderance of justice hath grown in actions and suits between the subjects of this realm, by reason that, upon some small mistaking or want of form in pleading, judgments are often reversed by writs of error, and oftentimes upon demurrers in law, given otherwise than the matter in law and very right of the cause doth require, whereby the parties are constrained either utterly to lose their right, or else after long time, and great trouble and expenses, to renew again their suits; for remedy whereof it is enacted, that after demurrer joined, and entered in an action or suit in any court of record within this realm, the judges shall proceed and give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, defect, or want of form in any writ, return, plaint, declaration, or other pleading, process, or course of proceeding

1 East, 591.; and see Barnes, 9. 1 H. Blac.

Sand. 285. Duppa v. Mayo.

For this distinction, *vide* 10 Co. 88. Dr. Leyfield's case. Doct. pl. 118. Style, 41. Latch, 185. Roll. R. 112. Co. Lit. 72. a. Hob. 127. 164. Hutt. 15. Savil, 78. 87. Palm. 568. Leon. 44. Carth. 66. 88.

27 Eliz. c. 5. § 1.

“ whatsoever, except those only which the party demurring shall specially and particularly set down and express, together with his demurrer; and that no judgment to be given shall be reversed by any writ of error for any such imperfection, defect, or want of form as is aforesaid, except such only as is before excepted.”

And by § 2. it is further enacted, “ That after demurrer joined and entered, the court, where the same shall be, shall and may, by virtue of this act, from time to time amend all and every such imperfections, defects, and wants of form, as is before mentioned, other than those only which the party demurring shall specially and particularly express and set down, together with his demurrer, as is aforesaid.”

There is a proviso in this act, that it shall not extend to criminal proceedings.

Co. Lit. 72.

Roll. R. 112.

Lutw. 4.

(a) In demurrer for duplicity, it is not

sufficient to demur *quia duplex est*, or *duplicem habet materiam*, but the party must shew wherein; for the statute, by requiring to shew cause, intended to oblige the party to lay his finger upon the very point. Salk. 219. pl. 5. 2 Ld. Raym. 798. 7 Mod. 71. 2 Salk. 678. pl. 5. *per Holt C. J.*

Roll. R. 112.

Saunders v.

Crawley.

As, in debt upon an obligation for performance of articles, which was to pay so much at two days in certain, the defendant said he paid accordingly, the plaintiff replied that he had not, this was held a double plea, because it went to both days, yet aided on a general demurrer.

10 Co. 94. a.

Doct. pl. 116.

Hob. 127.

Jenk. 306.

So, if the defendant pleads a plea which amounts to the general issue, this is but matter of form, and must be taken advantage of on a special demurrer: also, at common law, if a defendant had pleaded a plea which amounted to the general issue, and the plaintiff had demurred thereupon; if the defendant had refused to plead the general issue, but instead thereof joined in demurrer, the court determined it against him.

5 Mod. 18.

Also, it is held, that if a special matter is pleaded, which looks like the colour of a plea, but amounts to the general issue, it is no cause of demurrer; as, if in debt you plead a release, though you might have given it in evidence on *nil debet*, yet it is no cause of demurrer: so, in debt for rent, if you plead entry and expulsion, it is no cause of demurrer, though it may be given in evidence on *nil debet*.

Lil. Reg. 436.

But, where an act of parliament gives the party privilege to plead the general issue, and he plead specially, if such special plea be faulty the plaintiff may demur to it; for though he needed not to have pleaded specially, yet having done so, his plea must be agreeable to the rules of law.

Lil. Reg. 437.

There must be a special demurrer to a negative pregnant, that is, a negative plea, which doth also contain in it an affirmative: so, to an argumentative plea, that is, a plea which concludes nothing

nothing directly, but only by way of argument or reasoning; for the court will intend every plea to be good till the contrary doth appear.

In debt upon an obligation to perform covenants, the defendant pleaded generally performance of covenants, where some were in the negative, and some in the affirmative; and this was held to be but matter of form, and aided by the statute 27 Eliz. c. 5. except the party sheweth for cause of his demurrer, that some of the covenants are in the negative, and some in the affirmative, for the court shall adjudge according to the truth of the matter: but if any of the covenants are in the disjunctive it is otherwise, for the court cannot know which of them in the disjunctive he hath performed.

In debt upon a bond for performance of covenants in an indenture of apprenticeship, several breaches were assigned, and the defendant demurred generally; and *per Holt C. J.* you could not take advantage of the assignment of several breaches even at common law, without shewing it for cause; and though in this case there were the words *incerta et caret forma*, yet it was held but a general demurrer, and therefore ill.

But though matters of form are aided upon a general demurrer, yet there must be sufficient appear to the court to ground their judgments upon; and it is not enough that the party hath right, but such right must be disclosed to the judges in the record so as to enable them to pronounce upon it.

And therefore it hath been held, that if an executor or administrator brought an action of debt, and did not produce their probate or administration, that this was not aided.

words of 4 & 5 Ann. c. 16. which *vide*, title *Amendment*, letter (B).

So if a man plead a conveyance of a rent, or the like, that cannot pass without deed, without (a) producing the deed in his plea it is not aided; for it is not enough for the party to say that he is executor, or that the rent was granted to him, but the court must see and judge of it, else the right appears not; and the adverse party may cause the deed to be enrolled, which makes it a part of the plea, whereupon the court shall judge whether it maintain the plea or not.

the party demurring cannot take advantage of upon a general demurrer, and that when oyer of the deed is demanded, it is presumed that the deed is in court, and that *ei legitur*; the reading is the act of the court. Sid. 308.

So if the means be wanting whereby the right shall be made to appear, it is incurable: as if a man bring an action of debt upon an obligation and produce it, but say it was made beyond sea, or do not allege a place (b) where it was made, a general demurrer serves; and for the same reason two affirmatives without a traverse is not aided, because it admits no trial, without which the court cannot see the right.

there, under a *scilicet* at *Westminster*, or wherever the *venue* is laid.

So if in debt upon an obligation, conditioned for the performance of an award, the defendant pleads *nullum fecerunt arbitrium*, and

Cro. Eliz.
Oglethorp v.
Hyde; *et vide*
Hob. 15.
Moor, 856.
Co. Lit. 303.

Comb. 297.
Gibbs v. Cope.

Hob. 233.

Hob. 233.
But this is
now aided by
the express

Hob. 233.
10 Co. 88.
Cro. Jac. 172.
613. (a) That
the omission
of *profert in*
cur. the deed
pleaded is
only matter
of form, which

Hob. 233.
(b) Supposing
a bond made
in and dated
at *Fort St.*
George, in the
East Indies,
it is usual to
allege it made

Hob. 233.
Yelv. 152.

Cro. Jac. 220.
Saund. 102.

and the plaintiff replies and shews the award, he must also shew the breach, without which he hath no cause of action, or it is ill on a general demurrer; for though the defendant can make no answer to the breach, yet it ought to appear to the court that the plaintiff hath cause of action.

Sid. 370.

But if debt on an obligation conditioned for the performance of an award, so as, &c. the defendant pleads no award made, and the defendant replies, that *ante exhibitionem billæ, scilicet* the 24th of June, (which was a day within the submission,) the arbitrators made an award, &c. and the defendant demurs generally, the plaintiff shall have judgment; for though the plaintiff ought to have replied that the arbitrators made their award before the day limited to them, yet this is form only, and helped on a general demurrer.

Salk. 72. pl. 9.
Foreland v.
Marygold.

If in debt on a bond for performance of an award, the defendant pleads no award, and the plaintiff sets forth an award with *profert in cur.* and the defendant craves *oyer*, and then demurs for variance between the award set out in the replication and the *oyer*, and the variances appear material, the defendant must have judgment; otherwise, if the variance had been as to those parts in which the award was void.

Carth. 66.

cont. Sid. 253.

It hath been held, that a declaration in trespass not concluding *contra pacem domini regis* was ill on a general demurrer; but this is now helped by the forementioned statute 4 & 5 Ann. c. 16. which enacts, "That no advantage or exception shall be taken of or for an immaterial traverse, or of or for the default of alleging the bringing into court any bond, bill, indenture, or other deed whatsoever mentioned in the declaration, or other pleading, or of or for the default of alleging of the bringing into court letters testamentary or letters of administration, or of or for the admission of *vi et armis et contra pacem*, or either of them, or of or for the want of averment of *hoc paratus est verificare per recordum*, or of or for not alleging *prout patet per recordum*; but the court shall give judgment according to the very right of the cause as aforesaid, without regarding any such imperfections, omissions, and defects, or any other matter of like nature, except the same shall be specially and particularly set down and shewn for cause of demurrer."

10 East, 359.

And for some other examples where a

special demurrer is necessary, and where a general demurrer is held sufficient, see 10 East, 139. 2 H. Bl. 259. 5 Term R. 409.

7. Demurrer to Evidence.

Co. Lit. 72.

Allen, 18.

Godb. 10.

Raym. 404.

2 Jon. 146.

Doct. pl. 318.

Demurrer to evidence is an admission of the truth of the fact alleged by the adverse party, or an acknowledgment that the evidence produced by him at the trial of the cause is true, but a denial of its operation and effect in law, whereupon the party demurs, and prays the judgment of the court; for, the fact being agreed

agreed on, the judges are the proper expositors of the law, and are to determine the same, and not the jury. But if a matter of evidence, which is thought material, be offered, and the court disallow or overrule it, this is a proper matter for a (a) bill of exceptions, which the judges are compellable to sign. Also (b), if the court overrules one who offers to demur upon evidence, this is a proper case for a bill of exceptions, and the remedy which the statute in that case provides.

appear on' the record. *Per Buller J. Doug. 134.*] (a) For this *vide* title *Bill of Exceptions*.—(b) 9 Co. 15. 2 Inst. 426. and Cro. Car. 541. Cort and The Bishop of St. David's adjudged. — Jon. 351. S. C. by which it appears, that a bill of exceptions was tendered and signed.

¶ A demurrer to evidence is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed, because the evidence offered on the one side is not sufficient to maintain the issue. Upon joinder in demurrer by the opposite party, the jury are in general discharged from giving any verdict; and the demurrer being entered *on record*, is afterwards argued and decided in the court in bank, and the judgment there given may ultimately be brought before a court of error.¶

and see 2 Barn. & C. 445. Philipps on Evid.

If in ejectment, or any other action, the plaintiff give in evidence any matter in writing or record, or a sentence in the spiritual court, and the defendant offer to demur thereupon, the plaintiff cannot refuse joining in demurrer, but must do the same, or waive his evidence.

cannot be any variance of a matter in writing.

Also, if the plaintiff produce witnesses to prove any matter of fact, upon which any question of law arises, and the defendant admit their testimony to be true, in such case likewise the defendant may demur; so the plaintiff may demur upon the evidence offered by the defendant *mutatis mutandis*.

upon any evidence given by witnesses, the other, unless he pleaseth, shall not be compelled to join; because the credit of their testimony is to be examined by a jury; and the evidence is uncertain, and may be enforced more or less, but both parties may agree to join in demurrer upon such evidence. — Also it is said, that in a demurrer upon evidence the party demurred unto may demand judgment of the court, whether he ought to join in the demurrer; for if there be not a colourable matter to ground the demurrer upon, the court will not force the party to join in it, but will overrule it, that justice may not be frivolously delayed. Lil. Reg. 437.

But in the case of the king, he by his prerogative is not obliged to join in any demurrer; but in case any doubt arises, the court may direct the jury to find the matter special, and thereupon determine what the law is.

his prerogative may waive his issue and demur in law, *et c. cont.* Plow. 85. a. 236.

He that demurs upon evidence ought to confess the whole matter of fact to be true, and not refer that to the judgment of the court: and if the matter of fact be uncertainly alleged, or it be doubtful whether it be true or not, because offered to be proved only by presumptions and probabilities, and the other

[The reason for demurring to evidence is, that the jury, if they please, may refuse to find a special verdict, and then the facts never

See 1 Arch. Prac. 186. Stephen on Plead. 112. Tidd's Prac. 865. (9th ed.); and for fuller information on this sort of demurrer see 2 H. Bl. 187.; Ch. 9. (7th ed.)

5 Co. 104. a. Baker's case. Cro. Eliz. 751, 752. S. C. adjudged, because there

5 Co. 104. Cro. Eliz. 752. S. C.—Where it is said, that if either party offer to demur

Co. Lit. 72. a. Dyer, 53. pl. 8. Cro. Eliz. 752. 5 Co. 104. S. P. The king by

Allen, 18. Wright v. Paul Pinder, said to be resolved. Stile 22. 34. S. C.

party

party will demur thereupon, he that alleges this matter cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true.

Stile, 22. 34.
Allen, 18.
(a) In Stile, 34.
it is said by
Rolle, that a
new *venire*
facias should
go in the same
manner as if a
special verdict
be found in-
sufficient; but
in Allen, 18.

the opinion of the court was, that an *alias venire facias* should be awarded, and not a *venire de novo*, because no verdict was given.

Tidd's Prac.
(7th edit.) 892,
893.

[If a matter of *record*, or other matter in *writing*, be offered in evidence to maintain an issue joined between the parties, all the books agree, that the adverse party may insist upon the jury being discharged from giving a verdict by demurring to the evidence, and obliging the party offering the same to join in demurrer, or waive the evidence: and the reason given for it is, that there cannot be any variance of matter in writing. The books also agree, that if *parol* evidence be offered, and the adverse party demur, he who offers the evidence may join in demurrer if he will. But the language of the old books is very indistinct upon the question, whether the party offering *parol* evidence shall be *obliged* to join in demurrer. In a late case which came before the House of Lords, (*Gibson and Johnson v. Hunter*, 2 H. Bl. 187.) it was observed, in delivering the opinion of the judges, that *parol* evidence is sometimes certain, and no more admitting of any variance, than a matter in writing; but it is also often loose and indeterminate, often circumstantial. The reason for *obliging* the party offering evidence in *writing*, to join in demurrer, applies to the first sort of *parol* evidence; but it does not apply to *parol* evidence that is loose and indeterminate, which may be urged with more or less effect to a jury; and least of all, will it apply to evidence of circumstances, which evidence is meant to operate beyond the proof of the existence of those circumstances, and to conduce to the proof of the existence of other facts. In such cases, however, if the party who demurs will admit the evidence of the fact, which evidence is loose and indeterminate, or, in the case of circumstantial evidence, if he will admit the existence of the fact, which the circumstances offered in evidence conduce to prove, there will then be no more variance in this *parol* evidence than in a matter in writing; and in such case, the party shall be allowed to demur, and his adversary must join in demurrer. But on a demurrer to *circumstantial* evidence, unless the party demurring will distinctly admit, upon the record, every fact, and every conclusion, which the evidence offered

offered conduces to prove, it is not competent to him to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the party offering it to join in demurrer: though, if the party offering the evidence consent to waive the objection, and to join in demurrer, every fact is to be considered by the court as admitted, which the jury could infer in his favour, from the evidence demurred to: and the court will, if they can, give judgment upon such evidence: but otherwise, a *venire de novo* must be awarded. Dougl. 119. 2 H. Bl. 209.

The whole operation of entering the matter upon record, and conducting a demurrer to evidence, is and ought to be under the direction and control of the court, upon a trial at bar, or of the judge at *nisi prius*; subject, however, to an appeal, by bill of exceptions, if the demurrer be refused. And where a demurrer to evidence is admitted, it is usual for the court, or judge, to give orders to the associate, to take a note of the testimony, which is signed by the counsel on both sides, and the demurrer is affixed to the *postea*. 2 H. Black. 208. Cro. Car. 341. Bull. N P. 315.

The question upon a demurrer to evidence being, whether the evidence offered be sufficient to maintain the issue, the party, on such demurrer, cannot take advantage of any objection to the pleading.] Dougl. 218.

Upon a demurrer to evidence, though the matter of fact be confessed, yet the jury may enquire of the damages, and assess them conditionally, *viz.* if upon the argument of the demurrer the law should be for the plaintiff, then so much, &c. Also, it hath been resolved (a), that the damages may be enquired of by a writ of enquiry of damages, when the demurrer is determined: and it is said to be the most usual course, when there is a demurrer upon evidence, to discharge the jury without more enquiry. Plow. 408. Scholastica's case, Style, 22. (a) Cro. Car. 143. Darrose v. Newbott.

Error of a judgment in the palace court in *assumpsit*, where to prove the consideration an arrest was to be proved by the plaintiff; and for that he did not produce the writ the defendant demurred on the evidence, and thereupon judgment was given for the plaintiff: and now to reverse the judgment it was said for the plaintiff in error, that the king's writs are matters of record, and are not to be proved but by themselves; and it was agreed by the court, that the writ ought to have been produced in evidence, but by the demurrer it is confessed, the arrest being matter of fact, though it be to be proved by a matter of record; and the jury might of their own knowledge know that there was a writ; and by the demurrer on the evidence all matters of fact are confessed that the jury could know of their own consuance. Lev. 87. Fitz-Harris v. Boiun.

(O) *Plea at what Time to be put in, and the Ceremony requisite therein.*

IF the defendant neglects to put in his plea, when the rules for pleading are out, the plaintiff may sign judgment for want thereof; but if the matter which is to be pleaded is difficult, the court will upon motion grant the defendant longer time to put in Lil. Reg. 36, 37.

(a) It is usual now to grant time, by Judge's order obtained on summons for that purpose. — [When a

summons is taken out, and made returnable, before the expiration of the time for pleading, it is a stay of proceedings, pending the application: but it is otherwise, when taken out, or made returnable, after the expiration of the time for pleading. Say R. 165. Barnes, 240. 252. Cas. Pr. C. B. 137. Pr. Reg. 292. S. C. Barnes, 255. Cas. Pr. C. B. 144. S. C. Barnes, 254. Pr. Reg. 293. S. C. || In the latter case the plaintiff may sign judgment before the summons is returnable, 2 Black. R. 954. But he cannot sign judgment afterwards, 2 Barn. & A. 355. 1 Chitt. R. 93. 6 Taunt. 240. || Nor will it operate as a stay of proceedings, where the object of it is collateral to the time for pleading, as to discharge the defendant out of custody upon common bail, &c. *Per Cur. Mich.* 28 G. 3.] || *Vide Tidd's Prac.* 482, 483. (7th ed.)]

Lil. Reg. 37.

Also, where the plaintiff doth keep any deed, or writing, or other thing from the defendant, which doth belong unto him, and whereby he is to make his defence, and is disabled, by the retaining thereof, to plead for his best advantage, the court will upon a motion grant an imparlance to the defendant till the plaintiff do deliver it to him, or bring it into court, and also a convenient time after till he can draw up his plea; for the law gives every defendant convenient time to make his best defence; and in this case, if the plaintiff be delayed, it shall be adjudged his own default.

Hil. 5 G. 2. in *B. R.* Snelgrave v. Morris, Executor of H. Morris, and S. P. so ruled between the Bank of England v. Morris. 2 Stra. 1002. 1028. Ca. temp. Hard.

So where an executrix was sued by special original, it was moved, that being executrix she might imparl till next term, that she might know how to plead with safety; the motion was granted for four days to plead, and afterwards for three more; but the court refused to enlarge it to the following term, because of the inconveniency that might accrue to other creditors; and in doing it thus far obliged the defendant to enter into terms not to acknowledge judgment in the mean time to other creditors that were in equal degree with the plaintiff, nor to do any thing to his prejudice. (a)

165. 2 Barnard. K. B. 185. (a) Now, if defendant obtains, by a judge's order, time to plead, it is customary to insert the like conditions.

Trin. 5 G. 2. in *B. R.* Knight v. Robinson.

So a defendant had time to plead given till the second day of the next term, upon affidavit that four days before the declaration delivered he was and still continued to be so indisposed in mind that he could not make his defence.

5 Mod. 215.

When a person appears upon a recognizance, or in *propria personâ*, or is a prisoner in custody upon any information for a misdemeanor, where no process issued out to call him in, by the course of the court, in these cases, he must plead *instantèr*.

Comb. 3. per Aston.

(b) This must depend on the

Those that come in upon a *habeas corpus* or attachment must plead the same term without imparlance, giving the ordinary rules, which are eight days. (b)

situation of the cause when removed, the time when the *habeas* is returnable, and the person who sues it forth, &c.

A plea in abatement must be pleaded within four days, without special leave from the court, because the person coming in by the process of the court ought not to have time to delay the plaintiff: also such plea by the 4 & 5 Ann. c. 16. being for delay, is not to be received, unless on oath, and probable cause shewn to the court. Comb. 251. *Vide supra*, tit. Abatement (O), 27.

Upon a *respondens ouster* they have usually four days' time to plead; but this is said to be in the discretion of the court. Comb. 19.

By the rule of the court, as many days are allowed for the defendant to plead after oyer given as he had by the rule of the court at the time of oyer demanded. Mich. 4 G. 2. in *B. R.* Andrews v. Dingley.

2 Stra. 877. and Barnard. K. B. 368. S. C.; but S. P. does not appear.

[In *B. R.*, if the plaintiff *amend* his declaration, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*.] R. T. 5 & 6 G. 2. and see R. M. 10 G. 2. Reg. 2.

Defendant had an order by consent from a judge for eight days' time to plead, and at the expiration of the eight days plaintiff signed judgment, without giving a rule to plead; *et per cur.* the judgment is regular; rules are only to give the parties notice when they are expected to plead, here, the defendant's praying time to plead excludes any presumption that the plaintiff has not given him such notice. Mich. 7 G. 2. in *B. R.* Starkie v. Wilkes.

If the defendant do not plead according to the rules of the court, so that the plaintiff may enter judgment upon a *nil dicit*, yet if after the rules are out the defendant put in his plea into the office before the plaintiff hath entered his judgment, this plea is to be accepted, and the plaintiff ought not then to enter his judgment; and if he do, the judgment may be set aside for irregularity. 2 Lil. Reg. 298, 299.

[In *B. R.*, where the defendant has appeared, or filed bail, upon any kind of process, returnable the *first* or *second* return of any term; if the plaintiff declare in *London* or *Middlesex*, and the defendant live within twenty miles of *London*, the declaration should be delivered or filed *absolutely*, with notice to plead within *four* days; or, in case the plaintiff declare in any other county, or the defendant live above twenty miles from *London*, within *eight* days *exclusive* after the delivery or filing thereof; and the defendant must plead accordingly without any imparlance. R. T. 5 & 6 G. 2.

Where the defendant has not appeared, or filed bail, the rule in *B. R.* is, that "upon all process returnable before the *last* " return of any term, where no affidavit is made and filed of the " cause of action, the plaintiff may file or deliver the declaration " *de bene esse* at the return of such process, with notice to plead " in *eight* days exclusive after the filing or delivery thereof; " and if the defendant do not file common bail, and plead within " the said *eight* days, the plaintiff, having filed common bail for " him, may sign judgment for want of a plea." But, if the declaration be not filed until *after* the return of the process, the defendant has *eight* days to plead from the time of filing it, whenever it may be. And "upon all process, where an affidavit " is R. T. 22 G. 3. 1 Burr. 56. Delatre v. Mango, Mich. 20 G. 3. Tidd's Prac. (7th ed.) 476, 477.

“ is made and filed of the cause of action, the declaration may
 “ be filed or delivered *de bene esse* at the return of such process,
 “ with notice to plead in *four* days after the filing or delivery, if
 “ the action be laid in *London* or *Middlesex*, and the defendant
 “ live within *twenty* miles of *London*, and in eight days, if the
 “ action be laid in any other county, or the defendant live above
 “ twenty miles from *London*; and if the defendant put in bail,
 “ and do not plead within such times as are respectively before
 “ mentioned, judgment may be signed.” But in all the fore-
 “ going cases the declaration should be delivered or filed, and
 notice thereof given *four* days *exclusive* before the end of the
 term, a rule to plead duly entered, and a plea demanded, when
 necessary.

Tidd's Prac.
 (7th ed.) 478.

When the process is returnable the *last* return of the term, or where it is returnable before, but the declaration is not delivered or filed, and notice thereof given, *four* days *exclusive* before the end of the term, the defendant is entitled to an imparlance, and must plead within the first *four* days of the next term, provided the declaration be delivered or filed, and notice thereof given before the *essoin* day of that term, otherwise the defendant will be allowed to imparl to a subsequent term.

R. T.
 5 & 6 G. 2.
 2 Burr. 660.
 Dougl. 71.
 2 Black. R.
 2 Stra. 1164.
 1 Stra. 211.
contr. 2 Term
 R. 40.

If four terms have elapsed since the delivery or filing of the declaration, the defendant shall have a whole term's notice to plead before judgment can be entered against him, unless the cause have been stayed by injunction or privilege; and the notice in such case must be given before the *essoin*-day of the term: but it does not extend beyond the term; and therefore a rule to plead may be entered, and judgment signed, in the vacation.

6 Term R. 594.
 In all criminal
 prosecutions
 for misde-
 meanors two
 four-day rules

After a defendant in a *quo warranto* information has appeared, the prosecutor must give two four-day rules to plead, and after the expiration of the last, must also move in term time for a peremptory rule to plead, otherwise the defendant has until the next term to plead.

are given to plead, and a peremptory rule moved for; and then, if there be a demurrer, one four day-rule to join in demurrer, and a peremptory rule moved for. *Ibid.* Rex v. Sayer.

R. T. 35. G. 3.

The time allowed persons in confinement charged with offences against the excise laws, is, in case such persons are confined in any gaol within the distance of *forty* miles from *London* *six* days; if above *forty* miles, *eight* days, after the delivery of the copy of the indictment or information to such persons, or to the gaoler, keeper, or turnkey of the gaol, with a notice thereon indorsed.

Rusholm v.
 Chapman,
 5 Term R. 473.
 Thomas v.
 Prichard, 4 Term R. 664.

A prisoner need not give notice of a plea, unless he files it before the time when by the rules of the court he is compellable to plead.

Dyche v.
 Burgoyne,
 1 Term R. 454.
 Bowles v.
 Edwards,
 4 Term R. 118.

A plaintiff must make a demand of a plea before he signs judgment, and he cannot sign judgment until the expiration of twenty-four hours after the demand has been made. But the demand may be made at the time of delivering the declaration.

Churchwardens of Edmonton v. Osborne, 6 Term R. 689.

Time to plead under a judge's order, is reckoned *inclusive* of the day of the date of the order, but *exclusive* of the day on which it expires. Kaye v. Whitehead, 2 H. Black. 35.

If a rule to plead expire on a *dies non juridicus*, supposing such day not to be *Sunday*, the defendant is bound to plead on or before that day; and if he do not, judgment may be signed on the next day; for the offices are open on all the other *dies non juridici*, but *Sunday*.] Measure v. Britten, 2 H. Black. 616.

Every special plea must have counsel's hand, otherwise it will be rejected, and the plaintiff may sign judgment; but if there be two defendants, and one plead a general issue, and the other specially, and both are on the same paper; though the special plea is not signed, the plaintiff cannot reject the general issue, and take judgment against both; for, if he do, the judgment is totally erroneous, and if execution be sued, restitution shall be awarded: but the plaintiff may regularly take judgment against him who pleaded specially. 2 Lil. Reg. 299. ||Tidd's Prac. (7th ed.) 699.||

A foreign plea must be engrossed in parchment, and signed by counsel, and put in upon the oath (*a*) of the defendant, that is, he must swear that his plea is true, or such a plea is not to be received; because thereby he endeavours to oust the court of its jurisdiction. Lil. Reg. 299. Stile, 573. 345.; et vide Hetl. 126. (a) If one will not swear a foreign plea, where he ought to do it, the plaintiff may enter judgment upon a *nihil dicit*. Stile, 225.

Error was assigned, that the defendant in the writ of error was dead before the first judgment given, and it appearing by affidavits that he was alive, and that it was a trick merely for delay, the court determined to overrule the plea, unless the plaintiff would swear that it was true. Sid. 172. Keb. 477. 479. 658. 823.

(P) Continuance and Discontinuance in Pleading.

AT common law no plea could be determined but in the presence of the parties, unless default was made by one of the parties, and not excused; and therefore by the statute *Westm.* c. 28. to save delays at the *nisi prius*, they ordered that the inquest should be taken, though the defendant made default, and did not appear. Hence it became necessary, after issue joined, that there should be continuances from time to time till the verdict was taken, as before issue joined, a continuance was given the defendant from term to term until his plea was put in; and if these continuances were not entered from term to term, the defendant was without delay in court; and wherever he was so, there was an end of the proceedings in that writ; for he had fulfilled the command of that writ in appearing, and the court might give judgment against him if he did not plead; and if the court neither gave him leave to plead, nor gave judgment against him for want of a plea, he having fulfilled the writ, the matter was at an end; so, if he had pleaded, and the court had not given a day to the parties to prove their allegations, there likewise, the defendant having appeared, the writ was complied with, and the matter at an end, Bro. Discontinuance, (1) (2). 6 Mod. 283. Roll. Abr. 487, 488. Cro. Jac. 528. Cro. Car. 236.

unless the court gave further time to verify the allegations; and therefore in such cases there must be continuances till the verdict.

Roll. Abr. 484.
5 Bulst. 255.
Stile, 359.
Vide 1 Bulst.
144. S. P.
cont. but is
not law.

So, upon a demurrer, or after a verdict given, if the court give time to consider of their judgment, they must give day to the parties, because they can determine nothing in the absence of the parties, and the command of the writ being complied with by the defendant's appearance, and the effect of the writ answered, it is at an end; and the court can give time only from one term to another; for if they could give day to a second term, they might give it to a 5th, 20th, or 100th, and they would have power to delay *ad infinitum*.

Roll. Abr. 483.
Stile, 359.
Friend v.
Baker, ad-
judged.

If a man declares in an action upon the statute of monopolies, as the king's patentee of soap, and after the defendant in *Easter* term pleads, that the king did not make any such letters patent, and issue is joined thereupon, and day given to the plaintiff till *Mich.* term, but there is no continuance between *Easter* and *Trinity* term, it is a discontinuance; for though the court might give day to bring in the letters patent in *Mich.* term, omitting *Trinity* term, yet there ought to be a continuance between *Easter* and *Trinity* term by a *curia advisare vult* till *Trinity* term, or otherwise it is a discontinuance.

Roll. Abr. 486.
Lane, 81. 86.
89. Sir Hugh
Brown's case.
(a) If the issue
is found
against the de-
fendant, it is
not material
whether he
had a day in
banco or not;
because he hath nothing further to do but to discharge himself. Palm. 355.
Cro. Car. 236., et vide Cro. Jac. 528.

In ejectment, if the defendant at the day of *nisi prius* at the assizes pleads that the plaintiff entered into parcel of the land pending the writ, and the justices of *nisi prius* accept the plea, and dismiss the jury, though they do not give any day to the parties, in *banco*, yet this is not any discontinuance, although the plea is collateral; for the day of *nisi prius* and the day in bank are but one day, for the court in *banco* gave day to the jurors in *banco nisi prius iusticiarum ad assisas venerint*, and to the parties (a) day is given there absolutely.

Roll. Abr. 485.
Pipe v. Agar,
Roll. R. 408.*
S. C. But
5 Bulst. 208.
S. C. it is held
by the clerks,
that there is

If a man recovers upon demurrer, or by default, &c. and a writ of inquiry of damages is awarded, there ought to be discontinuances from term to term between the first and second judgment, otherwise it will be a discontinuance; for the first is but an award, and not complete till the second judgment upon the return of the writ of enquiry of damages.

no necessity to have the continuance entered after the writ of enquiry awarded; and *per Coke* it is good either way. — If a judgment be given in trespass, or other such action, by default or upon demurrer, and a writ of enquiry of damages awarded, returnable the next term, no continuance *per idem dies* shall be given to the defendant, because he is out of court by his own default; said to be the constant course of the Court of King's Bench. Roll. Abr. 486. But for this vide 11 Co. 6. b. Cro. Eliz. 75. 144. 774. Roll. R. 32. Godb. 195. Sid. 16.

Roll. Abr. 486.
Thornton v.
Wade, ad-
judged.
(b) That the
process in an
inferior court must be returned at a day certain, and ought to be to the court as well as to the day. Vide Cro. Eliz. 105. Cro. Jac. 514. Stile, 58. 66. 70. 122. Cro. Car. 254. 2 Bulst. 36.
Mod.

In an action of debt in an (b) inferior court, if the defendant acknowledges the action at one court, and no judgment is entered at this court, but at the next court judgment is given for the plaintiff; if there be no continuance between the said courts, this is a discontinuance.

Mod. 81. 2 Mod. 59. — But if a continuance be made in an inferior court *ad proximam curiam ibidem tenendam*, without alleging any day to which it is adjourned, yet, if the court be to be held by custom, not at any certain day, as every week, or *de tribus in tres*, &c. but *die lunæ*, when the judges thereof please, this is a good continuance. Cro. Car. 254. — In a pie-powder court the adjournment was entered *idem dies datus est*, where it should have been *eadem hora*, yet adjudged good. Moor, 459. pl. 637.

If in an action upon the case in an inferior court the defendant is essoigned, and hath a day *per essoigne*, and the plaintiff *habet eundem diem*, at which day the defendant being demanded appears not, but makes default, *et habet diem per defaultam secundum consuetudinem villæ* given by the court, &c. this is a discontinuance; for when the defendant made default he was out of court, and so no day (a) could be given to him; and the custom alleged cannot help that which is against the common law.

If, in a *quo warranto* against a corporation for using a fair and market, and taking toll, &c. issue is taken whether they have toll by prescription or not, and it is found for the defendants, the Attorney-General may yet proceed to take issue upon the rest, for in the case of the king there is no discontinuance before judgment.

cause he is always present in court. Roll. Abr. 486, 487.

In an action after issue joined, and a verdict for the plaintiff, the plaintiff cannot discontinue the action without the consent of the defendant; and if he will not enter the judgment, the defendant himself may enter it.

Mod. 13. — Where there has been a discontinuance after a special verdict. Latch. 216. Hetl. 3. Cro. Car. 575. Salk. 178. — Where by the course of the court the plaintiff may discontinue without motion, paying costs. Stile, 366. Leon. 105. — Where after a demurrer by leave of the court. Cro. Jac. 517. Cro. Car. 195. March, 24. Stile, 120. 134. 306. 309, 310. 382. Allen, 20. Sand. 23. 2 Sand. 74. Sid. 84. 306. Lev. 227. 298. 2 Lev. 118. 124. Mod. 41. Bulst. 217.

If a man vouches for parcel, and as to the rest makes no answer, and the demandant does not take advantage thereof by prayer of seisin, but suffers the process to be continued against the vouchee in right of the parcel, all is discontinued.

If the tenant vouches for all the demand, and the process upon the voucher is made for less than it is, all is discontinued.

In an action for trespass a discontinuance in parcel is a discontinuance in the whole.

In trespass for several things the defendant pleads a plea in bar for part, and does not answer to the rest, and the plaintiff demurs generally, the plaintiff shall not have judgment against the defendant; for the demurrer was by intendment upon the bar, and not for want of pleading to the residue; for he ought to have prayed judgment upon *nil dicit* for it, so all is discontinued.

vide Brownl. 228. Carter, 51. 2 Mod. 259. Yelv. 65. Sid. 225.

If a plea begins with an answer to the whole, but in truth the matter pleaded is only an answer to part, the whole plea is nought, and the plaintiff may demur; but if a plea begin only as an answer to part, and is in truth but an answer to part, it is a

Cro. Jac. 357.

Peplow v.

Rowley.

(a) For this

vide Cro. Car.

541. Jon. 531.

Yelv. 155.

Stile, 528, 529.

Hard. 504.

Attorney-Gen-

eral v. Town

of Farnham.

That when the

king is party

no day is given

to him, be-

Roll. Abr. 486, 487.

Roll. Abr. 487.

— But for

this *vide* Stile,

346. Sid. 60.

Lev. 48.

Latch. 216.

Where by the course of the court the plaintiff may

discontinue without motion, paying costs. Stile, 366.

Leon. 105. — Where after a demurrer

by leave of the court. Cro. Jac. 517. Cro. Car. 195.

March, 24. Stile, 120. 134. 306. 309,

310. 382. Allen, 20. Sand. 23. 2 Sand. 74.

Sid. 84. 306. Lev. 227. 298. 2 Lev. 118. 124.

Mod. 41. Bulst. 217.

18 E. 5. 40.

Roll. Abr. 487.

18 E. 5. 40.

Roll. Abr. 487.

7 H. 6. 27.

Roll. Abr. 487.

4 Co. 62. Roll.

Rep. 155. 176.

2 Bulst. 325.

— But

where for want

of answering

to part all is

discontinued,

65. Sid. 225.

Salk. 179. pl. 6.

Ld. Raym.

679; *et vide*

Salk. 180.

pl. 9. S. P.

1 Stra. 502.
S. P.

discontinuance, and the plaintiff must not demur, but take his judgment for that as by *nil dicit*; for if he demurs or pleads over, the whole action is discontinued.

Salk. 177. pl. 1.
Bisse v.
Harcourt,
Ld. Raym. 558.

In *indebitatus assumpsit* the defendant pleaded an attainder of high treason in disability; the plaintiff replied a pardon, *prout per exemplification. inde*, &c., (which was held good,) *et petit judicium et damna sua*; to which it was demurred; and held, that there was a discontinuance by the misconception of the replication, for an ill prayer of judgment is as none.

Roll. Abr. 485.

(a) A discontinuance can never be objected *pendente placito*, for

before judgment it may be continued at the pleasure of the court, though not after judgment in another term. Cro. Jac. 211. — But at what time continuances may be entered, *vide* Savil. 54. Lit. R. 4. Cro. Car. 236.

Salk. 179. pl. 7.
Curtius v.
Padley, Ld.
Raym. 872.

In debt, the declaration was of *Michaelmas* term, and the plea roll of *Easter*, and no continuance entered, and this upon demurrer was shewed to the court as a discontinuance; but they said the practice is never to enter continuances till the plea roll be entered up, though the declaration be of four or five terms standing.

Roll. Abr. 487.
Like point in
Godb. 219.
Cro. Jac. 55.
516, 517.

If the plaintiff be nonsuit, by which the defendant is to recover costs, if the plaintiff will not enter his continuances, on purpose to save the costs, the defendant shall be suffered to enter them, and so recover his costs.

Yelv. 5, 6.
Brownl. 192.
S. C. Johnson
v. Turner,
adjudged.

If in trespass for breaking his house, and taking and carrying away his goods, the defendant justifies the whole, and the plaintiff *quoad fractionem domus*, and the taking the goods, *nec non materiam in ea contentam*, demurs upon the defendant's bar, and the defendant joins in demurrer in this manner, *quia placit. predict. quoad fractionem domus*, and the taking the goods *sufficiens*, &c., and thereupon judgment is given, here is a discontinuance; for in the offer of the demurrer *ex parte querentis* nothing is alleged specially, but only *quoad* breaking of the house, and taking the goods; and though the subsequent words *nec non materiam in ea contentam* go to all the matter in bar, *viz.* the asportation; yet, when the defendant joins in demurrer, he joins but specially, *quoad* the breaking the house, and taking the goods, but says nothing as to carrying them away.

Yelv. 117.
St. John v.
Comyn, ad-
judged, and
the judgment
upon a writ of
error in *B. R.*
in *Ireland* re-
versed upon
a writ of error
here accord-
ingly; *et vide* Yelv. 138.

If upon a writ of error upon a judgment in ejectment the plaintiff assigns for error the want of an original, and the defendant pleads, that such a day an original was delivered to, &c., and concludes to the country, and thereupon the judgment is reversed; here is a discontinuance; for when the defendant concludes to the country where the matter of his plea, *viz.* the delivery of the original, was triable by record, and the plaintiff does not reply or demur upon defendant's plea, here is not any perfect record.

In an action of trespass against *A., B., and C.*, *A.* confessed judgment, and *B.* and *C.* pleaded severally not guilty, and several *venires* were awarded to try these issues, &c., but no day given to *A.*, and it was resolved upon a writ of error upon a judgment *in banco*, that it was according to the course of the court, and that if it was a discontinuance it was helped by the verdict against *B.* and *C.* (a)

plaintiff or defendant; in the construction of which it hath been held, that if as to part the defendant joins issue, but says nothing as to the rest, and this issue is found for the plaintiff, he shall have judgment. 11 Co. 6. b. 2 Leon. 194. Godb. 55. Roll. R. 161. Cro. Jac. 353. Hob. 187. Golsb. 109. Bulst. 25. Carter, 51. 3 Lev. 39. Salk. 179. pl. 8. 180. pl. 9. 2 Ld. Raym. 856. 1121. 7 Mod. 24. But, if the matter is pleaded to the whole, though in fact but an answer to part, this is a bad plea, and not helped by the statute. Hard. 351.—That discontinuances, as well on the part of the plaintiff as defendant, are aided. Cro. Eliz. 489. Cro. Jac. 528.—That discontinuances, in inferior courts as well as superior, are aided, being within this act. Salk. 177. pl. 2.* ¶ *Vide* Tidd's Prac. (7th ed.) 706, 707, 708.]]

¶ It

* CONTINUANCE OF SUIT OR PROCESS.

When necessary.—Defendant in custody on *capias ad satisfaciendum* was discharged on a written agreement; above a year after new *capias ad satisfaciendum* issues without continuance on the roll; it shall be set aside. Barnes, 205.—On *nil tiel record*, plaintiff may continue the day for bringing in the record. Barnes, 84.—*When not*—Continuance need not be entered on the record of *nisi prius*; therefore, if after issue joined, and before day of *nisi prius*, one of defendants dies, suggestion of it, and *venire facias* between plaintiff and surviving defendant, *et jurata* at the foot, agreeable thereto, is good. Barnes, 469.—*How it shall be entered.*—When the trial is deferred, if the *venire facias* is returned and filed, the proper entry is, that the jury *ponitur in respect*; if it be not filed, enter a *non misit breve*; either way will prevent a discontinuance. Rex v. Hare and Man, Stra. 266.—If proper continuances are entered on the plea roll, the want of them on the *nisi prius* roll is not material. French v. Wiltshire, And. 67.—If to declaration of *Trinity*, there is imparlance to *Michaelmas* term, and defendant procures judge's order for time to plead till the 15th of *December*, the imparlance shall be continued to *quinden. Mart.* Barnes, 161.—*At what time.*—If bill is of *Easter*, and in *Trinity* defendant pleads, and issue joined, and paper-book delivered without continuance from *Easter* to *Trinity*, it shall not be set aside; for it may be entered at any time on the roll. Wilkes v. Wood, 2 Wils. 203.

DISCONTINUANCE.

What shall be.—It is not a discontinuance, though no day is given to the tenants in dower to appear on the return of the writ of enquiry; or it is aided by statute 4 & 5 Ann. c. 16. Dobson v. Dobson, Ca. B. R. temp. Hardw. 19.—*When it shall be by leave of the Court.*—After demurrer argued and allowed on payment of costs. Butler v. Malissy, 1 Stra. 76. Henderson v. Williamson, Mich. 5 G. Stra. 116.—The court may grant it after special verdict argued, but will not do it in a hard action. Boucher v. Dawson, Ca. B. R. temp. Hardw. 194.—The court will not permit an executor to discontinue in any case where he has knowingly brought his action wrong, but on payment of costs. Harris v. Jones, 3 Burr. 1451.—After judgment on demurrer for plaintiff, and error brought, plaintiff may discontinue on costs in action and error. Barnes, 169.—Plaintiff may discontinue, though defendant has been arrested a second time before discontinuance. Barnes, 169.—After judgment on demurrer in replevin for avowant, plaintiff cannot discontinue. Barnes, 169.—Rules should be drawn up, "*have leave, or be at liberty,*" to discontinue, not "*shall discontinue.*" Barnes, 170.—Whether discontinuance may be entered without leave? Q. Barnes, 170.—Also, Whether plaintiff in replevin can discontinue? Q. Barnes, 171. [The avowant cannot though an actor. 1 Stra. 112.]—Plaintiff cannot move to discontinue after defendant has moved for judgment, as in case of a nonsuit. Barnes, 316. Plaintiff may enter *nil capiat per breve* on a plea in abatement without leave, but not in other cases. Barnes, 257.—*When it shall be aided.*—If after judgment by default on a bill against an attorney in C. B. where the proceedings are on a day certain, the writ of inquiry is returnable at a general return, it is a miscontinuance, and aided by the statutes. Launder v. Cripps, Stra. 947.—The statute

|| It is a rule that every pleading must be an answer to the whole of what is adversely alleged. Therefore in an action of trespass for breaking a close, and cutting down 300 trees if the defendant pleads as to cutting down all but 200 trees some matter of justification or title, and as to the 200 trees says nothing, the plaintiff is entitled to sign judgment, as by *nil dicit* against him in respect of the 200 trees, and to demur or reply to the plea as to the remainder of the trespasses. On the other hand, if he demurs or replies to the plea without signing judgment for the part not answered, the whole action is said to be discontinued. (a) For the plea, if taken by the plaintiff as an answer to the whole action, it being in fact a partial answer only, is, in contemplation of law, a mere nullity; and there is consequently an interruption or chasm in the pleading, which is called, in technical phrase, a discontinuance. And such discontinuance will amount to error on the record (b). It is to be observed, however, that as to the plaintiff's course of proceeding, there is a distinction between a case like this, where the defendant does not profess to answer the whole, and a case where by the commencement of the plea, he professes to do so, but in fact gives a defective and partial answer, applying to part only. The latter case amounts merely to insufficient pleading; and the plaintiff's course therefore is not to sign judgment for the part defectively answered, but to demur to the whole plea. (c) It is also to be observed, that where part of the pleading, to which no answer is given is immaterial, or such as requires no separate or specific answer — for example, if it be matter of aggravation — the rule does not in that case apply. (d)||

(a) Com. Dig. Pleader (E) 1. 1 Saund. 28. n. (3.)
4 Rep. 62. a.
(b) Cro. Jac. 555. Such error is cured however after verdict, by the statute of jeofails, 52 H. 8. c. 50. and after judgment by *nil dicit*, confession, or *non sum in-formatus*, by 4 Ann. c. 16.
(c) 1 Saund. 28. n. (5).
(d) Stephen on Plead. 235.

(Q) Pleas *Puis darrein continuance*.

Doct. pl. 297.
Salk. 178. pl. 5.
Ld. Rayni. 695.
|| See Stephen on Plead. 81. 598.||

THE defendant can regularly have but one plea, on which, if there be an issue or demurrer, the cause is to be determined, because there can be but one verdict in a cause: but if any new matter happens pending the writ, he may plead it after a former plea pleaded, provided he plead it before the next continuance after such new matter has happened, which is called a plea *puis darrein continuance*, because such matter being new it was not in his power to plead it when his former plea was pleaded; and it would be hard, because he had pleaded, to preclude him from an advantage which he had not at the time of pleading, since there was no laches in him; but this he cannot plead after a continuance, because having suffered the former plea to continue, he rests upon it, and waives the benefit of any new matter.

Moor, 871. pl. 1210. Stonner

In debt against an administrator, after demurrer joined, the administration was repealed, and granted to another, for which

52 H. 8. c. 50. extends to discontinuances made *after* verdict; as, if the original process is returnable at a common return, and the *scire facias* in error is returnable at a day certain, this discontinuance is aided by the statute. *Bern v. Bern*, Mich. 8 G. 2. Ca. B. R. temp. Hardw. 72. || *Vide* Tidd's Prac. 7th edit. 706, 707, 708.||

the defendant would have pleaded this matter, *puis darrein continuance*; but it was resolved not to be pleadable after demurrer, though it might after an issue joined.

¶ And in debt by an administrator it may be pleaded, that the plaintiff's letters of administration have been revoked *puis darrein continuance*.

So also that the plaintiff has become bankrupt, or is outlawed, or excommunicated, or that the defendant has become bankrupt and has obtained his certificate.

So an executor defendant may plead a judgment recovered against him as executor since the last continuance, and it is no answer to such a plea that the judgment was obtained by confession of defendant.¶

So, if a release be given after the day of *nisi prius*, and before the day in bank, he cannot plead it, because there is a verdict already in the cause, and upon another plea; and therefore the cause is determined, so that he is put to his *audita querela* to hinder the execution of the judgment.

But there are two cases where a man may plead, though it be not after the last continuance, *viz.* outlawry, and the death of the plaintiff: as to outlawry, it is upon the prerogative that the debt itself is forfeited to the king, and by virtue of the prerogative *nullum tempus occurrit regi*, and therefore he may plead it though a continuance has happened after the outlawry: so he may plead the death of the plaintiff, because, though a continuance has been entered, yet the continuance is a nullity, because there was no plaintiff in being to whom day could be given: so, it may be pleaded if the plaintiff died after the day at *nisi prius* (a), and before the day in bank; and the reason is, that there is no cause in court, for no judgment can be given for a person who is not *in rerum natura*, and if it be given it is erroneous; and if the plaintiff's attorney will traverse the plea, he cannot say the plaintiff comes *per attorn.*, because that would be to forejudge the matter in issue; but the attorney by his name, *viz.* J. S., *venit pro magistro suo et dicit*, may appear, and so traverse it.

But a release may, it seems, be pleaded, though there have been imparlances between, because there is no continuance of a former plea pleaded; and by the *libertas loquendi* the defendant has time given to plead what makes most for his advantage.

But if the writ be only abateable, as if the plaintiff be made a knight (b), or if the plaintiff being feme sole takes a husband, this must be pleaded after the last continuance, otherwise he depends on his first plea, and waives the benefit of his new matter: but it cannot be pleaded between the day at *nisi prius* and the day in bank, because there has been a trial in the same cause before.

But if the lessor of the plaintiff dies, this cannot be pleaded *puis darrein continuance*, because the right is supposed in the lessee: ¶ and a release by the lessor of the plaintiff cannot be pleaded *puis darrein continuance*.¶

The pleas of this kind are twofold, *viz.* in abatement and in bar;

v. Gibbons, 1 Stra. 493. S.P.; but see Hob. 81. *contra*. Bull. N.P. 309.

15 East, 622. 6 East, 413. Tidd's Prac. 878. (7th ed.)

5 Taunt. 333. 1 Marsh. 70.

21 H. 6. 10. Bro. Cont. 27.

2 Lutw. 1143. 1174.

21 H. 6. 10.

Doct. pl. 297.

Lev. 80. Sid.

93. 133. 143.

185. 2 Lutw.

1143. 1174.

5 Mod. 12.

(a) Death of a party between verdict and judgment not to be error, provided judgment be entered within two terms. 17 Car. 2. c. 8.

15 E. 4. 4.

2 H. 6. 13.

Sid. 143.

(b) Certain suits not to be abated for acceptance of knighthood. 4 H. 6. c. 4.

Hob. 5.

¶ 4 Maul. & S. 300.¶

15 E. 4. 149.

Allen, 66.
2 Lutw. 1143.

bar; if any thing happens pending the writ to abate it, this may be pleaded *puis darrein continuance* though there is a plea in bar, for this can only waive all pleas in abatement that were in being at the time of the bar pleaded, but not any subsequent matter: but, though it be pleaded in abatement, yet after a bar is pleaded, is is peremptory, as well on demurrer as on trial, because, after a bar pleaded he has answered in chief, and therefore can never have judgment to answer over: so, it may be pleaded in bar: but, as to the manner of its being pleaded in bar or abatement, herein it is to be observed, that in the first case it must be pleaded *quod breve cassetur*, and in the other *quod actionem ulterius manutenere non debet*, and not that the former inquest should not be taken, because it is a substantive bar in itself, and comes in the place of the former, and therefore must be pleaded to the action.

Bro. Continuance, 40.
Fitz. Continuance, 5.

There can be but one plea *puis darrein continuance*, that the plaintiff may not be delayed *ad infinitum*, for, if he made a second change he might make a third, and so *in infinitum*: but some have held, that he might plead an outlawry after the last continuance, because *nullum tempus occurrit regi*, but *quare* whether the subject shall after plea *puis darrein continuance* partake of the prerogative, or whether it shall be presumed, after such trifling, that it is frivolous and untrue, and therefore to be rejected.

Bro. Continuance, 1.
26 H. 8. 2.

If a matter happens after plea pleaded, and before issue joined, it shall be pleaded to be done pending the writ; but if it happen after issue joined, it shall be pleaded *post ultimam continuationem*.

Bro. Continuance, 30.
22 H. 6. 1.

If the plaintiff release to the defendant after the award of the *nisi prius*, and at the day of *nisi prius* the jury remain *propter defectum*, the defendant may plead it the day in bank; because the cause was not determined by the jury, and therefore he is at liberty to plead it at any other day of continuance; and it may be tried by the jury, when they appear.

(a) By this statute the death of one plaintiff or defendant, where there is another surviving, shall not abate the suit.

If the plaintiff, after a writ of enquiry awarded, release to the defendant, he cannot plead this release at the day in bank; because there is no day given him, and judgment is already: but, if the plaintiff dies, such death may be pleaded; because there is no person in court for whom judgment can be given: but now by the 8 W. 3. c. 11. the executors, &c. may have a *scire fac.* on such an interlocutory judgment. (a)

Hickey v. Burt, 7 Taunt. 48.; *et vide* 1 Chitty R. 390. 4 Barn. & A. 249. 419. 7 Taunt. 421. 4 Moo. 192. 7 Moo. 617.

¶ Where a release has been given under circumstances of fraud, the courts will, in some cases, not suffer it to be pleaded. As where a landlord, with permission of his bailiff, who had made a distress for rent, commenced an action in the bailiff's name against the sheriff, for taking insufficient pledges, and the bailiff, without the landlord's privity, released to the sheriff, who pleaded it *puis darrein continuance*, the Court of Common Pleas set aside the plea, and ordered the release to be delivered up to be cancelled.¶

Doct. pl 297.
Allen, 66.
2 Lutw. 1143.

Time and place must be laid in this as in other pleas, and it must have the same certainty with other pleas.

It

It is no good plea to say *puis darrein continuance* such a thing happened, but it ought to be precise in the day. 5 Mod. 12. Yelv. 141.

One may plead *puis darrein continuance*, that the plaintiff brought a second action for the same cause, and recovered, though he might have pleaded the former in abatement to the second. Comb. 357.

Plea *puis darrein continuance* put in at the assizes must be certified as part of the record, and cannot be then tried. 2 Mod. 307.

If after a plea in bar the defendant pleads a plea *puis darrein continuance*, this is a waiver of his bar, and no advantage shall be taken of any thing in the bar. (a) Salk. 178. pl. 5. Ld. Raym. 693. Barber v. Palmer; et

vide Hob. 81. — (a) A plea *puis darrein continuance* must be verified, or it will be set aside. Martin v. Wyvill, Stra. 492. ||See 5 Taunt. 333.|| — If on an imparlance to next term, plaintiff gives a release to defendant in the mean time, he may plead the release in bar as an original plea, as it is before issue; but if after issue joined, it must be pleaded *puis darrein continuance*. Price v. Kenrick, Fort. 358. — It cannot be rejected by the court if it be verified by affidavit; and they cannot determine whether it is a good plea or not, but on demurrer. Paris v. Salkeld, 2 Wils. 157. ||5 Taunt. 337.||

[It seems dangerous to plead any matter *puis darrein continuance*, unless you be well advised, because if that matter be determined against you, it is a confession of the matter in issue, and no *nisi prius* shall be granted. And the plea put in cannot be amended after the assizes are over: but it may during the assizes be amended before the judge of *nisi prius*. Cro. Eliz. 49. Yelv. 181. Freem. 252.]

It is in the breast of the judge at *nisi prius* whether he will accept of such plea or not, *i. e.* whether he will or will not proceed in the trial, therefore the party ought to make it appear to the judge that it is a true plea; yet the plaintiff is not to reply to this plea at the assizes, for the judge has no power to accept of such replication, nor to try it, but only to return the plea as parcel of the record of *nisi prius*; and if the plaintiff demur, it cannot be argued there. *Ibid.* 2 Mod. 307. It appears that the judge is bound to receive this plea, if verified by affidavit. 3 Term R. 554.

2 Wils. 137. ||5 Taunt. 337. 1 Marsh. 70. acc. In order to prevent vexatious delay, the court will order a demurrer to such plea to stand for the first paper day in term. 1 Stark. 62.||

A plea *puis darrein continuance* may be pleaded after the jury are gone from the bar, but not after they have given their verdict. Pearson v. Perkins, Hil. 3 G. 1. Bull. N. P. 310.

There are some pleas which may be pleaded at *nisi prius* that cannot properly be termed pleas *puis darrein continuance*, because the matter pleaded need not to be expressly mentioned to have happened after the last continuance. Thel. Dig. 204.

As in trespass, after issue joined, the defendant may plead that the plaintiff was outlawed of felony, without saying after the last continuance. So he may in like manner plead that the plaintiff was covert the day of the writ purchased, though he cannot plead that the plaintiff took baron pending the writ, without pleading it after the last continuance. — The diversity seems to be between such things as disprove the writ in fact, and such as disprove it in law. Bro. Continuance, 57.

The last continuance where such plea is pleaded at the assizes, is

is the day of the return of the *venire facias*, from whence the plea is continued by the award of the *distringas* or *habeas corpus* till the next term *nisi prius*, &c.]

5 Taunt. 533.
1 Marsh. 70.
S.C.; and see
5 Barn. & A.
853.

¶ If any matters pleadable *puis darrein continuance* happen after plea, and before the return of the *venire facias*, they must be pleaded in bank. — But matters arising after the return of the *venire facias*, may be pleaded either in bank or at *nisi prius*.

3 Barn. & C.
612. 317.

Where a continuance was entered from *Trinity* to the first day of *Michaelmas* Term, and matter arising in the interval was pleaded after the first day of *Michaelmas* Term *puis darrein continuance*, the court ordered the plea to be taken off the file. ¶

Salk. 519.

[If the matter of the plea arise by deed, it ought to be pleaded with a *profert*.

The form of the plea, if at the assizes, is as follows: — “ And now at this day, that is to say, &c. comes the said C. D. by R. H. his counsel, and says, that the said A. B. ought not further to maintain his action against him the said C. D., because he says that after the day of last past, from which day until the day of in *Michaelmas* Term next, (unless the justices of our lord the king, assigned to hold the assizes of our lord the king in and for the county of C., should first come on the day of at B. in the said county of C.) the action aforesaid is continued, to wit, on &c. at, &c. the said A. B. by his deed dated, &c. did release.” — And to shew the particular matter, and conclude, “ And this he is ready to verify, wherefore he prays judgment if the said A. B. ought further to maintain this action against him,” &c.

Freem. 252.

Where a plea is certified on the back of the *postea*, and the plaintiff demurs, if the defendant on the expiration of a rule given for him to join in demurrer, refuses to do so, the plaintiff may sign judgment.]

PRÆMUNIRE.

(A) What Offences come under the Notion of a Præmunire.

(B) Of the Punishment therein.

(A) What Offences come under the Notion of a Præmunire.

Hawk. P. C.
c. 19. (a) So
called from
the word in
the writ, which

THE offences coming under the notion of a *præmunire* (a), or for which the party incurs a *præmunire*, are reduced by Serjeant *Hawkins* to the following particulars:

is used for *præmonere*. Co. Lit. 129. 5 Inst. 120.

1. The

1. The offence of making use of papal bulls is made a *præmunire* by many ancient as well as later statutes, to which purpose it is enacted by 25 E. 3. st. 6. § 4. called the statute of provisors, "That whoever shall, by a papal provision, disturb any patron to present to a benefice, &c. shall be fined and imprisoned till he make full renunciation. And it is further enacted by 25 E. 3. st. 5. c. 22. that if any one purchase a provision of an abbey or priory, he shall be out of the king's protection; and by 38 E. 3. st. 2. c. 1. and 12 Ric. 2. c. 15. and 13 Ric. 2. st. 2. c. 2., that whoever shall accept a benefice, contrary to 25 E. 3. st. 5. shall be banished; and by 13 Ric. 2. st. 2. c. 3. that whoever shall bring a sentence of excommunication against any person for executing the said statute of 25 E. 3. st. 5. shall suffer pain of life and member; and by 16 Ric. 2. c. 5. that whoever shall purchase or pursue, or cause to be purchased or pursued, in the court of *Rome* or elsewhere, any translations, processes, sentences of excommunication, bulls, instruments, or other things contrary to the tenor of that statute, which touch the king, against him, his crown, his regality, or his realm, or bring them within this realm, or receive them, &c. shall be out of the king's protection; and their lands and tenements, goods and chattels, forfeited to the king, and they shall be attached by their bodies; and by 2 H. 4. c. 3. that whoever shall purchase from *Rome* a provision of exemption from ordinary obedience; and by 2 H. 4. c. 4. that whoever shall put in execution bulls purchased by those of the order of *Cîteaux*, to be discharged of tithes, shall incur the like penalty. They are further restrained by 6 H. 4. c. 1., 7 H. 4. c. 8., 9 H. 4. c. 8. and 3 H. 5. st. 2. c. 4. by which the statutes above mentioned are enforced and explained; and it is further enacted by 23 H. 8. c. 2. § 22. that whoever shall sue for or execute any licence, dispensation or faculty from the see of *Rome*; and by 28 H. 8. c. 16." (by which all bulls, briefs, &c. heretofore obtained from *Rome* are made void) "that whoever shall (a) use, allege, or plead the same in any court, unless they are confirmed by that statute, or afterwards by the king, shall incur the like penalty."

By the 13 Eliz. c. 2. those who purchase any bull, &c. from *Rome*, are guilty of high treason. But, as those ancient statutes continue still in force, it is in the election of the crown to proceed either upon them or 13 Eliz. c. 2. Also, by the said statute of 13 Eliz. c. 2. the aiders, comforters, and maintainers of such offenders, after the offence, to the intent to uphold the said usurped power, incur a *præmunire*.

Secondly, The derogating from the king's common law courts, is said to have been an high offence at common law, and is made a *præmunire* by many ancient statutes; for by 27 E. 3. c. 1. of provisors, "If any subject draw any out of the realm in plea, whereof the cognizance pertains to the king's court, or of things whereof judgments be given in the king's courts, or sue in any other court to defeat or impeach the judgments given in the
king's

Vid. Reg. 54.
3 Inst. 127.
25 E. 3. st. 6.
§ 4.

(a) Yet it hath been holden that the alleging an ancient bull in order to induce another principal matter whereon to ground a title, without claiming any thing from the bull itself, is not within this statute. 2 Lev. 251.

Davis, 84.

“ king’s courts, he shall be warned to appear, &c. in proper person, at a day containing the space of two months, at which if he appear not, he and his proctors, &c. shall be put out of the king’s protection, his lands and chattels forfeited, his body imprisoned, and ransomed at the king’s will,” &c.

16 Ric. 2. c. 5.

And by 16 Ric. 2. c. 5. “ Both those who shall pursue, or cause to be pursued in the court of *Rome*, or elsewhere, any processes, or instruments, or other things whatsoever which touch the king, against his crown and regality, or his realm, and also those who shall bring, receive, notify, or execute them, and their abettors, &c. shall be put out of the king’s protection.”

2 Buls. 299.
3 Inst. 125.
Cro. Jac. 336.

In the construction of these statutes it hath been holden, that certain commissioners of sewers, for summoning one before them who had got a judgment at law, and imprisoning him till he would release it, were guilty of a *præmunire*.

Hawk. P. C.
c. 19. § 18.
and the authorities there cited.

Also, suits in the admiralty or ecclesiastical courts within the realm, for matters which upon the face of the libel itself appear to belong only to the cognizance of the temporal courts, are said to be within 16 Ric. 2. c. 5. by force of the words, *or elsewhere*.

But for this
vide title
Court of
Chancery.

And it hath been formerly holden, that even suits in a court of equity, to relieve against a judgment at law, are within the danger of these statutes, especially if they tend to controvert the very point determined at law, or to relieve in a matter relievable at law.

Thirdly, Appeals to *Rome* are made *præmunires* by 24 H. 8. c. 12. and 25 H. 8. c. 19. by which it is enacted, “ that such appeals as formerly were made to *Rome*, shall be made from henceforth to Chancery.”

Fourthly, The exercising the jurisdiction of a suffragan without the appointment of the bishop of the diocese, is made a *præmunire* by 26 H. 8. c. 14. which sets forth at large how suffragans are to be nominated, &c.

Fifthly, By 25 H. 8. c. 20. “ If a dean and chapter refuse to elect one named in the king’s letter for a bishoprick, and to certify such election to the king within twenty days after the licence shall come to his hands, or if any archbishop or bishop after such election (or nomination by the king in default thereof, &c.) refuse to confirm and consecrate within twenty days the person signified to them by the king’s letters patent, they incur a *præmunire*.”

Sixthly, Maintaining the pope’s power is made a *præmunire* by 5 Eliz. c. 1.

Seventhly, By 13 Eliz. c. 7. “ If any one shall bring into the realm, &c. any *agnus Dei*, crosses, pictures, beads, or such like superstitious things pretended to be hallowed by the Bishop of *Rome*, &c. and shall deliver or offer the same to any subject to be used in anywise: or if any one shall receive the same to such intent, and not discover the offender, &c., or if a justice of peace, having any offence in that act declared to him, do not within sixteen days declare it to a privy counsellor, he incurs a *præmunire*.”

Eighthly,

Eighthly, By the 27 Eliz. c. 2. " Sending relief to any Jesuit, seminary priest, or college of priests or Jesuits beyond the seas, or to one not returning out of such college into *England*, shall incur a *præmunire*."

Ninthly, Persons refusing to take the oaths, incur a *præmunire* by several statutes, as 1 Eliz. c. 1, and 5 Eliz. c. 1. and 3 Jac. 1. c. 4. and 7 Jac. 1. c. 6. and 1 W. & M. &c. c. 1.

Vent. 171.

Raym. 212.

374.

2 Keb. 825.

[But see st. 31 G. 3. c. 21.]

Tenthly, By the 6 Ann. c. 7. it is enacted, " That if any person shall maliciously and directly, by preaching, teaching, or advised speaking, declare, maintain, and affirm, that the pretended Prince of *Wales* hath any right or title to the crown of these realms ; or that any other person or persons hath or have any right or title to the same, otherwise than according to 1 W. & M. c. 2. and 2 W. 3. c. 2. and the acts then lately made in *England* and *Scotland* mutually for the union of the two kingdoms ; or that the kings or queens of this realm with the authority of parliament are not able to make laws to limit the crown and the descent, &c. thereof shall incur a *præmunire*."

[By the statute 1 & 2 Ph. & M. c. 8. to molest the professors of abbey lands granted by parliament to *Henry* and *Edward* the Sixth is a *præmunire*.

So likewise is the offence of acting as a broker or agent in any usurious contract, where above ten *per cent.* interest is taken, by stat. 13 Eliz. c. 10.

To obtain any stay of proceedings, other than by arrest of judgment or writ of error, in any suit for a monopoly, is likewise a *præmunire* by stat. 21 Jac. c. 3.

To obtain an exclusive patent for the sole making or importation of gunpowder or arms, or to hinder others from importing them, is also a *præmunire* by two statutes ; the one 16 Car. 1. c. 21. the other 1 Jac. 2. c. 8.

On the abolition, by stat. 12 Car. 2. c. 24. of purveyance, and the prerogative of pre-emption, or taking any victual, beast or goods, for the king's use, at a stated price, without consent of the proprietor, the exertion of any such power for the future was declared to incur the penalties of *præmunire*.

To assert, maliciously or unadvisedly, by speaking or writing, that both or either house of parliament have a legislative authority without the king, is declared a *præmunire* by stat. 13 Car. 2. c. 1. by the *habeas corpus* act, 31 Car. 2. c. 2. it is a *præmunire*, and incapable of the king's pardon, besides other heavy penalties, to send any subject of this realm a prisoner into parts beyond the seas.

By 6 Ann. c. 23. if the assembly of the peers in *Scotland*, assembled to elect their sixteen representatives in the *British* parliament, shall presume to treat of any other matter save only the election, they incur the penalties of a *præmunire*.

The statute 6 G. 1. c. 18. (enacted the year after the *South-sea* project,) makes all unwarrantable undertakings by unlawful subscriptions,

scriptions, then commonly known by the name of bubbles, subject to the penalties of a *præmunire*.

The stat. 12 G. 3. c. 11. subjects to the penalties of the statute of *præmunire*, all such as knowingly and wilfully solemnize, assist, or are at present at any forbidden marriage of such of the descendants of the body of King George the Second as are by that act prohibited to contract matrimony without the consent of the crown.

It is said, that if the bishop take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a *præmunire*. And in such case was *Barlow*, Bishop of *Bath and Wells*, in the reign of *Edward* the Sixth, who was forced to obtain a pardon for having deprived the dean of *Wells*, the deanery being a donative by letters patent from the king.]

Degge, p. 1.
c. 15.
3 Inst. 122.
Bro. *Præmunire*, pl. 21.

(B) Of the Punishment therein.

16 R. 2. c. 5.

MOST of the statutes of *præmunire* refer the punishment to 16 Ric. 2. c. 5. which enacts, "That those who offend against the purport thereof shall be put out of the king's protection, and their lands and tenements, goods, and chattels, forfeited to our lord the king; and that they be attached by their bodies if they may be found, and brought before the king and his council, there to answer to the cases aforesaid; or that process be made against them by *præmunire facias*, in manner as is ordained in other statutes of provisors."

Co. Litt. 129. b.
3 Inst. 125.
218.
2 Hawk. P. C.
c. 48. § 9.

The judgment in *præmunire* at the suit of the king, against the defendant, being in prison, is, that he shall be out of the king's protection; and that his lands and tenements, goods and chattels, shall be forfeited to the king; and that his body shall remain in prison at the king's pleasure: but, if the defendant be condemned upon his default of not appearing, whether at the suit of the king or party, the same judgment shall be given as to the being out of the king's protection and the forfeiture; but instead of the clause, that the body shall remain in prison, there shall be an award of a *capiatur*.

Co. Litt. 130.
12 Co. 68.
3 Inst. 128.
Bro. Cor. 197.
Jenk. 199.

As the above-mentioned statute, 16 Ric. 2. c. 5., expressly saith, that such offenders shall be put out of the king's protection; and also the statute of 25 E. 3. stat. 5. c. 22. had farther added, that any one might do with a purchaser of the provisions therein prohibited, as with the king's enemy; and that he who should offend against such an one in body, lands, or goods, should be excused; it was formerly holden, that a person attainted in a *præmunire* might lawfully be slain by any one, as being the king's enemy and out of the protection of the laws; but the later opinions seem to have disapproved of this severity; and it is now expressly enacted by 5 Eliz. c. 1. § 21, 22. "That it shall not be lawful to kill any person attainted in a *præmunire*, saving such pains of death or other hurt or punishment, as heretofore might without danger of law be done upon any person that shall send or bring into the realm, or within the same shall execute any process, &c. from the see of *Rome*."

It

It is clearly agreed, that a person attainted in a *præmunire* can bring no (a) action whatsoever; neither is it safe for any one, knowing him to be guilty, to (b) give him any aid, comfort, or relief.

Hawk. P. C. c. 19. § 47. (b) That it seems doubtful whether there can be any accessories in *præmunire*, vide Stamf. P. C. 44. Plow. 97.

It hath been resolved, that a statute, by appointing that an offender shall incur the penalty and danger mentioned in the 16 Ric. 2. c. 5. does not confine the prosecution for the offence to the particular process thereby given.

It is holden, that the statutes of *præmunire* which give a general forfeiture (c) of all the lands and tenements of the offender, extend not to lands in tail.

&c. shall relate to the time of the offence, or only to that of the judgment, *Qu. ; et vide Cro. Car. 172. Jon. 217.*

It hath been adjudged, that a pardon of all misprisions, trespasses, offences, and contempts, will pardon a *præmunire*.

The defendant in a *præmunire* must regularly appear in person, whether he be a peer or commoner, unless he is dispensed with by some writ or grant for that purpose; though in the case of Sir *Anthony Mildmay* (d) he was allowed to plead a pardon to a *præmunire* by attorney: but (e) it has been thought that there was some clause to this effect in the pardon.

Upon an indictment of a *præmunire*, a peer of the realm shall not be tried by his peers.

Upon an information on the statute 6 G. 1. c. 18. for setting up a bubble called the *North Sea*, it was determined, that the court was not obliged by that act to give the whole judgment, as in case of a *præmunire*, against the defendant, but only such parts of it as in their discretions they should think fit; and accordingly a fine of 5*l.* was set on the party convicted, and judgment that he should remain in prison during the king's pleasure.

PREROGATIVE.

PREROGATIVE is a word of large extent, including all the rights and privileges which by (a) law the king hath, as head and chief of the commonwealth, and as entrusted with the execution of the laws.

we usually understand that special pre-eminence which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his royal dignity. It signifies (in its etymology from *præ* and *rogo*), something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in its nature singular and

Co. Litt. 130.
(a) Whether he is entitled to surety of the peace.

Vent. 173.

Co. Litt. 130.
(c) Whether the forfeiture of any lands,

Cro. Jac. 336.
2 Bulst. 299.

3 Inst. 125.
(d) 1 Roll. R. 190.
2 Bulst. 290.
(e) 2 Hawk. P. C. 273.

12 Co. 92.
Ld. Vaux's case.

2 Ld. Raym. 1561. The King v. Ca-wood, Stra 472.

Vide Stamf. Prero. c. 1.
Co. Lit. 90.
[By the word prerogative

eccentral ;

eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects; for if once any one prerogative of the crown could be held in common with any subject, it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim (Finch's L. 85.), that the prerogative is that law in case of the king, which is law in no case of the subject. 1 Bl. Com. 239.] (a) That the king's prerogative is part of the law of England, and comprehended within the same. 2 Inst. 496.

And. 153. Co.

Lit. 19. 73.

4 Co. 124.

—That he is to defend his subjects.

7 Co. 4. —

That he cannot change the law. 5 Co. 55.

2 Inst. 36.

11 Co. 70. —

Finch's L. 81,

82, 83. speaks

highly of it, as

a matter divine: the king, says he, carries God's stamp, and has the shadow of God's excellencies given him: the power of God is joined with excellency; for to do wrong is not omnipotency, but weakness; so it is with the king, he can do no wrong, &c. As to which my Lord C. J. Hale saith, it is regularly true, that the law presumes the king will do no wrong, neither indeed can he do any wrong; and therefore, if the king command an unlawful act to be done, the offence of the instrument is not thereby indemnified: For though the king is not under the coercive power of the law, yet, in many cases, his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful; and so renders the instrument of the execution thereof obnoxious to the punishment of the law; yet in time of peace, if two men combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but if it be by the command of the king, it is said it is no felony. Hal. Hist. P. C. 43, 44. || This means if the *combat* or *tournament* were by the command or licence of the king, then the death is no felony; for the king's licence made the combat lawful, which, without it, was an unlawful act. Vide 3 Inst. 56. 160. ||

Moor, 672.

Show. P. C. 75.

(a) And most

undoubtedly

this is the great end of the king's prerogative, who is not the sovereign of the state, but the people's executive magistrate: for as to sovereignty, that resides where the constitution has placed the legislative power, *i. e.* in king, lords, and commons, in parliament assembled; so that the king, in his political capacity, as one of the states of the realm, possesses a part, and only a part of the sovereignty, but is not sovereign, any more than a part is equal to the whole. But, as executive magistrate, he is invested with great power, pre-eminence, and many prerogatives; all intended by the constitution to be employed for the good of the people; none to their detriment; nor can any prerogative be legally so employed.

[This passage, which has been industriously foisted into the work by the last editor, abounds throughout with the most dangerous political errors. It gives a false view of the nature of our government: it represents it as almost a pure republic. From the qualifications which the kingly power is subjected to, the editor would infer the nonexistence of the power itself: because the king acts with *advice* in all cases, and with *advice* and *consent* in some cases, therefore he never acts *proprio jure*. Because the law hath assigned him various counsellors to aid and advise him in the deliberative and executive parts of his government, therefore these counsellors are coequal and coordinate with him. — But let us mark the several parts of this notable passage, and let us see how well they correspond with the authorities we shall hereafter cite — authorities drawn from our records and statute books, and from the writings and speeches of men eminent for their knowledge of the law and constitution of their country, and not suspected of any blind attachment to monarchy. "The king is not the sovereign of the state, but the people's executive magistrate." — "Sovereignty resides where the constitution has placed the legislative power, *i. e.* in king, lords, and commons, in parliament assembled; so

"that

"that the king, in his political capacity, as one of the states of the realm, possesses a part, and "only a part of the sovereignty, but is not sovereign, any more than a part is equal to the whole." — In the first place this writer seems to suppose, that the sovereign power of a state consists merely in legislation; whereas the power of a state consists equally in enforcing the execution of laws when made, as in the making of them. — "But," saith this writer, "the king is not the sovereign of the state, but the people's executive magistrate;" — if then the king is not the sovereign of the state, but the people's executive magistrate, the people are the sovereign of the state, for the king is *their* magistrate: but, according to this writer, the sovereignty is lodged not in the people only, but in king, lords, and commons; then, upon this writer's own hypothesis, the people cannot be sovereign, for, to use his own words, *a part cannot be equal to the whole*; but if they are not sovereign, how can the king be the *people's* executive magistrate? whence is their authority to commission this officer? — But so far from the king not being the sovereign of the state, it will appear from the following authorities, that the whole power of the state, both legislative and executive, subject to certain limitations and qualifications, is vested in the king alone; that he, with the advice and consent of his great council, makes laws; and, with the advice of other councils, executes those laws when made: that he is not one of the estates of the realm, as this writer supposeth him to be, but paramount those estates. Lord Coke saith, in his 4th Inst. p. 3. that the king is *caput, principium et finis* of his court of parliament. In 22 E. 3. Hil. term, plea 25. it is laid down thus: *Et fuit dit, que le roy fait les leis par assent des peres et de la commune, et non pas les peres et la commune.*

According to Lord Hale, "Although that the English monarchy is not in all respects absolute and unlimited, but hath certain qualifications of monarchical power, especially in point of making laws, and imposing taxes upon the people; yet, certainly, since the denomination of government is *ad plurimum*, the government is monarchical, and not aristocratical or democratical. And hence it is, that all jurisdiction in this realm, whether ecclesiastical or civil, is derived from the crown; and that the exercise thereof in the ministers or judges, to whom it is so delegated by the crown, is in right of the crown, and by virtue of a delegation from it." *Id.* 190. And in a preceding part of this tract, Lord Hale, speaking of the deliberative and executive parts of civil government, says, "In both which, though the king under God be supreme governor and fountain, yet it is necessary for him to call in others *in partem sollicitudinis*, and, as to use their assistance in the executive part, so to have their advice and council in the deliberative part of his government." Hale's Jurisd. of the Lords' House, p. 4. Again, *Whitelock* in his comment on the parliamentary writ, says, "The making of statutes is by the king with the assent of the lords and commons in parliament." Vol. i. 406. And farther, the style of our acts of parliament is, *Be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in parliament assembled.* Even in money bills, when the commons have granted the king their money, they pray that he will be graciously pleased to make it a law. "We your Majesty's most dutiful and loyal subjects, the Commons of Great Britain in parliament assembled, having, &c. &c. Do beseech your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent," &c. &c.

With respect to the king's not being one of the estates of the realm, read the words of Lord Hale in another part of the tract above referred to. The nobility, clergy, and commonalty are the three estates of the kingdom. The king comes in upon a higher denomination and title, namely, the head of these three estates. And therefore they that have gone about to make the king one of the three estates are mistaken, as will easily appear to any that will but read the records fully, being, *viz.* Rot. Parl. 9 H. 5. n. 15., the conclusion of the peace between the kings of England and France by the king's command in parliament, 2 May, 9 H. 5., read *coram tribus statibus regni, viz. praelatis et clere, nobilibus et magnatibus, et communitate regni Angliæ*, and by them assented to. Rot. Parl. 3 & 4 E. 4. n. 23. *le roy et les trois estates.* Rot. Parl. 13 E. 4. n. 16 & 17. *domino rege et tribus statibus regni stantibus in eodem parlamento.* And in the first parliament of the usurper R. 3., who would be sure to want no formality to countenance his usurpation, Rot. Parl. 1. *titulus Regius*, there is cited an instrument allowing him to be king before his coronation was declared in the name of the three estates of this realm of England, *viz.* the lords spiritual and temporal, and commons. "Bee it ordained," that "the tenour of the said rolle, with all the contynue of the same, presented as is abovesaid, and delivered to our beforesaid souverain lord the king, in the name and on the behalf of the said three estates out of parliament, now by the same three estates assembled in this present parlement, and by auctorite of the same, bee ratified, enrolled, recorded," &c. This, though done in a time of usurpation, yet sufficiently evidenceth what the three estates were. * And the

* In addition to the above authorities collected by Lord Hale, see Rot. Parl. 13 R. 2. m. 9. 11 H. 6. m. 17.

objections against it, 1. that two of those estates are constituents of the lords' house, and so must outbalance the commons, which are but one of the three estates; and, 2. that the lords spiritual by this means should have a negative voice upon the lords temporal and commons, and so no law could be made without the consent of the major part of the spiritual lords and the major part of the temporal lords, as well as the most part of the commonalty; I say these objections are vain. For though it be true, that two of the three estates are constituents of the lords' house, yet they constitute but one house. And the laws and customs of the kingdom, which are the true measure of all bounds of power have given a negative voice of either house upon the other, and of the king upon both; but have not given a negative voice of only one of the two estates constituting the lords' house unto the other, or to the commons being the third estate; *the legislative power being lodged in the king with the assent of the two houses of parliament as such*, and not with the assent of the three estates simply considered as such; *for it is the settled constitution and custom of the kingdom, that fixeth and defineth where the legislative power is lodged, not notions and fancies.* Hale's Jurisd. of the Lords' House, &c. p. 10, 11. And Lord Coke, before him, had begun his chapter on the High Court of Parliament in these words: "This court consisteth of the king's majesty, sitting there, as in his royal political capacity, and of the three estates of the realm, viz." &c. 4 Inst. cap. 1. And after him, at the memorable æra of the Revolution, in the preamble to the Bill of Rights, the Convention Parliament use these words: "Whereas the lords spiritual and temporal, and commons, assembled at Westminster, lawfully, fully, and freely representing *all the estates of the people of this realm*, did, upon, &c. present unto their Majesties," &c. Stat. 1 W. & M. sess. 2. c. 2.

But the theory of our government is sketched with admirable spirit and correctness by the Attorney-General, in his address to the jury upon Hardy's trial. "The power of the state, by which I mean the power of making laws, and enforcing the execution of them when made, is vested in the king; enacting laws in the one case, that is, in his legislative character, by and with the advice and consent of the lords spiritual and temporal and of the commons in parliament assembled, according to the law and constitutional custom of England; in the other case, executing the laws, when made, in subservience to the laws so made, and with the advice, which the law and the constitution hath assigned to him in almost every instance, in which it has called upon him to act for the benefit of the subject." — Hardy's Trial, by Gurney, p. 52. Again, in a subsequent passage, after having stated the royal duties, he goes on thus: "To that king, upon whom these duties attach, the law and constitution, for the better execution of them, have assigned various counsellors, and responsible advisers: it has clothed him, under various constitutional checks and restrictions, with various attributes and prerogatives, as necessary for the support and maintenance of the civil liberties of the people: it ascribes to him sovereignty, imperial dignity, and perfection: and because the rule and government, as established in this kingdom, cannot exist *for a moment* without a person filling that office, and able to execute all the duties from time to time, which I have now stated, it ascribes to him also that he never ceases to exist. In foreign affairs, the delegate and representative of his people, he makes war and peace, leagues and treaties: in domestic concerns, he has prerogatives, as a constituent part of the supreme legislature: the prerogative of raising fleets and armies: he is the fountain of justice, bound to administer it to his people, because it is due to them: the great conservator of public peace, bound to maintain and vindicate it; every where present, that these duties may no where fail of being discharged: the fountain of honour, office, and privilege; the arbiter of domestic commerce, the head of the national church." *Id.* 35. And in the conclusion of this brilliant sketch, he closes the whole with these emphatical words: "Gentlemen, I hope I shall not be thought to misspend your time in stating thus much, because it appears to me, that the fact that such is the character, that such are the duties, that such are the attributes and prerogatives of the king in this country, (all existing for the protection, security, and happiness of the people in an established form of government,) accounts for the just anxiety, bordering upon jealousy, with which the law watches over his person — accounts for the fact, that in every indictment, the compassing or imagining his destruction or deposition, seems to be considered as necessarily co-existing with an intention to subvert the rule and government established in the country: it is a purpose to destroy and to depose *him*, in whom the supreme power, rule, and government, under constitutional checks and limitations, is vested, and by whom, with consent and advice in some cases, and with advice in all cases, the exercise of this constitutional power is to be carried on." *Id.* 36.

With respect to the rule which is said in the text to be established, *viz.* "that all prerogatives must be for the advantage and good of the people, otherwise they ought not to be allowed by the law," it is neither expressed in terms sufficiently clear and precise, nor will it hold in the extent to which, as there stated, it may be carried. It is not clear from the terms whether it meant, that the prerogative or right itself shall be disallowed, if found to be injurious to the public, or only the act done by virtue and in exercise of that right or prerogative. If the

the former be the meaning, we may not hesitate to pronounce that there is no such rule of law : for all the prerogatives of the crown are vested in it for the protection and happiness of the people, and cannot in law be wrested from it without danger to both. If the latter be the meaning, then the rule will not hold universally and in all cases. The higher prerogatives of the crown are not to be measured by the rules of law, or to be scanned by the reason of our judges; nor are acts done by virtue of any of those prerogatives to be set aside on the ground, that they are not for the public good. For instance, the king has the prerogative of making war and peace: invested with that prerogative, he makes a treaty of peace: that treaty is found to be injurious to the country: is the treaty therefore a nullity? is there any authority in any man, or body of men in this country, to vacate it, because it is a bad treaty? The king has the prerogative of giving his *assent*, as it is called, to such bills as his subjects, legally convened, may present to him, that is, of giving them the force and sanction of a law: he withholds his assent to a bill evidently calculated to promote the interests of his people: does the bill, because it is a good bill, therefore pass into a law, though it want the royal *fiat*? or does the utility of the measure deprive the crown of its constitutional power of *rejecting*? The rule then seems to go no farther than this, that in the exercise of some of the prerogatives, the royal authority is submitted to the control and direction of the courts of law, the judgment of the king is in some cases committed to his judges. In those cases it is the duty of the judges so to admeasure the royal prerogatives as that they shall in no case be exerted so as to affect the inheritance of any one, to change the course of the law, or to work individual injury. Plowd. 256. 487. Noy, 175. They will always remember the maxim of law, that the king can do no wrong: if they find that wrong has been done, the act cannot be the act of the king and therefore ought not to be allowed.]

The rights and prerogatives of the crown are in most things as ancient as the law itself; for though the stat. 17 E. 2. st. 1. commonly called the statute *de prerogativa regis*, seems to be introductive of something new, yet for the most part it is but a sum or collection of certain prerogatives that were known law long before: as, that the king's wardship of lands *in capite* did attract the wardship of lands held of others; that the grant of a manor did not pass an advowson appendant, unless named; that the king had a right to escheats, wrecks, royal fishes, and many others which were ancient prerogatives of the crown. Bendl. 117.
2 Inst. 263.
496. 10 Co. 64.

But, for the better understanding hereof, I shall consider,

(A) When the King commences his Reign, and the Ceremony requisite therein: ||and herein of a King *de jure* and *de facto*.||

(B) Of the King's Prerogative as universal Occupant : And herein,

1. *That he is universal Occupant, and entitled to all derelict Lands.*
2. *Of his Prerogative in Escheats.*
3. *Of his Prerogative in Seas and Navigable Rivers.*
4. *Of his Prerogative in Swans and Royal Fishes.*
- [5. *Of his Prerogative in Ports and Havens.*]
6. *Of his Prerogative in Beacons and Light-Houses.*
7. *Of his Prerogative in Wreck.*
8. *Of his Prerogative in relation to Coins and Mines.*
9. *Of his Prerogative in derelict Goods; and therein, of Waifs, Strays, and Treasure Trove.*
10. *Of his Prerogative in Fines and Forfeitures.*

(C) Of his Prerogative over the Persons of his Subjects: And herein,

1. *Who shall be said his Subjects.*
2. *That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths enjoined them.*
3. *That he may restrain his Subjects from going abroad; and therein, of the Writ de Ne exeat Regno.*
4. *That he may command his Subjects to return Home; and therein, of awarding a Privy Seal.*

(D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws: And herein,

1. *That all Civil Jurisdiction flows from the King.*
2. *Of the King's Prerogative in Ecclesiastical Matters.*
3. *Of his Prerogative in creating Officers.*
4. *Of his Prerogative in making War and Peace.*
5. *Of his Prerogative in taking Care of Infants, Idiots, Lunatics, and Charitable Uses.*
6. *Of his Prerogative in Pardoning.*
7. *Of Dispensations and Non obstantes.*
8. *Of his Proclamations.*

(E) How the Rules of Law differ with respect to the King and a Private Person: And herein,

1. *Of what Things incapable, from the Dignity of his Person and Office.*
2. *What Things enure to him in his natural, what in his political Capacity.*
3. *Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.*
4. *That his Rights shall be preferred to a Subject's where they happen to meet.*
5. *Of Acts of Parliament which extend to or bind not the King.*
6. *That no Laches can be imputed to him; and therein, of the Maxim, Nullum Tempus occurrit Regi.*
7. *Of his Prerogative in his Suits and Proceedings in Courts of Justice.*

(F) Of the King's Grants and Letters Patent: And herein,

1. *What Things the King may grant: And therein,*

1. Of Grants arising from his Prerogative of Power, and what are inseparably annexed to the Crown.
2. Of Grants arising from his Interest.
3. How far the King must have an Interest, in order to enable him to grant.
4. Grants tending to a Monopoly; and therein, of Things of a new Invention.
5. Grants of the sole Liberty of Printing.
2. *Of the Construction of the King's Grants and Letters Patent, as to their being good or void; and herein, of King's being deceived in his Grant.*
3. *Where the King's Grantee shall partake of his Prerogative.*

(A) When the King commences his Reign, and the Ceremony requisite therein: ||and herein of a King *de jure* and *de facto*.||

UPON the death or demise of the king, his heir is that moment invested with the kingly office and regal power, and commences his reign the same day his ancestor dies; whence it is held as a maxim (*a*), that the king never dies.

7 Co. 12. in Calvin's case.

6 Co. 27.

7 Co. 30.

(a) And there-

fore if lands are given to the king by deed enrolled, without the words *heirs or successors*; yet a fee-simple passeth, for that in judgment of law he never dies. Co. Lit. 9.

And herein we must take notice, that the rules of descent are the same with those that govern private inheritances, except only as to the rule of *possessio fratris*, which does not hold in the descent of the crown or its possessions: neither is half blood any impediment in such case; for the brother of the half blood shall be preferred to the sister, in the enjoyment of the crown, as the most capable of the two, by the advantages and prerogative of his sex.

Co. Lit. 15. b.

[But these are not the only exceptions in the case of the crown to the general rules of descent: for, among the

females, the crown descends by right of primogeniture to the eldest daughter only, and her issue, and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect; and therefore Queen *Mary* on the death of her brother succeeded to the crown alone, and not in partnership with her sister *Elizabeth*. 1 Bl. Com. 194.]

Therefore, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters and dies without issue, the daughter shall not inherit those lands, nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Lit. 15. b.

As the king commences his reign from the day of the death of his ancestor, it hath been held, that compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death within the statute of 25 E. 3. stat. 5. c. 2. he being king presently, and the proclamation and coronation

3 Inst. 7. Hal. Hist. P.C. 101.

(a) The late only honourable ceremonies (a) for the further notification thereof.

Foster is,

however, very far from thinking that the solemnity of a coronation is to be considered among us merely as a royal ceremony, or as a bare notification of the descent of the crown, as authors of high distinction have been pleased to express themselves: He admits that it is, on the part of the nation, a public solemn recognition that the regal authority, and all the prerogatives of the crown, are vested in the person of the king, antecedent to that solemnity; but the solemnity of a coronation with us goeth a great deal farther; the coronation oath importeth, on the part of the king, a public solemn recognition of the fundamental rights of the people; and concludeth with an engagement under the highest of all sanctions, that he will maintain and defend those rights; and to the utmost of his power make the laws of the realm the rule and measure of his conduct. Fost. Rep. 189. See Sid. on Gov. 91, 92. S. 7.

Hawk. P. C.

c. 17. § 11.

(b) As to the distinction between a king *de facto* and *de jure*, my Lord Hale says, a king *de facto*, but not *de jure*, such as were H. 4. H. 5. H. 6. R. 3.

Also it is held, that every king for the time being, in the actual possession (b) of the crown, is a king within the intention of the above-mentioned statute; for there is a necessity that the reslm should have a king, by whom, and in whose name, the laws are to be administered; and the king in possession, being the only person who either doth or can administer those laws, must be the only person who hath a right to that obedience which is due to him who administers those laws; and since, by virtue thereof, he secures to us our lives, liberties, and properties, and all other advantages of government, he may justly claim returns of duty, allegiance, and subjection.

H. 7. being in the actual possession of the crown, is a king within this act; so that compassing his death is treason within this law; and therefore in the 4 E. 4. 20. a person that compassed the death of H. 6. was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown, which afterwards obtained, this had not been treason, but *è converso*, those that assisted the usurper, though in the actual possession of the crown, have suffered as traitors, as appears by the statute of 1 E. 4. and as was done upon the assistants of H. 6. after his temporary redeption of the crown, in 10 E. 4. and 39 H. 6. Hal. Hist. P. C. 102, 103. || But it seems that Sir R. Grey, the person alluded to as being attainted in 4 E. 4. 20. was attainted for actual rebellion against Edward the Fourth himself, some years after he was in full possession of the crown. See Sir M. Foster's remarks on this passage, Fost. Cr. L. 397. || [Sir M. Foster, speaking of a king *de jure et de facto*, and contending that allegiance is due by the subject to the latter as well as the former, hath these remarkable words: "He (the subject) hopeth for protection from the crown, and he payeth his allegiance to it, in the person of him whom he seeth in full and peaceable possession of it: he entereth not into the question of title, he having neither leisure, nor abilities, nor is he at liberty to enter into that question: but he seeth the fountain from whence the blessings of government, liberty, peace, and plenty flow to him, and there he payeth his allegiance." Fost. Cr. L. 399.]

Hawk. P. C.

c. 17. § 15.

and the authorities there cited.

It hath been settled, that all judicial acts done by Henry the Sixth, while he was king, and also all pardons of felony and charters of denization granted by him, were valid; but that a pardon made by Edward the Fourth before he was actually king, was void even after he came to the crown.

Hal. Hist. P. C.

104.

The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within this act; as was the case of the house of York, during the plenary possession of the crown in Henry the Fourth, Henry the Fifth, and Henry the Sixth. But if the right heir had once the possession of the crown, as king, though an usurper had afterwards gotten the possession thereof, yet the other continues his style, title, and claim thereto and afterwards re-obtains the full possession

possession thereof; a compassing the death of the rightful heir, during that interval, is a compassing of the king's death within this act; for he continued a king still, *quasi* in possession of his kingdom; which was the case of *Edward* the Fourth, in that small interval wherein *Henry* the Sixth re-obtained the crown; and the case of *Edward* the Fifth, notwithstanding the usurpation of his uncle *Richard* the Third.

¶ This last passage, however, is not very consistent with the statute 11 Hen. 7. c. 1., which after reciting, "That the subjects of *England* are bound by the duty of their allegiance to serve their prince and sovereign lord, *for the time being*, in defence of him and his realm, against every rebellion, power, and might raised against him," &c. enacts, "That no person attending upon the king, for the time being, in his wars, shall for such service be convict or attain of treason, or other offence, by act of parliament, or otherwise by any process of law,"—on which Sir *M. Foster* observes, "Here is a clear and full parliamentary declaration, that, by the ancient law and constitution of *England*, founded on principles of reason, equity, and good conscience, the allegiance of the subject is due to the king, for the time being, and to him alone"—and this is confirmed by Lord *Coke*. With respect, therefore, to the duty of allegiance, the only question is, who is the sovereign in possession; if the usurper is in possession, allegiance is due to him as sovereign lord, for the time being; and it must follow, that, as the subject cannot owe a divided allegiance, the rightful heir, even though he continue his style, title, and claim, cannot, during his exclusion, be within the statute of treason; and, surely Lord *Hale's* doctrine of a king, *quasi* in possession, something between a king *de jure* and a king *de facto*, is too vague and indefinite to form a rational or legal distinction.¶

It was resolved by the judges, in the case of Sir *H. Vane* (a), that King *Charles* the Second was king *de facto*, as well as *de jure*, from his father's death; and that therefore all those who acted against and kept him out of possession, in obedience to the powers then in being, were traitors.

the court in this case, involved, in the guilt of treason, every man in the kingdom who had acted in a public station under a government possessed *in fact* for twelve years together of a sovereign power; and that *Ld. Ch. J. Hale*, when of high rank at the bar, took the engagement "To be true and faithful to the Commonwealth of England, *without a King or House of Lords*." This, in the sense of those that imposed it, was plainly an engagement for abolishing kingly government, at least for supporting the abolition of it; and with regard to those who took it, it might, upon the principles of Sir *H. Vane's* case, have been easily improved into an overt act of treason against King *Charles* the Second. *Fost. R.* 402.

[But it ought to be considered, that it was first resolved by the same judges, that King *Charles* the Second was king *de facto* as well as *de jure* from his father's death; and it is apparent, that no other person was in possession of any sovereign power known to our laws.]

restoration of King *Charles* the Second are always called the acts in the twelfth year of his reign; and all the other legal proceedings of that reign are reckoned from the year 1648, and not from 1660.

11 Hen. 7. c. 1

Fost. Cr. L.
399.

5 Inst. 6.;

et vide 3 *Hallam's Midd.*
Ages, 291.

Keiling, 14,
15. *Keb.* 315.
(a) *Mr. Justice Foster* says,
that the rule
laid down by

1 *Hawk. P. C.*
c. 17. § 10.
Hence the
statutes passed
in the first
year after the

1 M. st. 3. c. 1.
§ 3.

(a) The queen
regent, as
were Q. Mary

and Q. Elizabeth, is a king within the 25 E. 3. stat. 5. c. 2. Hal. Hist. P. C. 101.; but a titular king, as the husband of a queen regent, is not. 5 Inst. 8. Hawk. P. C. c. 17. § 20.

1 W. & M.
st. 2. c. 2. § 9.

By the 1 W & M. stat. 2. c. 2. § 9. "Every person that shall be reconciled to, or hold communion with, the see or church of Rome; or shall profess the popish religion; or shall marry a papist; shall be incapable to inherit or enjoy the crown of this realm and Ireland; and in such case the people shall be absolved of their allegiance, and the crown shall descend to such persons, being protestants, as should have inherited the same, in case the person so reconciled, &c. were dead."

§ 10.

And by § 10. "Every king and queen, who shall come to and succeed in the imperial crown of this kingdom, shall, on the first day of the meeting of the first parliament, next after his or her coming to the crown, sitting in the throne of the House of Peers, in the presence of the lords and commons, or at his or her coronation, before such person as shall administer the coronation oath, at the time of taking the said oath, (which shall first happen,) make, subscribe, and repeat the declaration mentioned in the statute 30 Car. 2. for preserving the king's person and government, by disabling papists from sitting in either house of parliament."

Dyer, 209.
pl. 22. Plow.
209. Case of
the Duchy of
Lancaster.
Co. Lit. 43.
5 Co. 27.
Raym. 90.
[But it hath

The king, as king, cannot be a minor; so that grants, leases, &c. made by him, though under age, bind presently, and cannot be avoided by him, either during his minority, or when he comes of age; for the politic rules of government have thought it necessary, that he who is to govern and manage the whole kingdom, should never be considered as a minor incapable of governing himself and his own affairs.

been usually thought prudent, when the heir apparent hath been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian. 1 Bl. Comm. 248.]

(B) Of the King's Prerogative as universal Occupant: And herein,

1. That he is universal Occupant, and entitled to all derelict Lands.

Co. Lit. 1.
Dyer, 154.
Bendl. 237.
Seld. Mare
Claus. 223.
(b) A fiction
of law, adopt-
ed by the con-
stitution to

THE king by our law is universal occupant, and all property is presumed to have been originally in the crown (a); and that he partitioned it out in large districts to the great men who had deserved well of him in the wars, and were able to advise him in time of peace. Hence it is said, that the king hath the direct dominion; and that all lands are holden mediately or immediately from the crown.

answer the ends of government, but for the good of the people, the great object of the law and constitution of this country.—The right of the people of England to their property does not depend

depend upon nor was in fact derived from any royal grant. The reception of the feudal policy, in this nation, exactly answers the definition of a fiction; which is some supposition in law, for a good reason, against the real truth of a fact, in a matter possible to have been actually performed, according to that supposition. Cons. on Law of Forfeiture, 55.

Hence it is, that if the sea leaves any shore by a sudden falling off of the water, such derelict lands belong to the king: but, if a man's lands, lying to the sea, are increased by insensible degrees, they belong to the soil adjoining.

Dyer, 326.
2 Roll. Abr.
170. ¶ See
post, p. 399.¶]

So if a river, so far as there is a flux of the sea, leaves its channel, it belongs to the king; for the *English* sea and channels belong to the king; and he hath a property in the soil, having never distributed them out to his subjects.

2 Roll. Abr.
170.

But, if a river, in which there is no tide, should leave its bed, it belongs to the owners on both sides; for they have in that case the property of the soil; this being no original part or appendix to the sea, but distributed out as other lands.

2 Roll. Abr.
170.

If land be drowned, and so continue for divers years; if it be after regained, every owner shall have his interest again, if it can be known by the boundaries.

8 Co. Sir
Francis Bar-
rington's case.

It is said that there is a custom in *Lincolnshire*, that the lords of manors shall have derelict lands; and that such is a reasonable custom; for if the sea wash away the lands of the subject, he can have no recompense, unless he should be entitled to what he regains from the sea.

2 Mod. 107.

Information by *English* bill in the Exchequer-chamber for one hundred acres of derelict lands in *Lincolnshire*; the case was this: King *James* the First granted to *J.S.* the manor of *Holbeck*, with the appurtenances, by express words; and in the letters patent there was the following clause, *necnon totum illud fundum et solum et terras suas contigue adiacen. to the premises, quæ sunt aquâ cooperta, vel quæ in posterum de aqua possunt recuperari, &c., non obstante non nominando valorem, qualitatem sive quantitatem, &c.*; and these hundred acres being afterwards improved and recovered from the sea, the question was, Whether they passed to the patentee? and though it was urged in his behalf, that these words were as general as they well could be; that the king was entitled to the soil of the sea, not as matter of prerogative only, but as an interest which he might grant; that in some cases the king may grant a possibility; that the *non obstante* was so particular in this case, as if intended to cure all defects; and that the king's grants ought to be construed liberally, as most for his honour: yet, it being urged on the other side, that these words were too general; that though they might be intended to pass some small parcels or lines of land which may become derelict, yet not so as to pass any great tracts of land; and that, by the construction contended for, all the lands between that and *Denmark* might pass; and admitting the king might grant part of his seas, yet that must be by express name: It was held by *Montague*, Ch. B. with the advice of *Rainsford* and *North*, Ch. Justices, that the patent, as to these hundred acres which became derelict, was void.

2 Lev. 171.
2 Mod. 106.
Raym. 241.
S. C. Attor-
ney-General
v. Sir Edward
Farmer.

2. *Of his Prerogative in Escheats.*

Co. Lit. 15.
92. Godb.
211. (a) That
if the party be
pardoned
there can be
no escheat.
Owen, 87.

An escheat may be either *per defectum sanguinis*, or *per delictum tenentis*. (a) But it is said, that in case of an attainder of felony, the escheat to the lord is *pro defectu tenentis*; and the not descending, the consequence of the corruption of the blood; but in case of treason, the lands come to the crown as an immediate forfeiture, and not as an escheat.

2 Inst. 64.
Keilw. 104.
2 Roll. R. 251.
4 Inst. 224.
(b) That the
lord by escheat

If the king's tenant dies without heir, the lands shall escheat and revert again to the crown; but the lands holden of any (b) other lord shall, for want of the heirs of the tenant, escheat to the lord.

is in the *post*, and cannot vouch. 1 Co. 1.

2 Inst. 64.

If lands held of the king as of an honour come to him by a common escheat, as the tenant's dying without heir, or committing felony, these lands are part of the honour; otherwise, if forfeited for treason, for then they come to the king by reason of his person and crown; and if he grants them over, &c. the patentee shall hold of the king in chief.

Cro. Eliz. 120.
May v. Street.

It was found by special verdict, that the Prior of *Merton* was seised of a house in *Southwark*, held of the Archbishop of *Canterbury*, as of his borough of *Southwark*; and 30 Hen. 8. surrendered it to the king, who granted the said messuage and divers other lands in *London*, *Middlesex*, and *Essex*, to *J. S.* and his heirs, to hold of him in *libero burgagio*, by fealty, for all services and demands, and not in *capite*; that afterwards Queen *Mary* granted the manor and borough of *Southwark* to the mayor and commonalty of *London*; and the tenant of the said messuage died without issue; and the question was, Whether Queen *Eliz.* or the patentees of the borough should have the escheat? and adjudged for the queen; for the first patentee of the messuage held it of the queen in socage in *capite*, as of a seignory in gross; and the words in *libero burgagio* are merely void; for the land out of the burgh cannot be held in *libero burgagio*; and there shall not be several tenures; for one tenure was reserved by the king for all; and therefore of necessity it shall be a tenure in socage of the king.

Co. Lit. 8.
3 Inst. 19.
(c) But a right
of action,
which consists
only in privacy,
cannot es-
cheat.
3 Co. 2. b.

Upon an attainder of high treason, the king by his prerogative shall have all the lands of inheritance whereof the offender was seised in his own right; and also all rights of (c) entry to lands in the hands of a disseisor or other wrong-doer; though such lands are holden of another: but, in case of petit treason and felony, they go to the lord of whom they are holden; for the blood being corrupted, so that no person can represent him, it is the same as if he had died without heir; and, consequently, the lord is in by escheat.

Stamf. P. C.
191.

But the lord cannot enter into the lands holden of him upon an escheat for petit treason or felony, without a special grant; till it appears by due process, that the king hath had his prerogative of the year, day, and waste.

3 Inst. 215.

If one attainted of felony commits treason afterwards, and is thereof

thereof attained, as he may be, because the offence is of a higher nature than felony; yet this shall not divest the right of escheat, which by the felony was lawfully vested in the lord, contrary to the opinion of *Stamford*; for the act of the party shall not divest the lawful escheat of the lord.

If one seised in fee of a fair, market, common, rent-charge, or seck, warren, corrody, or other inheritance not holden, is attained of felony, the king shall have the profits of them during his life; but after his death they cannot descend, because his blood is corrupted; nor escheat, because not holden; but perish and are extinct by act in law. 3 Inst. 21.

If a man grant an advowson in gross to another in fee, and the grantee die without heir, it seems that this shall revert to the grantor, not being held of any man; for it is a thing that cannot vanish, but ought to be in some person: but in that case, if the grantor cannot have it, the king shall have it as supreme patron; and for that reason ought to present where none hath right. Roll. Abr. 816. Comp. Incumb. 75.

If a disseisor makes a feoffment, or dies seised; and after the disseisee dies without heir, there shall be no escheat, because the lord hath a tenant by title. Co. Lit. 268. b.

Though the lord hath not been seised of his services within the time of limitation, yet, if the tenant dies without heir, the land shall escheat; for at the time of the escheat the seignory remained, though seisin of the services was wanting. 4 Co. 11.

If an infant or *non compos* in person make a feoffment, and after die without heir (*a*), the land shall not escheat: otherwise, if made by letter of attorney, for then the feoffment is void. 4 Co. 125. (*a*) Dyer, 10. pl. 58. S. P. because the

lord hath a tenant by title. — If *J. S.* conveys lands to trustees and their heirs, to the use of himself for life, remainder to his first and every other son, &c. remainder to his own right heirs, and *cestui que trust* dies without heirs, *quære*, Whether the lands shall escheat or remain with the trustees? [In the case of *Burgess v. Wheate*, the Master of the Rolls (Sir *Thomas Clarke*), and the Lord Keeper *Henley*, held, against my Lord *Mansfield*, that the crown could not in equity, upon a failure of the heirs of *cestui que trust*, claim against a trustee by escheat, if he had the legal estate in him, for that (among other reasons) the title by escheat could only arise where there was a defect of a tenant; that where there was a feoffee there was a tenant, whether he were beneficially entitled or not; so that the principle of escheat failed. 1 Bl. Rep. 123. ¶ 1 Eden R. 177.] The authority of this case, however, hath been somewhat shaken by the intimation of Lord *Thurlowe's* opinion in *Middleton v. Spicer*, 1 Bro. Ch. Ca. 204. — Where the character of land is not imperatively and definitively fixed upon money by the terms of a will or other instrument, a court of equity will not order it to be laid out in land, in order to let in the crown claiming by escheat. *Walker v. Denne*, 2 Ves. jun. 170.]

If he who hath title to a writ of escheat accept homage or fealty of the tenant, this will bar him; otherwise if he accept rent of the tenant; for that may be done by a bailiff. Co. Lit. 268.

If there be lord and tenant, and the tenant be disseised, and the disseisee die without heir, and after the lord accept the rent from the disseisor, this is no bar to him: otherwise, if he avow upon the disseisor for the rent. Co. Lit. 268.

But if, after title of escheat accrued, the disseisor make a feoffment or die seised, the acceptance of the rent from the feoffee or heir, will be a bar. Co. Lit. 268.

If one lease a manor for life or years, and a tenancy escheat (*a*), this belongs to the manor held in farm, for which the lessor shall have 2 Inst. 146. (*a*) After the death of the

tenant for life, have a general writ, and suppose a lease by him made of the lands the lessor may have a writ of escheat, and the words of the writ are true, viz. that the tenant that died, &c. held the lands of him. Keilw. 114. a. — The tenancy comes in lieu of seignior. Co. 122.

Co. Lit. 13. b. For the better taking care of the king's escheats there is an
(a) By the ancient officer named by the lord treasurer (a), and called escheator, because his office is properly to look to escheats, wardships, and other casualties belonging to the crown. (b)
14 E. 3. c. 8. to be chosen by the chancellor, &c. as sheriffs; by 12 E. 4. c. 9. must have a freehold in the same county worth 20*l.* per ann.; by the 1 H. 8. c. 8. must have 40 marks yearly; by the statute 14 E. 3. st. 1. c. 8. there shall be as many escheators as when King Edward came to the crown, viz. one in every county. — But anciently there were but two, one on this side *Trent*, and the other beyond *Trent*, but they had sub-escheators. Co. Lit. 13. b. (b) To enquire of casual profits, and seize them into the king's hands, that they may be answered to him. Co. Lit. 92. b.

8 Hen. 6. c. 16. || The statutes 8 Hen. 6. c. 16. and 18 Hen. 6. c. 6. provide
18 Hen. 6. c. 6. that no lands which are seized to the king upon inquest before escheators, shall be let to farm until the return of the inquest, and one month afterwards, unless the party grieved by such inquest shall traverse the same, and offer to take the lands to farm until the determination of the traverse, in which case they shall be let to such party.

Doe dem. And it has been decided that these statutes extend to the case
Hayne, and of an escheat upon the death of a tenant last seized without heirs,
His Majesty, where no immediate tenure of the crown was found by the inquest: and as the crown could not grant to a stranger in such
v. Redfern, case without office, so neither could a plaintiff in ejectment
2 East, 96. recover on the demise of the crown, which must be considered as a grant: and the inquisition being void under the statute 2 & 3 Edw. 6. c. 8. § 8. for not finding of whom the lands were holden, was held not sufficient to support the grant.

1 Madd. 582. It seems doubtful whether a person claiming as heir of a bare trustee can be allowed to traverse an inquest of escheat.||

Vern. 357. If the inheritance of lands escheat to the king, although he is
Attorney-General v. Thruxton. in the *post*, yet he shall have a term that was limited to attend the inheritance.

7 Ves. jun. 71. || It is the ordinary practice with the crown to give a lease to the party discovering an escheat.||

3. Of his Prerogative in Seas and Navigable Rivers.

Seld. Mar. Cl. It is universally agreed, that the king hath the sovereign do-
251. &c. Roll. minion in all seas and great rivers; which is plain from *Selden's*
Abr. 168, 169. account of the ancient *Saxons*, who dealt very successfully in all
5 Co. 106. naval affairs, and therefore the territories of the *English* seas and
10 Co. 141. rivers always resided in the king.

[In the narrow seas, that is, the seas which adjoin to the coasts of *England*, the king hath a double right, viz. a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety, or ownership. This right of propriety or ownership is evidenced, 1st, in the right of fishing in these seas and the arms and creeks thereof, which is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is lord, or as the right of fishing belongs to him that is owner of a private or inland river; and 2d, from the king's right of propriety to the shore, and the *maritima incrementa*. — The shore, as to this purpose, is the land lying between high-water and low-water mark in *ordinary* tides; and this land belongeth to

to the king *de jure communi* both in the shore of the sea, and the shore of the arms of the sea. And that is called an arm of the sea where the tide flows and reflows, and so far only as the tide flows and reflows. 29 Ass. 95.—The *maritima incrementa* are of three kinds.—1. *Per projectionem vel alluvionem*. 2. *Per relictionem vel desertionem*. 3. *Per insulæ productionem*. The increase *per alluvionem* is, when the sea by casting up sand and earth doth, by degrees, increase the land, and shut itself out farther than the ancient bounds went; and this is usual. The reason why this belongs to the crown is, because, in truth, the soil, where there is now dry land, was formerly part of the very *fundus maris*, and, consequently, belonged to the king. But, indeed, if such alluvion be so insensible, that it cannot be by any means found that the sea was there, *idem est non esse et non apparere*, the land thus increased belongs as a perquisite to the owner of the land adjacent.—As to the increase *per relictionem*, or recess of the sea, this doth *de jure communi* belong to the king; for as the sea is part of the waste or demesne, so of necessity the land that lies under it, and therefore it belongs to the king when left by the sea; and so also it regularly holds in lands deserted by a river, that is an arm of the sea or creek of the sea *primâ facie*, especially, if the creek or river be part of a port.—And as to islands arising *de novo* in the king's seas, or the king's arms thereof, these upon the same account and reason *primâ facie* and of common right belong to the king; for they are part of that soil of the sea, that belonged before in point of propriety to the king: for when islands *de novo* arise, it is either by the recess or sinking of the water, or by the exaggeration of sand and slab, which in process of time grow firm land environed with water; and thus some places have arisen, and their original recorded, as about *Ravesend* in *Yorkshire*. Hale *De Jure Maris*, c. 4. || See 3 Barn. & C. 91. 4 Barn. & C. 495; and *post.* p. 399.]]

And, as the king hath a prerogative in the seas, so hath he likewise a right to the fishery and to the soil; so that if a river, as far as there is a flux of the sea, leaves its channel, it belongs to the king. Dyer, 326. 2 Roll. Abr. 170.

Hence the admiralty court, which is a court for all maritime causes, or matters arising upon the high sea, is deemed the king's court; and its jurisdiction derived from him who protects his subjects from pirates, and provides for the security of trade and navigation. 4 Inst. 142. Molloy, 66. For this court and its jurisdiction, and how far it extends, *vide tit. Court of Admiralty*. || See *antè*, tit. *Piracy*, as to the jurisdiction of the admiral, and the places to which it extends, *infra corpus comitatus*.]]

From the king's dominion over the seas it was holden, that the king as protector and guardian of the seas might, before any statute made for commissions of sewers, provide against inundations by lands, banks, &c., and that he had a prerogative herein as well as in defending his subjects from pirates, &c. (a) 10 Co. 111. Case of the Isle of Ely. [(a) The commission enacted by st. 28 H. 8. c. 5. recites this part of the king's jurisdiction, *viz.* "We therefore, for that by reason of our royal dignity and prerogative royal we are bound to provide for the safety and preservation of our "realm," &c. This prerogative of the crown Lord Hale calls an *interest of jurisdiction*, *viz.* in reference to common nuisances. "And," he says, "another part of the king's jurisdiction in reformation of nuisances, is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called *altæ viæ regiæ*, so these public rivers for public passage are called *fluvii regales*, and *haut streames le roy*; not in reference to the propriety of the river, but to the public use; all things of public safety or convenience being in a special manner under the king's care, supervision, and protection. And therefore, the report in Sir John Davies, of the piscary of *Ban*, mistakes the reason of those books, that called these *streames le roy*, as if they were so called in respect of propriety, as 19 Ass. 6. Dy. 11. for they are called so, because they are of public use, and under the king's special care and protection, whether the soil be his or not. Hale *De Jure Maris*, by Hargrave, p. 8.]

But notwithstanding the king's prerogative in seas and navigable rivers, yet it hath been always held, that a subject may fish in 3 E. 4. 18, 19. Bro. Custom,

46. Fitz. Bar. in the sea; for this being a matter of common right, and the
93. Mod. 105. means of livelihood, and for the good of the commonwealth,
2 Salk. 637. cannot be restrained by grant or prescription.

pl. 4.
[12 Bos. & Pul. 472.] [Although *primâ facie* an arm of the sea be in point of propriety the king's, and *primâ facie* it be common for every subject to fish there, yet a subject may have by usage a several fishery there, exclusive of that common liberty which otherwise of common right belongs to all the king's subjects. See Hale De Jure Maris, cap. 5. and the several authorities there collected.] [4 Term R. 459.]

6 Mod. 75. Also it is held, that every subject of common right may fish
Warren v. with lawful nets, &c. in a navigable river as well as in the sea;
Mathews. and the king's grant cannot bar them thereof; but the crown
Salk. 357. pl. 4. only has a right to royal fish; and that the king only may grant.
S.C. and S.P.
Per Holt C. J. on a claim of *solam piscariam* in the river *Ex* by grant from the crown.
[See *antè*, tit. *Pischary*, and 5 Barn. & C. 875.]

Hale De Jure [And as a subject may have a right of fishing in the sea and the
Maris, c. 6. arms thereof, so the shore, that is, the land, which lies between
high-water and low-water mark at ordinary neap-tides, may
belong to a subject. The statute of 7 Jac. 1. c. 18. supposeth it;
for it provides, that those of *Cornwall* and *Devon* may fetch sea-
sand for the bettering of their lands, and shall not be hindered
by those that have their lands adjoining to the sea-coasts, which
it appears by the statute they were formerly. Vide *Cartæ Anti-
quæ*, D. D. n. 24. the charter of *Alan de Percy* to the monks of
Whitby, and the bounds thereof, viz. *totam marinam a portâ de
Whitby usque Blowick, &c., et usque Terdiso, et usque in mare, et
per marinam in Whitby*, confirmed by King *Henry* the First.
And the bounds of that abbey's possessions take in many creeks
of the sea, yet are given by a subject, viz. *Derwent, Muse, Ese, &c.*

Ibid. So The shore may not only belong to a subject in gross, which
agreed in Sir possibly may suppose a grant before time of memory, but it may
Henry Constable's case, 5 Co. be parcel of a manor. And the evidences to prove this fact are
107. 5 E. 3. 3. commonly these—constant and usual fetching gravel and sea-weed
Dy. 326. b. and sea-sand between the high-water and low-water mark, and
So in the Ex- licensing others to do so; inclosing and imbanking against the
chequer-chamber, P. 16 Car. sea, and enjoyment of what is so inned; enjoyment of wrecks hap-
inter l'Attorney pening upon the sand; presentment and punishment of purpres-
ney General tures there in the court of a manor; and such like.
et Sir Samuel Rolls, Sir Richard Buller, and Sir Thomas Arundel, *per omnes barones*. [See
the case of *Dickens v. Shaw*, reported in Hall on the Rights of the Crown on the Sea-shore,
Appendix.]

Hale, *ubi supra*. And as it may be parcel of a manor, so it may be parcel of a
vill or parish. And the evidence for that will be usual perambulations, common reputation, known metes and divisions, and the like. And upon this account the parson of *Sutton*, about 14 Car. 1. had a verdict for the tithes of *Sutton-Marsh* in *Lincolnshire*, upon a long and a great evidence: though it appeared, that within time of memory it was the mere shore of the sea covered at ordinary tides, and without the old sea-bank.

Hale, *ubi supra*. And it may not only be parcel of a manor, but *de facto* it many times is so, and perchance it is parcel of almost all such manors as by prescription have royal fish or wrecks of the sea within their manor.

manor. For, for the most part, wrecks and royal fish are not, nor indeed cannot, be well left above the high-water mark, unless it be at such extraordinary tides as overflow the land: but these are perquisites which happen between the high-water and low-water mark; for the sea withdrawing at the ebb leaves the wrecks upon the shore, and also those greater fish, which come under the denomination of royal fish.

¶ It hath been decided that *primâ facie* every subject has a right to take fish found upon the sea-shore, between high and low-water mark; but such general right may be abridged by the existence of an exclusive right in some individual. And the public have not any common law right of bathing in the sea, and as incident thereto, of crossing the sea-shore on foot, or with bathing machines for that purpose.

that of *Bagott v. Orr*, *suprà*, Hall on the Rights of the Crown on the Sea-shore. p. 184.

Nor have they a common law right to tow on the banks of ancient navigable rivers.¶

And as the shore may thus belong to a subject, so in some instances may the *maritima incrementa*. Hence custom and prescription may give the *jus alluvionis* to the land whereunto it accrues. But custom cannot entitle the subject to *relict* lands, or make them parcel of a manor. For the soil from under the water must needs be of the same propriety as it is when covered with water. If the soil of the sea, while it is covered with water, be the king's, it cannot become the subject's because the water hath left it. But in the case of *alluvio maris*, it is otherwise; because the accession and addition of the land by the sea to the dry land gradually is a kind of perquisite, and an accession to the land; and therefore, in case of private rivers, it seems by the very course of the common law such a gradual increase *cedit solo adjacenti*; and though it may be doubtful whether it be so *ex jure communi* in case of the king, yet doubtless it gives a reasonableness and facility for such right of *alluvio* to be acquired by custom; for though in every acquist *per alluvionem* there be a reliction or rather exclusion of the sea, yet it is not a recess of the sea, nor properly a reliction.

¶ The principle being settled, that land derelict by the sea belongs to the crown, and land formed by alluvion, and by the sea's casting up of sand and earth, belongs to the owner of the adjacent land, it becomes a mere question of fact and evidence in each particular case, whether the land in question falls within the one description or the other.

Where an inquisition found that a piece of land had in times past been covered with the water of the sea, but was then, and had been for several years past, by the sea *left*, and the commissioners caused the same to be seized into the king's hands; the defendant filed a traverse stating that he was seised in fee of the manor of *North Thoresby*, *cum N.C.*, and the demesne lands thereof, and that the said piece of land, by the slow, gradual, and imperceptible projection, alluvion, subsidence, and accretion of ooze, soil, sand, and other matters

Bagott v. Orr,
2 Bos. & Pull.
472. *Blundell*
v. Catterall,
5 Barn. & A.
268. See re-
marks on the
doctrine of
this case, and

Ball v. Her-
bert, 3 Term
R. 255.

Hale De Jure
Maris, c. 6.
¶ See *ante*
p. 393.¶

The King *v.*
Lord Yar-
borough,
5 Barn. & C. 91.
5 Bing. 165.
S. C.; *et vide*
4 Barn. & C.
495.

matters, being slowly, gradually, and by imperceptible increase in long time cast up, deposited, and settled, by and from the flowing and reflowing of the tide upon and against the extremity of the said manor, hath been formed, &c. and thereby became parcel of the demesne lands of the manor; without this, that the land was *left* by the sea as found by the inquisition. The replication by the Attorney-General traversed that the land was formed as alleged in the inducement to the defendant's traverse, and joined issue on the traverse taken by the defendant: and issue was joined on the traverse taken by the Attorney-General. It appeared by the evidence that the land in question had been formed by ooze and soil deposited by the sea; and that the increase could not be observed when actually going on, although a visible increase took place every year, and in the course of fifty years a large piece of land had thus been formed. It was held, that upon this evidence the land could not be said to have been *left* by the sea, and that it was formed by the slow, gradual, and imperceptible projection, &c. of ooze, soil, and sand, as alleged in the inducement to the defendant's traverse, and that both issues were properly found for him.||

Hale, *ubi supra*.

But, though it be regularly true, that *terræ relictæ per mare* cannot be prescribed, yet a creek, arm of the sea, or *districtus maris*, may be prescribed in point of interest; and by way of consequence or concomitance, the land *relictæ* there, according to the extent of such a precinct as was so prescribed, will belong to the former owner of such *districtus maris*. But otherwise it would be, if such prescription before the reliction extended only to a liberty, or *profit appendre*, or jurisdiction only within that district; as, liberty of free fishing, admiral jurisdiction, or the jurisdiction of a leet, hundred, or other court; for such may extend to an arm of the sea, as appears by 8 E. 2. *corone*; for these are not any acquests of the interest of the water and soil, but leave it as it found it. Therefore the discovery of the extent of the prescription or usage, whether it extends to the soil or not, rests upon such evidences of fact, as may justly satisfy the court and jury concerning the interest of the soil.

Hale, *ubi supra*.

And the same rule, which hath been observed before touching acquests by the reliction or recess of the sea, or the arms or creeks thereof, holds with respect to islands arising within those parts. Of common right and *primâ facie*, it is true, they belong to the crown: but, where the interest of a *districtus maris*, or arm of the sea, or creek, or haven, doth in point of propriety belong to a subject, either by charter or prescription, the islands that happen within the precincts of such private propriety of a subject, will belong to the subject according to the limits and extent of such propriety. And therefore, if the west side of an arm of the sea belong to a manor of the west side, and an island happen to arise on the west side of *filum aquæ* environed with the water, the propriety of such island will entirely belong to the lord of the manor of the west side: and if the east side of an arm of the sea belong to a manor of the east side *usque filum aquæ*, and such an island happen

happen between the east side and such a *filum aquæ*, it will belong to the lord on the east side: and if the *filum aquæ* divide itself, and one part take the east, the other the west, and leave an island in the middle between both the *fila*, the one half will belong to the one lord, and the other to the other. But this is to be understood of islands that are newly made; for if a part of an arm of the sea, by a new recess from its ancient channel, encompass the land of another man, his propriety continues unaltered.]

4. *Of his Prerogative in Swans and Royal Fishes.*

The king, as a perpetual sign and acknowledgment of his dominion of the seas, hath several creatures reserved to him under the denomination of royal creatures, as swans, sturgeons, and whales; all which are the natives of seas and rivers. 7 Co. 16.

But a subject may have a property in swans three manner of ways:

First, by the acquisition of tame swans; *viz.* by buying tame swans, or by grant of the king of wild swans, and taming them; and then the subject shall have the property in them wheresoever they are, as of any other tame animal. 7 Co. 16. b.

If the cock swans of one man get into the hen swans of another, by the custom of *England* this brood shall be divided; and it shall not follow the female, according to the common right of accession. And this is founded on a natural observation on the moderation of this sort of creatures, that they will not couple with more than one; and so if they were to be separated they could never be propagated. 7 Co. 17. a. 2 Black. Com. 290, 291.

A custom that the owner of swans should have two cygnets, and the owner of the manor the rest, has been held good. 7 Co. 17. a.

Swans that are not the king's may be strays in a manor as well as any other creatures; and a man may prescribe to have swanning for them in another manor. 7 Co. 17. a.

Secondly, the property of wild swans may be in the subject by a grant of swan-mark from the king; for, in this case, all the swans marked with such mark shall be the subject's wheresoever they fly. 7 Co. 17. a.

A swan-mark may be granted over as well as the privilege of a park or warren. 7 Co. 17.

By the 22 E. 4. c. 6. "No person, other than the son of the king, shall have any mark or game of swans, except he have lands of freehold to the yearly value of five marks; and if any person not having lands to the said yearly value, shall have any such mark or game, it shall be lawful to any of the king's subjects, having lands to the said value, to seize the swans as forfeit; whereof the king shall have the one half, and he that shall seize the other." 22 E. 4. c. 6.

Thirdly, swans may be the subject's *ratione privilegii*; as, if the king grants to the subject the game of wild swans in such a river; but in such case, the subject cannot bring an action of trespass, *quare cygnos suos ibid. nificavit.* or *gignem. cepit*; for a 7 Co. 17.

man cannot call that his own, which he hath only during particular occupancy and possession in a certain place.

Hawk. P. C.
c. 33. § 27.

If a man take away swans marked or pinioned, or those which are unmarked, if they be kept in a pond or private river, it is felony.

St. de prero-
gativa regis,
15 E. 2. c. 11.
[(a) To give

The king shall have wreck of the sea, whales, and great sturgeons taken in the sea and elsewhere throughout the whole realm (a); except in places privileged by the king.

the crown a right to such fish, they must be taken within the seas parcel of the dominion and crown of *England*, or in the creeks or arms thereof; for, if taken in the wide seas, or out of the precinct of the seas belonging to the crown of *England*, they belong to the taker. 39 E. 3. 35. *per Belknap*. — A subject might and may unquestionably have this franchise or royal perquisite, 1st, by grant; 2d, by prescription within the shore between the high water and low water-mark, or in a certain distinct *districtus maris*, or in a port, or creek, or arm of the sea; and this may be had in gross, or as appurtenant to an honour, manor, or hundred. Hale de Jure Maris, c. 7.]

[5. Of his Prerogative in Ports and Havens.

Hale de Por-
tibus Maris,
c. 2.

A port, saith my Lord *Hale*, is *quid aggregatum*, consisting of something that is natural, *viz.* an access of the sea, whereby ships may conveniently come, safe situation against winds where they may safely lie, and a good shore where they may well unlade: something that is artificial, as keys, and wharfs, and cranes, and warehouses, and houses of common receipt: and something that is civil, *viz.* privileges and franchises, *viz.* *jus applicandi*, *jus mercati*, and divers other additaments given to it by civil authority.

Id. c. 5.

To erect a public port originally and *de novo*, is a part of the *jus regale* of the crown of *England*. And as it is not competent to a subject to institute or erect a common port without the charter of the king, or a lawful prescription, so neither is it competent to a subject without such charter or prescription to erect a port for the men of such a fee or precinct, as for his own tenants. A lord of a county palatine, though he may have, and usually had, ports by charter or prescription, yet he cannot erect a common port within his palatine jurisdiction. For the concernment of a port must necessarily exceed the extent and limits of the *jura regalia* that are incident to a county palatine; for the safety of the kingdom, the commerce of the kingdom, and the king's revenue are concerned in it. Merchants and seamen of all parts and quarters of the world are let into the kingdom publicly, and under the public protection, in a public port: and, consequently, it is not within the extent of a jurisdiction palatine *de novo* to erect a public port.

Id. c. 5.

In the erecting of a port the royal authority is not restrained, as in the grant of a market, by the vicinity of the new port to a former port. For though the old port may be greatly injured by the erection of the new port in its neighbourhood, yet that circumstance will of itself, be no objection to it; provided that the new port be not within the proper limits of the old port, and there be no obstruction to the water or otherwise, but that ships may, if they will, arrive at the former port.

But,

But, 1. It cannot be erected within the peculiar limits by charter or prescription belonging to the former port, because that is part of the interest of the lord of the former port. Neither can the first port be obstructed or wholly defaced, or excluded for arrival of ships, but by act of parliament, as was done in the case of *Melcombe* translated to *Poole*. Rot. Parl. 11 H. 6. n. 30. And the reason is, because a public interest is concerned; *viz.* the interest of the merchant at large, and the interest of the traders and mariners in that particular place or port, who have a right settled in them for the application, lading, and unlading of ships there.

2. If the king have an ancient port at *A.*, and he erect another port hard by, with a general prohibition that no man shall bring his goods or merchandizes by sea to any other port within five miles but to that which is newly erected, this prohibition is good, as against the king's interest in the former port, though the new port be erected within the precincts of the old; for he may derogate from his own simple interest by his own restriction. But this restriction is not good against the subjects of the port of *A.*, who by usage had a right to come with their own shipping, and lade and unlade: and this, although the goods might be customable goods; for the inhabitants of *A.* had an easement acquired to themselves by prescription.

3. But if the king erect by his own proclamation a port at *A.* where there was no arrival of ships before, and doth not grant it to another person, but keeps the interest in himself of this franchise; there, it seems, the king may dissolve this port, or erect another port, with a prohibition that no ship shall arrive within such a distance, but at the new port; for there was no right of arrivage of any ships at the former harbour lodged in the inhabitants nor any other subject, but only permissive at the king's pleasure, and he may derogate from his own right.

4. But if a subject hath a port and arrival of ships at *B.* by prescription or charter, and afterwards the king erect a new port, within three or five miles within or without the precincts of the port of *B.*, with a prohibition that no ships shall arrive within five miles of the new-erected port elsewhere; this prohibition or restriction is void, as against the interest of the owner of the port of *B.*, or the inhabitants of *B.*, because there was a former interest lodged in the owner and inhabitants of the port of *B.*, which cannot be taken from them without their own consent, or by act of parliament.

5. But if a subject, or the king's fee-farmer, hath a port at *B.* by prescription or charter, and the king grants that no ships shall arrive within five miles, or such like compass, the king cannot within that precinct erect *de novo* a port to the prejudice of that port to which he had precedently granted this privilege. For the grant is good as against the king, and any interest derived from him after this grant: and although, as hath been said, without this restrictive clause, the king might have erected a port near to the former, which would have had this concurrent power or

franchise, yet the king hath bound up his hands by his own charter ; and by this inhibition, the precinct, to which this inhibition extends, is become as it were parcel of the precinct of the port.

Hale de portibus Maris, c. 6.

||(a) See Earl of Lonsdale v. Nelson, 2 Barn. & C. 302.||

The right in ports, according to Lord *Hale*, is threefold :— The *jus privatum*, or the interest of propriety or franchise. The *jus publicum*, or the common interest that all persons have to resort to or from public ports, as public sea-marts or markets, with their goods, wares, and merchandizes. (a) The *jus regium*, or the right of superintendency and prerogative, which the king hath for the safety of the realm, or benefit of commerce, or security of his customs. The first, *viz.* the *jus privatum*, divides itself into the ownership of propriety, and the ownership of franchise. The ownership of propriety is, where the king, or a common person by charter or prescription, is the owner of the soil of a creek or haven, where ships may safely arrive and come to the shore. This interest of propriety is *primâ facie* in the king, but may belong to a subject. But the subject hath not thereby the franchise of a port, nor may he so use or employ it, unless he hath had that liberty time out of mind, or by royal charter. Indeed he may bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as fish, &c. ; but he may not use it as a public port or admit foreigners, unless in case of necessity, nor take toll or anchorage there ; for that is finable, either by presentment, or in a *quo warranto*. — The ownership of franchise is that which gives the formality or denomination of a public or lawful port, and becomes a free arrival of ships to lade and unlade their merchandizes, and this may be acquired by prescription, or by creation by the king either by proclamation or by charter.

||(a) The public have a right to use the cranes on public quays in a port, on paying a reasonable compensation to the owner. Bolt v. Stennett, 8 Term R. 606.||

Before any port is legally settled, although the propriety of the soil of a creek or harbour may belong to a subject or a private person, yet the king hath his *jus regium* in that creek or harbour ; and there is also a common liberty for any one to come thither with boats and vessels as against all but the king. And upon this account, though *A.* may have the propriety of a creek or harbour or navigable river, yet the king may grant there the liberty of a port to *B.*, and so the interest of propriety and the interest of franchise several and divided. And in this no injury is at all done to *A.*, for he hath what he had before, *viz.* the interest of the soil, and, consequently, the improvement of the shore, and the liberty of fishing ; and as the creek was free for any one to pass in it against all but the king, for it was *publici juris* as to that matter before, so now the king takes off that restraint, and by his licence and charter makes it free for all to come and unlade. (a)

But if *A.* hath the *ripa*, or bank of the port, the king may not grant a liberty to unlade upon that bank or *ripa*, without his consent, unless custom hath made the liberty thereof free to all, as in many places it is ; for that would be a prejudice to the private interest

interest of *A.*, which may not be taken from him without such consent. And therefore in the creation of a new port either by proclamation or charter, it hath been the course to secure the interest of the shore beforehand, for the building of wharfs and quays for the application of merchandize, and for the building of houses. So that it is possible, though not ordinary, that the interest of propriety and the interest of franchise may be divided: but it is usual and best in conjunction.

But, though the dominion either of franchise or propriety be lodged by prescription or charter in a subject, yet it is charged or affected with that *jus publicum* that belongs to all men; and so it is charged or affected with that *jus regium*, or right of prerogative of the king, so far as the same is by law invested in the king. It is only with the *jus regium*, that we have to do at present, observing by the way, that the patronage and protection of all *jura publica* being intrusted by the common law to the king; the care of preventing and reforming public nuisances in ports is left to him, and his courts of justice, the prosecutions for them are in his name, and the fines for the defects or annoyances in them are part of his revenue.

purpresture and nuisance have been committed, he may proceed by information to have a decree to abate it. Case of the City of Bristol v. Morgan, Trin. 11 Lord Hale De Portibus Maris, p. 81. and Attorney-General v. Richards, Anstr. 603.

Id. c. 8.
Though the question of nuisance be a question of fact, and therefore proper for the cognizance of a jury, yet where the king claims and proves a right to the soil, where a claim in equity, and Car. 1. cited in

The *jus regium*, or prerogative of the king in the ports of the sea, branches itself into three parts, as it relates first, to the preservation of the safety and peace of the kingdom; second, to the trade and commerce of the kingdom; or, third, to the improvement and due answering of the ships' customs and subsidies arising by merchandize imported or exported. From the first ariseth his power of inhibiting persons to come into the realm, or of inhibiting persons to go out of the realm, of both which see hereafter (C 3, 4.) From the second ariseth the power claimed by him of opening or shutting the ports in reference to goods exported or imported, of which we shall treat under this division of the subject. With respect to his power in the last, it will be treated of under title "SMUGGLING."

As to his power of opening and shutting the ports in reference to goods exported or imported, we shall transcribe the words of Lord Hale upon this delicate point.

Concerning importation of foreign goods, and the prohibition of the importation of them, we may find *de facto* that such inhibitions have been of two sorts, *viz.* general inhibitions that such or such merchandizes shall not at all be imported, under pain of confiscation or forfeiture; or else they have been inhibitions or restraints *sub modo*; as, namely, they shall be imported only at such ports or in such ships.

First, For general prohibitions of merchandizes of any particular kind. These were sometimes made, but very rarely; neither indeed could they be lawful without the help of an act of parliament, because there have been in all times several statutes made for the liberty and encouragement of merchants strangers

especially to come into the kingdom and trade, which could not be derogated by a proclamation. *Magna Charta*, c. 30. 2 E. 3. c. 4. 9 E. 3. c. 1. 14 E. 3. c. 2. 25 E. 3. c. 2. and divers other statutes.

And therefore, if at any time there were such inhibitions by proclamation, they were commonly temporary upon an exigence of state, and not perpetual, nor of any certain continuance. But when there were perpetual or long restraints of this nature, they were always done by parliament. 3 E. 4. c. 4. 1 R. 3. c. 12. 19 H. 7. c. 21. against importation of foreign manufactures therein specified; 4 E. 4. c. 1. against importation of foreign clothes; 5 Eliz. c. 7. against importation of daggers, &c.; 27 H. 6. c. 1. an inhibition of the wares of *Brabant* and *Holland*, because they there had made restraint of importation of *English* cloth; 23 H. 8. c. 7 an inhibition by act of parliament of the importation of *French* wines between *Michaelmas* and *Candlemas*; and very many more of the like kind. And the reasons of these interposings of acts of parliament was, because that proclamations proved very ineffectual to that purpose, partly because it was at best doubtful whether they could at all be effectual against so many acts of parliament; but doubtless they could not without an act of parliament induce a forfeiture of the goods so imported, as hath been often resolved; whereof more hereafter. See the resolution of the case of monopolies, 11 Rep. 88. the grant of the sole importation of foreign cards, though prohibited by act of parliament, ruled to be against law, and a monopoly. Much more were the things not prohibited by law to be imported. *Vide Peeth's case*, Rot. Parl. 50 E. 3.

The only act of parliament that seems to give a countenance to these kinds of inhibitions, is that of 3 Jac. 1. c. 6. The king granted a charter to the merchants, that no *Spanish* wines should be imported but by them. This act repealed that charter in a great measure, whereby some would infer that the patent was good, since nothing but an act of parliament seemed necessary to repeal it. But the consequence is mistaken. *In majorem cautelam* an act of parliament was used in this case as the most safe and effectual means: but if any man consider those acts of parliament that enact the sea to be open, or the resolutions of court in cases of this nature, or the very preamble of the act itself, he will easily find that such inhibitions cannot be without an act of parliament.

Secondly, as touching particular restraints; as, for instance, that malmseys shall not be imported, but unto the port of *Southampton*; such a grant is against law, and was accordingly resolved in the case of *Southampton*, Trin. 1 Eliz. Rot. 73. cited in *Cooke's Comment upon Magna Charta*, c. 30. and therefore there was a special act of parliament made, the 5 Eliz., for the making good of that charter; and the like course hath been used to make good those restrictions of foreign trade to particular companies; as, for instance, the *Muscovy* Company, and some others.

2. Concerning exportation, and how far forth the ports may be shut in reference to goods and merchandizes exported, both the

quid

quid facti and the *quid juris* therein. These prohibitions of exportation were never generally for all goods; for that were to destroy trade, but of some particular goods and merchandises. And those restraints were of two kinds, *viz.* general restraints, that they should not be at all exported; or special and qualified restraints, that they should not be exported, but in such ships, or at such places. Touching both these briefly: and first, touching the general inhibitions.

It is certain, that inhibitions of this nature were very frequent by proclamation; and when they carried with them the apparent reasonableness and fitness of the inhibition, they were not much disputed. Those inhibitions were for the most part touching such commodities whereby the kingdom might be weakened, or scarcity occasioned, by the exportation: as arms, ammunition, corn, victuals, gold, silver, horses, timber, thread of yarn or woollen, and sometimes of falcons. *Vide Claus.* 10 E. 2. m. 13. *dorso.* *Claus.* 38 E. 3. m. 29. *Claus.* 41 E. 3. m. 24. *dorso.* *Claus.* 43 E. 3. m. 3. *dorso.* *Claus.* 45 E. 3. m. 4. *dorso.* And sometimes in the proclamation there was annexed a clause of imprisonment of offenders; sometimes the forfeiture of the things imported; sometimes the forfeiture of all their goods and lands. But these clauses of forfeiture were only *in terrorem*; for, as we have before observed, a proclamation barely cannot induce a forfeiture of goods. But yet sometimes the searchers and other officers did seize the goods; and when they had so done, they were compelled to account for the goods so seized in the Exchequer; and the parties, whose goods were so seized, were put to much trouble, before they could have their goods again. But the most usual way to punish offenders against such proclamations was by fine and imprisonment, for where the king may by law prohibit, the proclamation doth increase the offence. And these proceedings were by information at the king's suit, sometimes in the King's Bench, as H. 1. E. 2. *B. R. Rot.* 38. against such as exported horses, arms, money, and plate, against the king's proclamation; sometimes in the Exchequer, *Communia Trin.* 16 E. 3. *Rot. Mich.* 19 E. 3. *Rot. claus.* 64. m. 29. and sometimes *coram concilio*, *viz.* in Chancery.

How far these proclamations might be warrantable by law in these particular cases, I shall not positively determine; only thus far I shall say,

First, That if it were admitted, that in these particular cases of arms, ammunition, victuals, and money, such proclamation might be made, and thereby the offenders might be subject to fine and imprisonment; yet it could not be extended to other things, neither ought or might this inhibition be an engine to gain money for licences. For if the proclamation had any strength, it was because of the inconveniences of the exportation of these things. If it were not a public inconveniency, it could not be inhibited barely by proclamation; and if it were a public inconveniency, it might not be licensed for private profit. If it might, the strength of the proclamation would consequently cease.

Secondly, If these proclamations were admitted lawful; yet

they could not induce any forfeiture of lands or goods, or of the very goods so exported against that inhibition; because that lies not within the strength of any thing but a law.

Thirdly, Though possibly in the time of hostility, or public danger, or common scarcity, such prohibitions by proclamation of exportation of victuals and arms, might have a temporary effect and use; yet we may easily guess that they were not effectual for perpetuity, nor indeed sufficient provisions *pro tempore*; for the king and his council thought not fit to rest upon such ineffectual means, but acts of parliament have successively passed for the inhibition of exportation of these very things, with penalties of forfeitures added to them. See 1 E. 4. c. 5. for horses; 1 E. 2. P. M. c. 5. of corn, herrings, butter, cheese, and wood; 25 H. 8. c. 5. of victuals of all sorts; 9 E. 3. c. 1. 19 H. 7. c. 15. of bullion or money. The like might be instanced in divers others things.

Let us now come to particulars, or qualified restraints; and they are of two kinds:

First, The restraints of exportation in any but *English* bottoms. This hath been attempted to be done by proclamation, as a good expedient for the increase of shipping and mariners, and the encouragement of trade and navigation. *Vide inde claus.* 41 E. 3. m. 25. of a proclamation to that purpose; but it proved ineffectual, till provision was made for it by acts of parliament, *viz.* 5 R. 2. c. 3. — 6 R. 2. c. 8. — 14 R. 2. c. 6. — 4 H. 7. c. 10. But because it provoked foreign princes to do the like, it was repealed by the statute 1 Eliz. c. 13. with certain provisions made in the case by that statute and the statutes of 5 Eliz. c. 5. and 13 Eliz. c. 15. But now, by a late act of parliament, 12 Car. 2. intituled, “An act for encouraging of navigation,” the use of foreign ships is in a great measure restrained.

And upon the whole matter, it will appear from the several acts of parliament that have been made for the support and increase of trade, and for the keeping of the sea open to foreign and *English* merchants and merchandize, that there is now no other means for the restraint of exportation or importation of goods and merchandizes in times of peace, but only when and where an act of parliament puts any restraint. Several acts of parliament having provided, *que la mere soit overt*, it may not be regularly shut against the merchandize of *English*, or foreigners in amity with this crown, unless an act of parliament shut it out, as it hath been done in some particular cases, and may be done in others.

Pref. to Harg.
Hale's Tracts,
v. i. p. xxx.
18 E. 3. c. 3.

In another place Lord *Hale* hath these words: “Touching the prohibitions of exportations and importations of commodities. — It is true that by divers graunts in parliaments the sea ought to be open for exportation and importation of merchandize. *Rot. Parl.* 18 E. 3. n. 17. 22 E. 3. n. 8. *Item que passage de leines et d'autres marchandises soient overts sans faire aprestes ouster la custome a les merchaunts, que ont les custumes du roi par un certain, quele aprest turne al profit des dits merchaunts et outrageouse grevance et nuschanee a votre commun.* Resp. *Soit le passage*

" *passage overt, et que chescun poit passer fraunchement, savant au roi se que lui est due.* Yet clerely the kinges of this realme always exercised a power in restraint of the free passage of some commodities of this realme by their own power, as well before as after 22 E. 3. And though complaints were made of it, yet the crown retained the power. *Vide* 25 E. 3. n. 22. 1 H. 5. n. 41.

" Some instances of the particulars.

" (1.) For exportation prohibited.

" 1. The kinges have usually before the stat. of 1 & 2 P. & M. c. 4. and 13 Eliz. c. 15. prohibited the exportation of corne and graine; because the necessary sustenance of the realme. And this is in effect admitted legal. *Rot. Parl.* 17 R. 2. n. 39. Upon a petition for a repeal of such a restraint, the answer was, *Le roi le voet a present, proviso que bien lise a son conseil a restrainer le passage quant il semble besoignable.* For such restraints *vide claus.* 5 E. 3. parte 1. m. 21. dors. *Rot. Parl.* 50 E. 3. n. 156. *Vide claus.* 41 E. 3. m. 21. dors. B. 15. Claus. 48 E. 3. m. 11. dors. B. 159. Claus. 46 E. 3. m. 21. dors. B. 118. Claus. 47 E. 3. m. 12. dors. B. 127. Of

wools and woolfels, 49 E. 3. m. 21. dors. B. 170.

" 2. The kinges of this realme have usually prohibited the exportation of coigne and bullion before any act to restrain it, because it is the riches and wealth of the realme. *Claus.* 30 H. 3. m. 11.

" 3. The kinges of this realme have usually prohibited the exportation of armes, or such other thinges as are for the necessary defence or strength of the realme. *Vide claus.* 10 E. 3. m. 31. dors. a proclamation inhibiting the exportation of boards or timber for ships. *Claus.* 38 E. 3. m. 29. a prohibition of exportation of horses, falchons, thread, bowes, arrowes, bow-stringes, and arms, and to arrest the ship and goods. The like prohibition of commerce with enemies. *Claus.* 43 E. 5. m. 3. dors. B. 50.

" 4. The kinges have usually restrained the passage of customable goods to some particular ports for the better preventing of defrauding of customes, and at these ports the cockets kept. Thus did E. 8. *claus.* 5 E. 3. parte 1. m. 12. dors. Now settled by the act of 1 Eliz. c. 11.

" And in these cases prohibitions of this nature were legal, and for the most part the coercion was by stay of the ship or goods prohibited; for no proclamation could induce a forfeiture; and for that cause most of these thinges were provided for by act of parliament, which subjected the party to a forfeiture or other penalty. *Vide the penalty for breaking such an arrest,* claus. 46 E. 5. m. 28. B. 110.

" (2.) Now for an instance of a restraint of foren trade or importation.—Upon this the acts of *Magna Carta*, c. 30. 9 E. 3. c. 1. 25 E. 3. stat. 4. 2 R. 2. c. 1. lye heavy; and it hath been seldom practised. *Vide* a restraint of foren trade in *Ireland*, 3 R. 2. n. 44.

" Thus much for the kinge's power of shutting the ports; which, though it was sometymes useful and profitable for the kingdom, yet oftentimes was made a meanes of great damage and oppression, which did arise by letting loose the restraint to particular men for profit.

" And

Vide Claus.

46 E. 3. m. 22.
dors. B. 118.

1 East, 486.

8 East, 275.

12 East, 296.

16 East, 197.

4 Rob. Ad.

R. 11. 2 *id.* 162.

“ And so ariseth the next consideration of the king’s power
“ of opening the ports.

“ The king might open the passage, which either by his
“ own proclamation he had restrained, or which by act of par-
“ liament were restrained, either in respect of this or that
“ particular commodity; as when exportation of some particular
“ wares were restrained in respect of the place, as the transport-
“ ation of wools to the staple. This is cleere and without
“ question, whereof before. These licences were also complained
“ of, and often enacted against, but could never be remedied.
“ *Vide* 21 R. 2. n. 82. and the procurers of such licences
“ punished. 51 E. 3. n. 17. *Vide* 27 H. 6. n. 29. 9 H. 6. n. 37.”]

||The king has also the common law prerogative of granting
licences to trade with an enemy in time of war, which without
such licence is illegal; but he cannot grant such licences in
contravention of the navigation laws.||

6. *Of his Prerogatives in Beacons and Light-Houses.*

4 Inst. 148.

12 Co. 15.

Carter, 90.

2 Keb. 114.

3 Inst. 204.

(a) Before the
the reign of
E. 3. there
were but
stacks of wood
set upon high
places, which were fired when the enemy was descried; but, in his reign, pitch-boxes were
instead of these stacks of wood set up; and this is properly a beacon. 4 Inst. 148.

It is clearly agreed, that the king only has a prerogative in
beacons and light-houses (a); and that he may erect any such,
and in such places as will be most convenient for the safety and
preservation of ships, mariners, and navigation. Also, it seems
to be the better opinion, that this being for the public utility, and
one of the prerogatives which he is intrusted with for the safety
of the whole realm, he may erect such beacon, &c. as well in the
soil or ground of a subject as in that of the crown; and that he
may do this without the subject’s consent.

Vide the
authorities
suprà, and
Carter, 90.

(b) Resolved
by the two
Ch. Justices,
Attorney and
Solicitor-Ge-
neral, that this
act extended
as well to
light-houses
in the night,
as to beacons,
&c. by the
day. 4 Inst.
149. in marg.
||And it is also
extended to vessels appointed to carry lights. 48 G. 3. c. 101. § 61.||

Also, it is clear, that the subject hath not any power to erect
any such beacon, &c. without the king’s licence and authority
for that purpose.

But by the 8 Eliz. it is enacted, “ That the master, wardens,
“ and assistants of the Trinity-house of *Deptford Strond*, shall
“ and may lawfully from time to time at their will and pleasure,
“ and at their costs, make, erect, and set up such and so many
“ beacons, marks, and (b) signs for the sea, in the sea-shores
“ and upland near the sea coasts or forelands of the sea only,
“ for sea-marks, as to them shall seem meet; whereby the
“ dangers may be avoided, and the ships the better come to
“ their ports; and all such *beacons*, marks, and signs so by
“ them to be erected, shall be continued, renewed, and main-
“ tained from time to time at the costs and charges of the said
“ master, wardens, and assistants.”

Vide tit. *Court*
of Admiralty.

And although by the common law none but the king could
erect *beacons*, light-houses, and sea-marks, yet of later times, by
letters patent granted to the Lord High Admiral, he hath
power

Bract. lib. 5.
fol. 120.

known, was very difficult to do; unless some living animal escaped to the shore, whereby they might take the tokens of a property. Hence, ancient authors define it to be no wreck, if a dog or a cat escape alive; or, if certain signs were placed on the goods whereby they might be known. And because this prerogative of wreck was abused, to the prejudice of the merchant, the statute *Westm.* 3 Ed. 1. c. 4. has provided, that if a dog or cat escape alive (which in these cases they took to be the most certain proofs of property) that then the sheriff, coroner, or lord of the isle might claim them; and if the owner came and made his claim within a year and day, he should have his goods, otherwise they remained to the king.

2 Inst. 167.

The instance of a dog or cat are only for examples; for if any living thing escapes, the claim may be made.

2 Inst. 167.
Molloy, 239.

If the mariners are pursued by enemies, and come ashore and leave the empty floating ship, which comes to land without any person; yet shall they claim the ship when it comes on shore.

2 Inst. 168.

The year and the day mentioned in the statute, shall be from the time of the seizure; for from the time of seizure there is a notoriety, in order for the party to make his claim.

5 Co. 107.

But the property is in the king or the lord of the manor, against all but the right owner, from the time that the goods touch land, even before seizure; for the king's interest herein is different from that of another occupant, who only acquires a right by the seizure; for he is intrusted with his prerogative in order to prevent any other occupant.

2 Inst. 168.

If the owner dies within the year and the day, his executors or administrators may make claim thereto; because it is not limited by the statute to the owner at the time of the wreck.

5 Co. 107.

2 Inst. 167.
(a) By the express words of the statute

This law extends not only to wreck, but to *flotsam*, *jetsam*, and *ligan*: but the wreck must be claimed by action at (a) common law, the *flotsam*, &c. by suit in the Admiralty; because the wreck is on the land, the *flotsam*, &c. in the seas.

15 R. 2. c. 3. the Admiralty cannot take cognizance of goods wrecked.

5 Co. 108.

If the suit be commenced before the year and the day, it sufficeth, though the verdict be not given; for the delay of the law must do no man an injury.

2 Inst. 168.

If wreck be embezzled both from the king and the owner, this may be enquired into on a commission of *oyer* and *terminer*, and the party fined.

2 Inst. 168.

If a lord of the manor take the king's goods as wreck, the king may claim them after the year and the day; because the king being perpetually employed in the business of the public cannot be bound to a time.

If goods wrecked be *bona peritura*, the king or lord may sell them before the year and the day be past; for the statute shall not be understood to restrain them to keep these things that of their own nature cannot be kept.

5 Co. 107, 108.
Sir Henry
Constable's
case.

If wreck be granted to the lord of the manor, and he take *flotsham* and wreck, and the jury find this whole matter, and assess entire

entire damages, judgment shall be given against the plaintiff; for the court will not give their judgment, when for part of the matter claimed the plaintiff hath no title; and it being matter of fact, the court cannot apportion the damages.

Tonnage is granted to the king for all goods imported into the realm as merchandize, by any merchant whatsoever: certain goods are wrecked, and the question was, Whether they should pay this duty? And resolved by *Vaughan*, that they should not; 1st, Because they could not be said to be imported; for importation is the bringing in of goods by artificial means, as by ships, &c. with deliberation, in order for some use; therefore these goods casually cast up, cannot be said to be imported. 2dly, They cannot be said to be imported for merchandize, but they are now as goods destined for sale; but they may be reserved to the proprietor. 3dly, They are not brought in by any merchant, for they are presumed to be deserted and derelict, and thence the property changed; and the king having a property in the whole, it is to no purpose to give him a part.

Vaugh. 164 to 172.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

6 Mod. 149.
per cur.

8. *Of the King's Prerogative in relation to Coins and Mines.*

It is clearly agreed, that by the common law the king hath a prerogative in, and is entitled to, all royal mines of gold and silver, and treasures of gold and silver hid in the earth; and that he is intrusted with the (a) coinage, and making money current; and that he alone can bring the mines and treasures of any conquered country into use, by coining them out into his money. And this prerogative is lodged in the king, as he administers justice to all; and therefore the power and regulation of that which is the (b) common standard and measure of all bartering and commerce is committed to his care.

Dav. 19.
2 Roll. Abr.
166. 5 Co. 114.
Co. 146.
(a) The legitimation of money, and the giving it its denominated value, is justly reckoned *inter jura majestatis*; and in

England it is one special part of the king's prerogative. *Hal. Hist. P. C.* 188. (b) Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The materials whereof it is made; 2. The denomination or extrinsic value; 3. The impression or stamp. *Hal. Hist. P. C.* 188. — Sir John Davis mentions six things as essentials to the legitimation of coin; 1. Weight; 2. Fineness; 3. Impression; 4. Denomination; 5. Authority of the prince; 6. Proclamation. Davis, 19. in the case of mixed money — which last, viz. the proclamation, is not always necessary to the legitimation, says my Lord C. J. *Hale*; for the currency of money is a question of fact, and may be proved by the officers of the Mint or their indenture, on an indictment for clipping and counterfeiting the king's coin. *Hal. Hist. P. C.* 196. 2 Salk. 446. S. P.

Also, this prerogative is given to the king as a necessary consequence of the power of war and peace; for there can be no wars made without the expense and consumption of treasure.

Plow. 315. — frequently called the Sinews of War.

Co. Lit. 90. b 11 Co. 91.

2 Roll. R. 298.

Besides, it was thought, that if any other persons had the power of mines of gold and silver, they might by these immense treasures grow too formidable, and wrest that authority from the king which was deposited in his hands only.

Plow. 316.

The

Cotton, 4.
Lock of Coin.

The use and necessity of money arose from the nature of trade; but more especially from this, that the several provisions of life are in their own nature perishable, and not to be laid up in specie. This made it necessary that some things should be fixed on to pass as tickets of credit in exchange for those commodities: hence, the thing agreed on must have these qualities. 1st, It must be durable, because otherwise it would not be more easily laid up than the provisions themselves. 2dly, It must be scarce, that a little of it may serve to be carried from place to place, in order to supply men's several occasions. Upon these two accounts gold and silver were pitched on as the two metals most scarce and most durable, and therefore best able to answer both the purposes. If therefore gold and silver be taken up as the measures of all other things, it follows, that the comparison of their value will stand thus: when the labour spent in digging, refining, and importing an ounce of silver, is equal to the labour in sowing, reaping, and threshing a bushel of corn, then is an ounce of silver equal to a bushel of corn; the industry in the acquiring is equal, and, consequently, men's property in them is the same, that is, their values are equal; for, if the corn be more plenty than the silver, then a bushel and a half of corn will possibly be worth an ounce of silver; if, on the other hand, the silver be more plenty than the corn, then, possibly, an ounce and a half of silver will amount to no more than a bushel of corn; and what is done by coining of silver is no more than ascertaining the value of several pieces in order for commerce; as that the crown shall contain an ounce and the like, that the people may not be compelled to use their scale and touchstone on every bargain.

Lock of Coin.

The policy in relation to the coin is, that the value remains unalterable; for the standard cannot be varied without manifest injustice; as, suppose a man contracts for ten crowns, which is equal to ten ounces of silver, that suppose equal to ten bushels of corn, and before payment the public standard should alter; for instance, that the crown were lessened to half an ounce, and yet we suppose that the industry in the acquirement is the same in relation to the ounce of silver and the bushel of corn; it then follows that the ten crowns paid in public money will be equal to but five bushels of corn, and, consequently, the man by the public act will lose half the value in which he had a property, by the contract: so, in cases of foreign trade, where the measure of commerce is the intrinsic value of the silver or gold, there can be no variation of such measure without injustice.

2 Inst. 575.
[(a) In this opinion Sir W. Blackstone concurs with Lord Coke, 1 Bl. Com. 278.]

And indeed the keeping to the common standard is of that importance, that my Lord *Coke* seems to be of opinion (a), that the alteration of money in weight or alloy cannot be without an act of parliament; and in this grounds his opinion on the statutes of 25 E. 3. c. 13. and 9 H. 5. sess. 2. c. 6., but herein the law seems to be as laid down by my Lord *Hale*.

Hal. Hist. P.C. 191.

1. That at the first institution of any coin within this kingdom, the king, and he alone, sets the weight, the alloy, the denominated value

value of all coin; and this is done commonly by indenture between the king and the master of the Mint.

2. He may by his proclamation legitimate foreign coin, and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting such money was not treason till the statute of 1 Mar. c. 6. made it so; nor the clipping, washing, impairing thereof was not treason till 5 Eliz. c. 11. and 18 Eliz. c. 1., but all these statutes allow the power of legitimation thereof to the king by proclamation. Hal. Hist. P.C. 192.

3. He may enhance the external denomination of any coin already established, by his proclamation; and thus it hath been gradually done almost in all ages. (a) This is sometimes called imbasement of coin, and sometimes enhancing of it; and it is both; it is an enhancing of coin in respect of the extrinsic value or denomination, but an imbasement in respect of the intrinsic value; as for instance, when in the time of Edward the Fourth a noble was raised to a higher rate by twenty-pence. Hal. Hist. P.C. 192. (a) Though it be not absolutely an imbasement of the coin in the species, yet it hath very near the same effect. Hal. Hist. P.C. 194.

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before; namely, to mix the species of money with an alloy below the standard. Hal. Hist. P.C. 192. Dav. 18. 2 Roll. Abr. 166.

As to my Lord Coke's opinion, all he says that can be inferred from it is, that it is not safe nor honourable for the king to debase his coin below sterling; and that if it be at any time done, it is fit to be done by assent of parliament; but certainly all it concludes is that *feri non debet*, but *factum valet*. Hal. Hist. P.C. 194.

From the king's prerogative in coins it hath been adjudged that at common law, and without any statute, an information lay against persons for transporting large quantities of money, being against the policy of the state and government. Hob. 270. Courteen's case, and Poph. 149. where it is held, that engrossing a great quantity of money is an offence; *et vide* Roll. R. 299.

But, though mines of gold and silver belong to the king, yet mines of tin and copper belong to the subject; for by none of the above-mentioned reasons are these to be annexed to the crown. Plow. 323. 2 Inst. 578. 12 Co. 12.

But herein there hath been a great question, *viz.* Whether, if the mine of copper or tin contained gold or silver, as they often do, whose it should be, the king's or the subject's? And the judges here made a very extended construction, and held, that gold and silver being the nobler and more valuable metals should attract the less valuable, and belong to the king; as likewise for the following reason, that the king's property cannot be held in jointure with the subject, and that the king's property, though ever so small, shall not be lost by mixture with the subject's. Plow. 325. 328. 356.

But upon this case the reporter very justly observes, that in all base metals of copper, tin, &c. there is a mixture of gold and silver, which mixture is of no value in comparison to the other metal, and the gold or silver is the life of the mine, without which it cannot be worked; so that this was declaring all copper and tin mines in the king. Plow. 339.

And

1 W. & M. st. 1. c. 30. § 4. And therefore by the statute 1 W. & M. stat. 1. c. 30. § 4. it is enacted, "That no mine of copper, tin, iron, or lead, shall be adjudged a royal mine, although gold or silver may be extracted out of the same."

5 W. & M. c. 6. § 2. And by the 5 W. & M. c. 6. § 2. "All proprietors of mines wherein any ore shall be found in which there is copper, tin, iron, or lead, shall hold and enjoy the same, notwithstanding that such mines or ores shall be claimed to be royal mines; *provided* that their majesties, and all claiming royal mines under them, may have the ore of such mines, (other than the tin ore in the counties of *Devon* and *Cornwall*,) paying to the proprietors within thirty days after the ore is laid on the banks, and before the same is removed, the rates following, *viz.* for all ore washed wherein is copper, 16*l.* per ton; and for all ore washed wherein there is tin, 40*s.* per ton; and for all ore washed wherein there is iron, 40*s.* per ton; and for all ore washed wherein there is lead, 9*l.* per ton; and in default of payment it shall be lawful for the proprietors to dispose of the ore."

Plow. 356. et
vide postea.

The king by express words may grant away royal mines as well as invest a subject with any property in the afore-mentioned chattels, but then it must be by express words; for, if the king grants to *J. S.* lands and the mines therein contained, and royal mines are found in them, they shall not pass to the subject; for the king's grant shall not be taken to a double intent, because they are records that ought to have the strictest truth and certainty; and the most obvious intent is, that they should only pass the common mines that are grantable to a common person.

12 Co. 12. It hath been held by the judges assembled at *Serjeant's Inn*, that the king may enter into any man's ground and dig saltpetre for making gunpowder; and that the king hath a prerogative herein, being necessary for the safety of the realm, although it be a thing of a new invention.

12 Co. 13, 14. And herein my Lord *Coke* observes, 1st, That it must be done with as much conveniency and as little to the prejudice of the owner of the ground as possible; and, consequently, that the digging in a man's house, barn, outhouse, &c., or weakening the walls of any such house, &c., is unlawful.

12 Co. 12. 2. That the soil or ground must be made and left as commodious to the owner as it was before.

12 Co. 13. 3. That this is in nature of a purveyance, and an incident inseparable to the crown, and cannot be granted, demised, or transferred over to another.

12 Co. 14. 4. That the owner of the land cannot be restrained from digging and making saltpetre; the king not having an interest in it as he hath in gold and silver in the land of the subject.

9. *Of his Prerogative in derelict Goods; and therein, of Waifs, Strays, and Treasure Trove.*

Bro. tit. Prero. All derelict goods, and in which no man hath a property, belong

long to the king as well as derelict lands; so (a) of extraparochial tithes, though things of an ecclesiastical nature.

2 Inst. 646. ||1 Black. Com. 295.|| — That a person may be guilty of felony in taking goods, the owner whereof is unknown, in which case the king shall have the goods, and the offender shall be indicted for having *bona cujusdam ignoti*. Hawk. P. C. c. 33. § 29.

So, if a person dies intestate and without kindred, his goods and chattels belong to the king. And herein the usual course is said to be for a person to procure the king's letters patent, and then the ordinary admits the patentee to administration.

As to goods waived, these belong to the king, and are in him without any office; because the property is in nobody, and therefore by public agreement is put out of the finder in whom it was by the state of nature, and is vested in the king in recompense for his trouble and charge in the execution of justice.

But at the common law, the owner pursuing the felon, and the felon waiving the goods, the owner may retake them. Also upon an appeal of felony the owner is entitled to a writ of restitution; and as a farther encouragement for the prosecution of felons, by the 21 H. 8. c. 11. it is provided, that if the party come in as evidence on the indictment and attain the felon, he shall have a writ of restitution awarded by the judge of assize.

If a felon in flight waive his own goods, and the king seize them, these also are waifs; for they are relinquished, and the property is in nobody.

In trover the defendant pleads in bar that the queen was seised of the manor of *Newport Pagnel*, and that in the said manor the goods were found waived, and doth not say that they were waived in flight; this is no bar; for if the goods were only laid upon the manor, and not waived in the pursuit, they are no such waived or derelict goods as the king may claim by his prerogative.

The owner may at any time retake the goods waived, if they are not seized by the king or lord of the manor; for the lord's property begins from the seizure; for since there is no property altered by the wrong and theft of the felon, and it follows that the right remains till they are seized for the king as a guardian of the public safety, upon the pursuit, or forfeited to him upon the conviction.

Waifs and strays are not necessarily incident to a leet, but they may be appurtenant to it by grant from the king; for the original prerogative is in the crown, and comes from thence to the subject at the pleasure of the king.

And though a lord of a private manor may have waifs and strays by prescription, yet he cannot have *bona felonum* and *fugitivorum* without grant from the king; because no man can prescribe for them for every prescription must be immemorial, and the goods of felons and fugitives cannot be forfeited without record, which presupposes the memory of that continuance.

The king may grant the privilege of strays to the lord of a manor, or he may claim it by prescription which supposeth a grant lost; but no lord of a manor can take the king's beasts as strays, because the grant of the king must be supposed to extend

pl. 12. 2 Vent. 267, 268.

(a) 5 Co. 18.

felony in taking the goods, and the offender shall be indicted for having *bona cujusdam ignoti*. Hawk. P. C. c. 33. § 29.

Salk. 37. pl. 3.

5 Co. 109.

How far a sale in a market overt alters the property in those cases, *vide tit. Fairs and Markets*, vol. 4.

Bro. Estray, (9). 29 E. 3. 19.

5 Co. 109.

Cro. Eliz. 69.

Foxley's case.

21 E. 4. 16. Kitchen, 82.

8 H. 7. 1.

Bro. Estray, 15.

Bro. Estray, 15. 5. Co. 109. 43 E. 3. 16.

44 E. 3. 19.

5 Co. 105. Kitchen, 82.

no farther than this particular prerogative of the king, that is to take the cattle of common persons.

24 H. 6. 5.
Bro. tit.
Estray, 5.

Where the lord of a manor hath not a grant or prescription for stray, there the sheriff shall seize it in behalf of the king, and shall account for it to the king in the Exchequer.

Co. Lit. 121. b.

If *A.* be seised of a manor whereunto the franchises of waif and stray be appendant, and the king purchase the manor with the appurtenances, the royal franchises are reunited to the crown, and not appendant; because the stray belongs to the kings by his prerogative, and when the manor comes to him, the strays are in him *jure coronæ*; but, if he grant the manor in as ample a manner as *A.* had it, this grants the strays by reference to the former grant.

29 E. 3. 3.
Bro. tit.
Estray, 4.

In the case of the king, if a man justifies, as beasts taken in behalf of the king, yet he must say that the beasts were taken and proclaimed; for otherwise the king's mere seizure shall not be a sufficient presumption in behalf of his property.

Bro. Estray, (5).
24 H. 6. 5.
Cro. Eliz. 694.

The sheriff or bailiff of the king cannot pray in aid of the king in an action of trespass brought against him; for the aid of the king cannot be demanded to come in to justify the acts of his ministers, but they are answerable for their own acts; and the taking any chattels is only a fact of the king's ministers; but in matters of titles of land which are no fact of the king's ministers, but relate to his permanent revenue, the particular tenant shall pray in aid of the reversion.

Cro. Eliz. 694.

Also, the pleading of the officer is not good, unless he says he hath answered the value of them to the king; for the officer cannot justify the taking in his own right.

Yelv. 96.

The king or lord of the manor hath property from the time of the stray's coming upon the manor against all others but the right owner; but, in relation to the right owner, he hath only the custody, and not the property.

3 Inst. 133.
Kitch. 80.
|| Bract. l. 3.
c. 5. 1 Black.
Com. 296. ||

The king hath a prerogative in treasure trove, that is, treasures of gold and silver, which must be hid in the earth, and in which no man hath a property; but treasures of gold and silver found on the surface of the earth, or found on the sea, belong to the finder.

3 Inst. 133.
Hal. Hist.
P. C. 506.

This prerogative was thought to be of that consequence to the crown, that it is said, that anciently the concealing of treasure trove was punished with death; but it is now only punishable with fine and imprisonment.

10. Of his Prerogative in Fines and Forfeitures.

2 Vent. 268.
Vide tit.
Forfeiture,
vol. iii.

Fines and forfeitures for offences at law go to the king as the head of the government; and are given to him as well for the public good as for the increase of his revenue.

Hal. Hist.
P. C. 253.

Hence it is held, that if a person be attainted of high treason, all his lands, of whomsoever holden, are forfeited to the king, and that though the lands are immediately held of the king yet he hath them not as royal escheats, but *jure coronæ*, or *prærogativa regalis*.

And ||

¶ And by attainder all personal property, and rights of action in respect of property, accruing to a party attainted, either before or after attainder, are vested in the crown, without office found.¶

Bullock, v. Dodds, 2 Barn. & A. 258.

Also, where a statute giveth a forfeiture, either for nonfeasance or misfeasance, the king shall have it, unless it be otherwise particularly directed by the statute.

Moor, 258.
7 Co. 36.
11 Co. 68.

And on this foundation it hath been adjudged, that an archdeacon having sold the office of registrar of the archdeaconry, which is a forfeiture within the statute 5 & 6 E. 6. c. 16. the right of nomination belonged to the crown, and not to the bishop of the diocese.

2 Vent. 267.
Woodward v. Fox.

Vide plus titles "FORFEITURE" and "OUTLAWRY."

(C) Of his Prerogative over the Persons of his Subjects: And herein,

1. *Who shall be said his Subjects.*

ALL persons born in any part of the king's dominions and within his protection are his subjects, as are all those born in *Ireland, Scotland, Wales*, the king's plantations, or on the *English* seas; who by their births owe such an inseparable allegiance to the king that they cannot by any act of theirs renounce or transfer their subjection to any foreign prince.

7 Co. 1. &c.
Calvin's case.
Molloy, 570.
Co. Litt. 129.
Dyer, 300.
Vide tit.
Aliens, vol. i.

¶ By the common law all persons born out of the king's ligeance were aliens; but, by the effect of several statutes, children born out of the king's ligeance, whose fathers, or grandfathers by the father's side, were natural born subjects, at the birth of such children, are now deemed to be natural born subjects themselves, to all intents and purposes, unless their said ancestors were attainted or banished beyond seas for high treason, or were, at the birth of such children, in the service of a prince at enmity with *Great Britain*.

7 Ann. c. 5.
4 G. 2. c. 21.
13 G. 3. c. 21.

But these statutes only apply to male ancestors, and therefore the children of a natural born female *British* subject, and of an alien father, are, if born out of the king's allegiance, aliens; and such children cannot inherit their mother's lands in *England*.

Duroure v. Jones,
4 Term R. 300.

Two cases have arisen as to the effect of the above statutes on children born in *America* since the separation of that country from *Great Britain*; the question being, Whether the parents of such children were "natural born subjects" of the king, so as to render the children subjects under the operation of the 4 G. 2. c. 21.?

In one case it was decided, that children born in *America* since the recognition of the independence of the colonies, of parents born there before that time, and continuing to reside there afterwards, were aliens, and could not inherit lands in *England*. Their parents were held to have put off their allegiance to the king of *Great Britain*, by remaining in *America* after the recognition of its independence as a state.

Doe v. Acklam,
2 Barn. & C.
779.

But, in a subsequent case, where the parent expressly adhered to the *British* government on the separation of the colonies, and

Auchmuty v. Mulcaster,

5 Barn. & C. 772. left *America*, and afterwards went back to *America* in the service of *Great Britain* after the recognition of independence, and his children were born after his return to *America*, the children were held *British* subjects within the 4 G. 2. c. 21., and that it was exactly the same as if the father had gone to reside in any other foreign country before the birth of his children.||

5 Inst. 4, 5.
Dyer, 145.
Hob. 271.
2 Salk. 650.
pl. 2.
Hawk. P. C. c. 17. § 5.
Hal. Hist. P. C. 59.
||Vid. tit. *Ambassador*.||
Also, the subjects of a foreign prince, coming into *England* and living under the protection of our king, may, in respect of that local ligeance which they owe to him, be guilty of high treason, and indicted that they *contra dominum regem* (the words *naturalem dominum suum* being omitted) did compass, &c. *contra ligeantiam suam debitum*. And it is said that even an ambassador, committing a treason against the king's life, may be condemned and executed here, and that for other treasons he shall be sent home.

Hawk. P. C. c. 17. § 6.
But aliens who in a hostile manner invade the kingdom, whether their king were at war or peace with ours, and whether they come by themselves or in company with *English* traitors, cannot be punished as traitors, but shall be dealt with by martial law.

Dyer, 224.
Vaugh. 281:
If the king of *England* makes a new conquest of any country, the persons there born are his subjects; for by saving the lives of the people conquered he gains a right and property in such people, and may impose on them what law he pleases.

2 P. Wms. 75, 76. (a) That where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity. 2 Salk. 412.
But until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent (a); for in all such cases the laws of the conquering country shall prevail.

2 P. Wms. 75.
2 Salk. 411.
pl. 1. Like point. 2 Ld. Raym. 1245.
If there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them; and therefore such new found country is to be governed by the laws of *England*; though, after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them.

2. That he is entitled to the Service and Allegiance of his Subjects; and therein, of the Oaths enjoined them.

Say. 45.
Moor, 111.
2 Vent. 247, 248. 4 Mod. 269. Salk. 167. pl. 1.
Id. Raym. 29.
Skin. 574. pl. 1.
Carth. 506.
It is clearly agreed, that the king hath an interest in all his subjects, and is entitled to their services, and may employ them in such offices as the public good and the nature of our constitution require; and on this foundation it hath been held, that the king may oblige a person to serve the office of sheriff, and that no person can be exempt from such office but by act of parliament or letters patent. (a)

|| (a) It should seem, that in every case where a party is called upon to perform a public duty, he is liable to be punished for refusing to perform it. 2 Maule & S. 218. 2 Inst. 214. ||

The allegiance that is due from every subject to the king is of two kinds: 1st, Original, virtual, and implied: 2dly, Expressed or declared by oaths or promises. The first of these arises from that protection which every subject hath from the king and the laws, and is (a) said to be due to the natural and not to the politic person of the king; and from the breach thereof ariseth the crime of high treason.

regal capacity or crown, exclusive of the person of the king (among other things), were the *Spencers* banished in the reign of *Edward* the Second. Hal. Hist. P.C. 67.]—That the obligation of allegiance is not to be applied nor laid upon private causes; for no man can make a cause of allegiance other than such as the law makes, and as concerns the faith and loyalty that the subject oweth to his sovereign in points of state. Hob. 271, 272.

[Natural allegiance cannot be forfeited, cancelled, or altered by any change of place, time, or circumstances, nor by any thing but the united concurrence of the legislature. For it is a principle of universal law, that the natural born subject of one prince cannot, by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was due. Indeed the natural born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another; but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural prince.

Post. Cr. L. 184. This is exemplified by a strong instance in the report which that learned judge hath given of *Aeneas Macdonald's* case. He was a native of *Great Britain* but had received his education from his early infancy in *France*, had spent his riper years in a profitable employment in that kingdom, and had accepted a commission in the service of the *French* king: acting under that commission, he was taken in arms against the king of *England*, for which he was indicted and convicted of high treason; but was pardoned upon condition of his leaving the kingdom, and continuing abroad during his life. *Id.* 59.—By st. 26 G. 3. c. 60. it is enacted, that no registry of any ship or vessel shall thenceforth be made, until the owner or owners of such ship or vessel shall have taken an oath therein set forth in manner therein directed, containing, among others, the words following: "That I the said *A. B.* (and the said "other owners, if any) am (or are) truly and *bonâ fide* a subject (or subjects) of *Great Britain*, "and that I the said *A. B.* have not (nor have any of the other owners, to the best of my knowledge and belief) taken an oath of allegiance to any foreign state whatever, except under the "terms of some capitulation (*describing the particulars thereof*)." And by st. 27 G. 3. c. 19. § 4. reciting the above clause, it is enacted, that any oath which shall have been, or may be taken, for the sole purpose of acquiring the rights of a citizen or burgler in any foreign city or town in *Europe*, to be enjoyed during the time that the person or persons taking such oath shall reside in such city or town, and for a limited time after such residence shall have expired, shall not be deemed an oath of allegiance to a foreign state, within the true intent and meaning of the above act.

The express allegiance, or by oaths and promises, is either by the common law, or by particular acts of parliament. By the common law, besides the oath due by tenure or *ratione feodi*, all persons above the age of twelve years were obliged in the torn or leet to take an oath of fidelity and allegiance, whether such persons held any lands of the king or not; and in all oaths of fealty, as

7 Co. Calvin's case. Hal. Hist. P.C. 59. 61.

(a) 1 Vent. 5. [For the misapplication of their allegiance to the

1 Bl. Com. 369. Sir *M. Foster* observes, that "the well-known

"maxim which "the writers "of our law "have adopted and applied to this "case, *nemo "potest exuere "patriam*, "comprehendeth the whole "doctrine of "natural allegiance."

Spelm. title Fidelitas, Co. Lit. 85. Finch of Law, 241. 2 Inst. 147. Hal. Hist. P.C. 64. &c.

likewise in the profession of homage to any inferior or subordinate lord or prince, it was with a *salvâ fide et ligeantiâ domini regis*, which saving to omit was punishable in such lord.

The particular acts of parliament relating to this matter are the 1 Eliz. c. 1. which enjoins the oath of supremacy, 3 Jac. 1. c. 4. which instituted the oath of obedience, the statutes 7 Jac. 1. c. 2. 6. 13 Car. 2. statute 2. c. 1. 13 & 14 Car. c. 3. & 4. 25 Car. 2. c. 2. 30 Car. 2. stat. 2. c. 1. which, are abrogated by 1 W. & M. sess. 1. c. 1 & 8. and new oaths appointed in their room by the 1 W. & M. sess 2. c. 2. & 3. 3 W. & M. c. 2. 13 W. 3. c. 6. 8 Ann. c. 22. 4 Ann. c. 8. 6 Ann. c. 7. 14. 23. 1 Geo. 1. c. 13. 13 Geo. 1. c. 29. 2 Geo. 2. c. 31. 9 Geo. 2. c. 26. 6 Geo. 3. c. 53.

2 G. 2. c. 31.

[(a) By the 9 G. 2. c. 26. the time is enlarged to six calendar months after such admittance, &c. And statutes are annually passed for the purpose of enlarging the time and indemnifying those who have omitted to qualify.]

|| *Vide* title *Papists*, as to the old oaths required, and for the act 10 G. 4. for their relief; and see tit. *Offices and Officers*, as to the oaths now required from persons holding municipal and other offices.||

By the 2 Geo. 2. c. 31. it is enacted, " That all persons that " shall be admitted into any office, civil or military, or shall " receive any pay by reason of any grant from his majesty, or " shall have command or place of trust under his majesty, or by " authority derived from him, in *England*, or in his majesty's " navy, or in *Jersey* or *Guernsey*; or that shall be admittted into " office in the household of his majesty, or of the Prince of " *Wales*, or any other of his majesty's issue; and all ecclesiastical persons, heads and other members of colleges and halls in " the universities, that are of the foundation and enjoy any ex- " hibition, being of the age of eighteen years; and all persons " teaching or reading to pupils, and all schoolmasters and " ushers, and all preachers of separate congregations, high con- " stables, and every person who shall act as a serjeant at law, " counsellor, barrister, advocate, attorney, solicitor, proctor, " clerk, or notary, by practising as such in any court in *England*, " who shall after the 21st of *January* 1728, be admitted into any " of the above-mentioned preferments, &c., or shall come into " any such capacity, &c., shall take the oaths appointed by " 1 Geo. 1. c. 13. as by the said statute is directed in the Court " of Chancery, King's Bench, Common Pleas, or Exchequer, " at any time (a) before the end of the next term after he shall " be admitted, &c., or before the end of the next quarter-ses- " sions where such persons shall reside."

Persons neglecting to incur the penalties in 1 Geo. 1. c. 13. viz. disability to, &c., or to be guardian or executor, or capable of any legacy or deed of gift; or to be in any office, or to vote at any election for members of parliament, and shall forfeit 500*l*.

3. *That he may restrain his Subjects from going Abroad; and therein, of the Writ de Ne exeat Regno.*

F. N. B. 85. Dyer, 165. 196. 2 Roll. R. 12. 5 Mod. 131. Lit. R. 27. Stile, 442. (b) This statute is repealed

By the common law every subject may go out of the kingdom for merchandize or travel, or other cause, as he pleases, without any licence for that purpose: this appears from the (b) statute 5 R. 2. c. 2. made to restrain persons passing out of the realm, but excepts lords, great men, and notable merchants; as also by the statute 26 H. 8. c. 10. which gave power to the king during his

his life to restrain persons from trading to some certain countries (*a*); which acts had been vain and idle, if the king by his prerogative might have done it.

But, notwithstanding this general freedom and liberty allowed by the common law, it appears plainly that the king by his prerogative, and without any help of an act of parliament, may prohibit his subjects from going out of the realm; but this must be by some express prohibition; as (*b*), by laying on embargoes, which can be only done in time of danger, or by writ of *ne exeat regno*, which, from the words *quam plurima nobis et coronæ nostræ prejudicialia ibidem prosequi intendis*, appears to be a state writ, but is never granted universally, but to restrain a particular person, upon oath made that he intends to go out of the realm. Indeed *Fitzherbert* says, that the king may restrain his subjects by proclamation; and assigns as a reason for it, that the king may not know where to find his subject, so as to direct a writ to him.

(*b*) *Vide tit. Merchant.*

It is agreed that the matter alleged in the writ of *ne exeat regno* is not traversable, and that the king may avoid it without shewing any cause; and though it may be objected, that if the king may, without assigning any reason, grant it in one case, he may in five hundred, &c., the answer is, that this is a royal trust reposed in the king, which the law does not presume that he will abuse or make use of to the prejudice of the subject.

This writ may be awarded under the privy seal or signet, as well as the great seal.

The writ of *ne exeat regno*, though a prerogative or state writ, hath been introduced into the Court of Chancery. It was at first but tenderly made use of, but is now become the common process of that court. The plaintiff, by a standing order made in my Lord *Cowper's* time, is to make oath of his debt, and the writ is always marked for the sum sworn in the affidavit, in words at length and not in figures; and the plaintiff swears the defendant is going out of the kingdom, which if he should do, the debt may be lost; the order is till answer or further order; and it was formerly thought, that upon the party's putting in a full answer the writ should be discharged; but of late the party hath been obliged to give security to abide the order on hearing, before the court will discharge the writ; which security is taken by recognizance before a Master, as all other security is, and it is in the penalty of what is sworn due; and the sheriff takes bail accordingly when he arrests the party thereon, the sum sworn due being constantly indorsed on the *ne exeat regno* as a guide for the sheriff to take bail by.

A writ of *ne exeat regno* may be granted in any case where there is danger of subterfuge from the justice of the nation, though of a private concern.

Giving out that he intends to go beyond sea, assigned as a reason for awarding a writ of *ne exeat regno*, and it was granted.

A solicitor's bill being taxed and reported overpaid 60*l.*, on

by 4 Jac. 1. c. 1.
(*a*) *Noy*, 182.

12 Co. 53.
11 Co. 92.
Fitz. N. B. 89.
2 Inst. 54. —
One reason,
says Sir *John Davis*, why
the king is en-
titled to cus-
toms, is, his
permitting his
subjects to go
beyond sea
when he might
restrain them.
Dav. 9.

4 Mod. 179.
Dyer, 179.
Moor, 109.
3 Inst. 179.
Comb. 55.
Skin. 166.

F. N. B. 85.
Lane, 29.

2 Co. 17. b. 76. 11 Co. 92.

Skin. 113.
Chan. Ca. 115.
2 Chan. Ca.
245. 7 Mod. 9.
Ld. Raym. 696.
Cases in *B. R.*
562. Stil.
441, 442.

2 Chan. Ca.
245.

2 Chan. R. 2.
Prec. Chan.

171. Lloyd v. Cardy. [(a) But it hath been since determined, that this writ cannot be granted but *on bill filed*. *Ex parte Brunker*, 3 P. Wms. 512.]

2 Vent. 545. Sir Jerom Smithson's case. [So, Read v. Read, 1 Ch. Ca. 715. Anon. 2 Atk. 210. Pearne v. Lisle, Ambl. 76.] || See 14 Ves. 261. 1 Jac. & Walk. 407. 1 Turn. & Russ. 522. ||

1 P. Wms. 263. It hath been held, that a *ne exeat regno* lies to prevent one from going into *Scotland*, it being out of the jurisdiction of chancery; and the process thereof not reaching thither, is equally mischievous to the suitor here as if he actually went out of the kingdom: and in this case it is said, that the condition must be not to go out of the realm, or to *Scotland*; but in (b) a later case it is held, that there is no occasion that the order should be particular as to *Scotland*; and that even since the *union* the writ in the general form will restrain the party from going into *Scotland* as well as any of the king's other dominions that are out of the process of this court.

(b) Hunter v. Maccray. Ca. temp. Talb. 196

Prec. Chan. 250. Le Clea v. Trot. A *ne exeat regno* having been awarded against the defendant, *J. S.* (who was the now petitioner) became his surety to the sheriff; after answer put in *J. S.* petitions to be discharged, but was denied; then the cause was heard, and 19,000*l.* decreed against the defendant, and he committed for nonpayment; and then *J. S.* petitions again to be discharged, because being a *manu-captor*, and the party in prison, there can be no danger of his going beyond sea. *Lord Keeper*: If so, then his surety is in no danger, and would not discharge him.

Ex parte Brunker, 3 P. Wms. 512. [It hath been determined, that this writ shall not issue on a mere legal demand, for which the defendant might have been holden to bail.]

Anon. 2 Atk. 410. Pearne v. Lisle, Ambl. 76. Atkinson v. Leonard, 5 Br. Ch. R. 218. Parker v. Appleton, *Id.* 427. But from the case of Atkinson v. Leonard it seems, that it *shall* issue in matters where the courts of law and equity have *concurrent* jurisdiction. || Hannay v. M'Intyre, 11 Ves. 54. Jones v. Alephsin, 16 Ves. 470. Jones v. Sampson, 8 Ves. 593. *acc.*; and see Grant v. Grant, 5 Russell, 598. But where the demand is merely legal it will not be granted, although the party could not be held to bail in consequence of privilege, Gardner v. —, 15 Ves. 444. And being in the nature of equitable bail, it will not be granted under circumstances that would not entitle the party to bail at law; therefore, in case of alimony it will only issue for arrears actually due. 14 Ves. 261. 1 Jac. & W. 407. If the party can be held to bail, the writ can only be had in case of matters of account. — *Ibid.* And the writ will not issue for alimony after a decree in the ecclesiastical court, pending an appeal from that decree. 1 Turn. & Russ. 522. ||

Anon. 1 Atk. Nor shall it issue on a demand which is not certain.

421. Shearnan v. Shearnan, 5 Br. Ch. R. 370. Anon. 1 Br. Ch. R. 376. || *Vide* 1 Turn. & Russ. 532. 2 Jac. & Walk. 211. ||

Morris v. M'Neil, 2 Russell, 604. || And, in a suit for specific performance, the writ shall not issue against the purchaser, unless the court deem it quite clear that there must be a decree for specific performance. ||

In general, the application for it must be supported by an affidavit, swearing positively to the debt: but on a bill for an account, it is sufficient for the plaintiff to swear to the balance *as to his belief*.

¶ The writ will not be discharged though it appear to have issued for a sum exceeding what can be sustained; but the amount will be reduced. But, where the affidavit of the plaintiff and the answer of the defendant, together made a strong *prima facie* case that nothing was due, the writ was discharged with costs.

In general the affidavit should be as positive as an affidavit to hold to bail, for information and belief can only be admitted in matters of pure account. And it must be positive as to the intention of the party to leave the kingdom; but it is sufficient to state that the debt will be endangered, without averring that the party's object is to avoid the jurisdiction.

If the party has been before arrested for the same cause at the suit of the plaintiff, the writ will be discharged.

On motion by a residuary legatee for a *ne exeat* on the ground of collusion between an executor and a debtor of a testator, and that the latter was about to quit the country, the Lord Chancellor refused the application, saying, he knew no instance of such an application being granted.

And a *ne exeat* was refused to restrain an *Irish* member of parliament from going to *Ireland*; the Lord Chancellor saying, the original object of the writ was to restrain the subject from going to the king's enemies, and the court had no authority to alter the form of the writ.¶

Where the demand is against an administrator, &c. the plaintiff should also swear to his belief of assets come to the defendant's hands.

This writ may issue against a feme covert executrix, whose husband is out of the jurisdiction.

S. C. and Moor v. Mellish, therein cited. ¶ The contrary has since been held by Lord Eldon, *Pannell v. Taylor*, 1 Turner R. 96.; but in *Moore v. Hudson*, *Leach v. C.* granted the writs against husband and wife executrix, the plaintiff undertaking not to serve writ. 6 Madd. 218.¶

As the real object of the writ, when applied to private concerns, is to compel the defendant to abide the event of the suit, the court always inclines to discharge the writ upon such security being given.

409. Ambl. 62. *S. C. Robertson v. Wilkin*, Ambl. 177. *Atkinson v. Leonard*, 3 Br. Ch. R. 218. ¶ Whether the writ shall issue against a foreigner or person usually resident *out* of the jurisdiction, in respect of a demand which originated *abroad*, and is *there* suable, *vide Pearne v. Lisle*, *Robertson v. Wilkie*, *Atkinson v. Leonard*, *ubi supra*.]

¶ The court is very delicate to apply the writ to foreigners, and it is a necessary term that it be simply a case in equity.

But the circumstance of a party being a foreigner is not alone a ground for discharging the writ.

Rico v. Gualtieri, 5 Atk. 501. Anon. 2 Ves. 489.

Grant v. Grant, 3 Russell, 398. *Leo v. Lambert*, *id.* 417.

10 Ves. 164.
8 Ves. 33.
11 Ves. 54.
19 Ves. 342.
19 Ves. 315.
7 Ves. 417.

8 Ves. 594.
2 Mer. 472.

1 Jac. & W. 646.

11 Ves. 43.

Anon. 2 Ves. 489.

Jerningham v. Glass, 5 Atk. 409. Ambl. 62.

held by Lord C. granted the more than one

Baker v. Dumaresque, 2 Atk. 66.

Jerningham v. Glass, 5 Atk. Br. Ch. R. 218.

¶ And see 1 Ves. & B. 129. *Beames on Ne exeat Regno*, 63. 68.¶

De Carriere v. De Calonne, 4 Ves. 577.

Flack v. Holm, 1 Jac. & W. 413.

Grant v.
Grant,
3 Russell, 598.

And the writ will be granted in respect of a debt contracted in *Jamaica*, between persons resident there, though in *Jamaica* the defendant could not have been arrested for the demand. ||

4. *That he may command his Subjects to return Home ; and therein, of awarding a Privy Seal.*

Dyer, 128. b.
Lane, 44.
Moor. 109.
3 Inst. 179.

As the king may restrain any of his subjects from going abroad, in like manner it is clearly agreed, that he may command them to return home; and that the disobeying a privy seal to this purpose is the highest contempt. 1st, It is a disobedience to the command of the king himself directed to the party. 2dly, The command is, that he shall return upon his faith and allegiance, which is the strongest compulsion that can be used. 3dly, The thing required by the king is the principal duty of a subject, viz. to be at the service of his king and country.

(a) And when he does return he shall be fined. Hawk. P. C. c. 22. § 4.

The punishment for this offence is, the seizing the party's estate (a) till he return; and of this there are divers instances in our books.

Dyer, 128. b.
Vouched in a case there.
Lan. 44. S. C. cited and said to be proved by other precedents. (b) Leon. 10. cited.

As that of *William de Brittain* in the 19th year of *Edward* the Second, who refusing to return upon the king's writ, his goods and chattels, lands and tenements, were thereupon seized into the king's hands: and the like was done in the case of *Edward of Woodstock* (b), Earl of *Kent*, in the same reign.

Dyer, 176.
Jenk. Cent. 220. Bartue's case.

So in the case of one *Bartue* who married the Duchess of *Suffolk*, they obtained a licence from Queen *Mary* to go out of the realm, under pretence of recovering some debts they were entitled unto as executors to the duke; when in reality it was on account of the religion established by Queen *Mary*, and living with other fugitives under the protection of the *Palsgrave* of the *Rhine* in *Germany*, who was an eminent *Calvinist*, were sent to by privy seal; but the messenger in endeavouring to serve them with his letters, being obstructed, beat and abused by their servants and attendants, a certificate was made of this, and their lands and tenements seized.

Leon. 9.
Moor. 109.
Dyer, 375.
And. 95. S. C.
Sir Francis Englefield's case. Vide also 7 Co. 18. Poph. 18. 4 Leon. 135.
Lane, 42. &c.
The King v. Earl of Nottingham.
Pasch. 7 Jac. 1. in *Scac*.

So in the case of Sir *Francis Englefield*, who departed the kingdom on a licence obtained for three years; but not returning at the expiration of the three years, a privy seal was sent to him by Queen *Eliz.* which he not obeying, and this matter being certified into Chancery by the queen under her sign manual, in the fifth year of her reign by virtue of a commission under the great seal directed to Sir *Henry Nevil* and others, his lands and tenements were seized.

So in the case of Sir *Robert Dudley*, who, intending to travel, obtained a licence from King *James* the First to go to *Venice*; but, before his departure, he by indenture enrolled for valuable consideration, as was expressed in the deed (but none paid), conveyed the manor of *Killingworth*, with other lands, to the Earl of *Nottingham* and others in fee, with a proviso, that upon tender of an angel of gold all should be void; and with a covenant on the

the part of the bargainees, that they should make all such estates as the said Sir *Robert* should appoint: the bargainees were not parties to the deed, nor had they notice of it until some time after; but afterwards they made a lease to Sir *Robert Lee*, to the intent that Lady *Dudley* should take the profits of part of the premises for ten years, if their estate continued so long unrevoked. The king, hearing that Sir *Robert* had been guilty of some bad practices beyond seas, in the fifth year of his reign sent his privy seal to him, which he not obeying, the great question in this case was, whether those lands thus conveyed were forfeited? And adjudged that they were, the conveyance being fraudulent as to the king.

In these cases it hath been held, that the king hath only an interest in the offender's lands till he return; and (c) that his restoring of them to him is not a matter of grace but of right. (c) Lane, 48. per Tanfield Ch. Baron.

But though the lands are to be restored to the offender, yet it is held, that till his return the king hath a greater interest than the perception of the profits; and that he may assign or grant them, *quamdiu in manibus suis fore contigerint*; and that he or his patentee are entitled to woodfals, may make leases, and grant copyholds, being *domini pro tempore*. Sav. 7, 8. Leon. 9. Dyer, 176. in marg. Moor, 112.

And on this foundation it was holden, in Sir *Francis Englefield's* case, that where Q. *Eliz.* in the eighth year of her reign, and after the forfeiture of Sir *Francis*, granted a manor, part of Sir *Francis's* estate, with all the profits, *quamdiu in manibus nostris fore contigerit*; and afterwards the acts 13 *Eliz. c. 3.* and 14 *Eliz. c. 6.* were made for vesting the estates of fugitives in the crown; after which the queen made a second seizure of those lands, and by her letters patent appointed a steward, who held a court, took surrenders, and granted admittances in right of the queen; yet it was resolved, that this second seizure, by virtue of these acts, gave the queen no greater estate or interest than she had before by the common law; consequently, that the first grant was good, and the courts holden, surrenders and admittances by her steward were void. Moor, 109. Dyer, 375.

The regular course in those cases is for the messenger to certify his proceedings into Chancery, of which, by *mittimus*, a certificate is sent into the Exchequer, out of which court a commission issues to enquire, &c. and seize the lands of the delinquent; and it is said, that this certificate admits of no traverse, because no venue can be laid here for its trial, the matter being transacted beyond sea: but it is said, that the (a) messenger ought to make oath of the service of the writ of privy seal. Dyer, 176. And 95. (a) The writ ought to be served by some messenger, who upon his oath is to make a certificate of it

in Chancery. 3 Inst. 180.

And it is said, that there is no need of a date to the privy seal; for that the matter therein contained is not traversable, nor is it returned as other writs are, but the king who issues it is to receive the message or answer of the party, and he is the judge of the contempt. Leon. 9.

The contempt incurs from the very time notice is given the party; for the words of the writ are *quod indilate*, &c. Lane, 46.

It

Lanc, 46.; *et*
vide Dyer, 176.

5 Inst. 180.

It is held, that though the party hath a licence at the time of his going abroad, that yet he is obliged to obey the privy seal, for that such licence is countermandable, being only an authority or dispensation, and not like an interest moving from the king.

It is said that the king cannot recall the party, but by the great seal or privy signet.

(D) Of the King as the Fountain of Justice, and intrusted with the Execution of the Laws: And herein,

1. *That all Civil Jurisdiction flows from the King.*

Fleta, c. 17.
Co. Lit. 99. a.
114. *vide* tit.
Courts.

ALL jurisdiction exercised in these kingdoms that are in obedience to our king, is derived from the crown; and the laws, whether of a temporal, ecclesiastical, or military nature, are called his laws; and it is his prerogative to take care of the due execution of them. Hence, all judges must derive their authority from the crown, by some commission warranted by law; and must exercise it in a lawful manner, and without any the least deviation from the known and stated forms.

4 Inst. 164.
2 Inst. 54. 478.
2 Hal. Hist.
P. C. 131. 282.
Vaugh. 418.
2 Salk. 510.

So, although the king is the fountain of justice, and intrusted with the whole executive power of the law, yet he hath no power to change or alter the laws which have been received and established in these kingdoms, and are the birthright of every subject; for it is by those very laws that he is to govern; and as they prescribe the extent and bounds of his prerogative, in like manner do they declare and ascertain the rights and liberties of the people, and therefore admit of no innovation or change but by act of parliament.

1 P. Wms. 329.
Christian v.
Corren.

From the inherent right inseparable from the king to distribute justice among his subjects, it hath been held, that an appeal from the *Isle of Man* lies to the king in council, without any reservation in the grant of the *Isle of Man* of any such right; and it was said, that though there had been exclusive words, that yet the grant must have been construed to be void upon the king's being deceived, rather than the subject should be deprived of a right, inseparable to him as a subject, of applying to the crown for justice.

2. *Of the King's Prerogative in Ecclesiastical Matters.*

Hal. Hist.
P. C. 75.
(a) The pope by degrees, and whilst the people were blinded with superstition, usurped the royal authority in all matters ecclesiastical, as is manifest by the statute of provisors, which was made as a

remedy for this grievance, &c. Lord Raym. 25.; *et vide* 5 Co. Cawdry's case, Cro. Eliz. 542. and the statutes 26 H. 8. c. 1. and 1 Eliz. c. 1. whereby such authority as the pope had, claiming as supreme ordinary, is annexed to the crown, and is declared to belong thereto of right; for which *vide* 4 Inst. 341. Lit. R. 232. Moor, 463. Dyer, 237. Selden Janus Anglo. 27. 26 H. 8. c. 1.

and the statutes 26 H. 8. c. 1. and 1 Eliz. c. 1. whereby such authority as the pope had, claiming as supreme ordinary, is annexed to the crown, and is declared to belong thereto of right; for which *vide* 4 Inst. 341. Lit. R. 232. Moor, 463. Dyer, 237. Selden Janus Anglo. 27. Co. Lit. 134. Dav. 88. 2 Inst. 580. 584.

(b) So that the King of *England* doth not recognize any foreign authority superior or equal to him in this kingdom, neither do the laws of the Emperor or Pope of *Rome*, as such, bind in the kingdom of *England*; but all the strength and obligation that either the papal or imperial laws have obtained in this kingdom, is only because they are and have been received and admitted in this kingdom, either by consent of parliament or by immemorial usage and acceptance in some particular courts and matters, and not otherwise.

The king therefore is said to have two jurisdictions, one temporal, the other ecclesiastical; the latter of which is derived from the common law, though the form of the proceedings and the coercive power exercised in the ecclesiastical courts is after the form the canon and civil law; and this being indulged to them, the judges of the common law will give credit to their proceedings and sentences in matters in which they have a jurisdiction, and believe them consonant to the law of holy church, although against the reason of the common law; and if there be a *gravamen* it must be redressed by appeal.

But if these courts exceed their jurisdiction, and the bounds and limits prescribed them by the laws and statutes of the realm, they are subject to the controul of, and may be prohibited by, the king's temporal courts; for the canon and civil law did not bind originally in *England*, nor have they been received universally; and therefore are called *leges sub graviore lege*, the common law still maintaining its superintendency over them.

The king being delivered from papal usurpation, might by common law grant a commission to hear and determine ecclesiastical causes. Hence the jurisdiction of the High Commission Court was acknowledged as deriving its authority immediately from the crown: but it was held, that that court, without the help of an act of parliament (a), could not in matters of ecclesiastical conusance use any temporal censure or punishment, as fine or imprisonment.

tical," and the 16 Car. 1. c. 11. by which this court is abolished — and for the jurisdiction which is exercised, *vide* 22 Co. 45. &c. 15 Co. 2 Roll. Abr. 224. 4 Inst. 352. Noy, 149. Moor, 917. March, 80. Gibs. Cod. 50.

Also, the common law hath annexed unto certain offices ecclesiastical jurisdiction, as incident to the offices: thus, every bishop by his election and confirmation, even before consecration, hath ecclesiastical jurisdiction annexed to his office, as *judex ordinarius* within his diocese; and divers abbots anciently, and most archdeacons at this day, by usage, have the like jurisdiction within certain limits and precincts; all which they derive from the crown, although the process in the ecclesiastical court runs in the name and under the seal of the bishop or ecclesiastical judge.

The matters of ecclesiastical conusance are of two kinds, criminal and civil: their criminal proceedings extend to such crimes as by the laws of the land are of ecclesiastical conusance (b), as heresy, fornication, adultery, and some others, wherein their proceedings are *pro reformatione morum*, and *pro salute animæ*; and the reason why they have the conusance of these and the like

(b) The laws of *England* have no dependence on the civil law, nor are governed by it, but are binding by their own authority. Hal. Hist. P. C. 616.

Show. R. 218.
Roll. Abr. 530.
4 Co. 29.
7 Co. 42.
5 Co. 7.
2 Vent. 45.

Vide tit. Courts.

(a) *Vide* 1 Eliz. c. 1. a statute entitled "An act for restraining to the crown the ancient jurisdiction ecclesiastical," and the 16 Car. 1. c. 11. by which this court is abolished — and for the jurisdiction which is exercised, *vide* 22 Co. 45. &c. 15 Co. 2 Roll. Abr. 224. 4 Inst. 352. Noy, 149. Moor, 917. March, 80. Gibs. Cod. 50.

Vide tit. Ecclesiastical Courts.

2 Inst. 488.
Vaugh. 212.

(b) They cannot hold plea of a legal perjury, or perjury in like

contracts, but for perjury in their courts they may punish. — So, where one forged letters of ordination, it was held that the spiritual court may proceed to deprive him. Sid. 217. Lev. 138. Keb. 721. Keilw. 39.

— So, where a parish clerk was guilty of scandalous crimes, and being proceeded against in the spiritual court, it was held on a motion for a prohibition, that they may proceed to deprive him for these crimes, though they were in their nature only punishable in the temporal courts. 2 Ld. Raym. 1507.; *et vide* Dyer, 295. Comp. Incumb. 55. Hob. Searle's case L. P.

— Cannot punish for writing a libel, being an offence indictable at law. Comb. 71. — For sacrilege the party may be proceeded against in the spiritual court, although the robbery is likewise punishable in the temporal courts. 37 H. 6. 39. Bro. Appeal. 31. 45. 2 Inst. 492. 2 Keb. 23. Sid. 281. — So an action at law lies for an assault and battery on a spiritual person, as also a suit in the spiritual court for irreverence to his person. 6 Mod. 156. Cro. Eliz. 655. — But for calling a woman whore and thief, the party cannot be proceeded against in the spiritual court and by action at law, being one continued act. 2 Roll. Abr. 259. So, for solicitation of chastity which is attended with force and violence. *Vide* 4 Co. 20. 2 Salk. 552. pl. 15. 7 Mod. 78. 2 Ld. Raym. 809. 1101.

Vide tit. Ecclesiastical Courts, letter (D).

The civil causes committed to their consueance, wherein the proceedings are *ad instantiam partis*, ordinarily are the business of tithes, rights of institution and induction to ecclesiastical benefices, matters of matrimony and divorce, and testamentary causes, and the incidents thereunto, as the insinuation of testaments, legacies of goods, and money, &c. wherein they proceed according to the canon law, and the civil law, which is taken as a director in points of exposition and determination.

Gibs. Cod. 763.

[The king is patron paramount of all the benefices in *England*. In virtue of which, the right and care of filling all such churches as are not regularly filled by other patrons belongs to the crown; whether it happen through the neglect of others, (as, in the case of lapse,) or through incapacity to present, as, if the patron be attainted, or outlawed, or an alien, or have been guilty of simony, or the like.

Ibid. Wats. c. 9.

Upon which ground, the king hath right to present to all dignities and benefices of the advowson of bishopricks and archbishopricks during the vacation of the respective sees. Not only to such as shall become void after the seizure of the temporalities, but to all such as shall become void after the death of the bishop, though before actual seizure. And because it is a maxim in law, that the church is not full against the king, till induction; therefore, though the bishop hath collated, or hath presented, and the clerk is instituted upon that presentation, yet will not such collation or institution avail the clerk, but the right of presenting devolves to the king.

Wats. c. 9.

2 R. Abr. 343.

And it is said, that this privilege which the king hath of presenting by reason of temporalities of a bishoprick being in his hands, shall be extended unto such preferments to which the bishop of common right might present, though by his composition he hath transferred his power to others. And therefore when the temporalities of the archbishoprick of *York* are in the king's hands, the king shall present to the deanery of *York*,
although,

although, by composition between the archbishop and the chapter there, the chapter are to elect him: and this, because the patronage thereof *de jure* doth belong to the archbishop, and his composition cannot bind the king, who comes in paramount, as supreme patron: for of the whole bishoprick the king is supreme patron, although it be dismembered into divers branches, as deans, and other dignities; and of ancient time all the bishopricks were of the king's gift, but afterwards the king gave leave to the chapter to elect; yet the patronage notwithstanding remains in the king.

Upon promotion of any person to a bishoprick, the king hath a right to present to such benefices or dignities as the person was possessed of before such promotion; though the advowson belongeth to a common person. (a) This right of presenting upon promotion by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown; and hath been established not only by long practice, but by many judgments upon full and solemn hearings; and that, whether the churches are new or old; and how often soever this happens successively by promotions to bishopricks from the same benefice or dignity: as was adjudged in the case of *St. Martin's* and *St. James's*. (b) Of late, the great question hath been, on supposition of the right, how far it is answered, and the term of the crown satisfied, by the grant of a *commendam* to retain such promotions, or any part of them, together with the bishoprick. Of which question the solution hath been, that by a *commendam* for life, and for the time of continuing in such a bishoprick, the turn of the crown is answered, and in such case the proper patron shall present, upon death or translation; but that the right of the crown shall not be defeated by a *commendam* granted for a term of months or years, certain and limited.

This is not a right of patronage in the king; nor is it a right of eviction, for it ejects nobody: nor an usurpation, for it is a rightful act. But it is a contingent, casual right, arising upon a particular event, the incumbent's becoming a bishop. 2 Bl. Rep. 773. — (b) 4 Mod. 200. 3 Lev. 377. S. C. Lev. Intr. 544. S. C. 1 Show. 413. 441. 495. S. C. 1 Ld. Raym. 23. S. C. Show. P. C. 164. S. C. Carth. 313. S. C.

But in *Ireland* the law is, that a man shall not be promoted to a bishoprick there, until he hath resigned all the preferments which he hath in *England*: which preferments being void before the acceptance of the bishoprick, it seemeth that in such case the king shall lose the presentation.

Exeter, Cro. Jac. 691. it is holden, that this prerogative right of presenting accrues as well where the incumbent is promoted to an *Irish*, as an *English* bishoprick. But, as the report of this case hath been lately considered in other respects as rather apocryphal, it may not be safe to rely upon its authority in this particular.

It hath been determined, that where the advowson is in common, so that the patrons are to present by turns, the prerogative presentation doth not pass for the turn of the otherwise rightful patron; for the prerogative right doth not supply, but only suspends or postpones the turn of the patron, and of all the patrons, if more than one, and doth not take away the right of the one, and leave the rest entire; for that would be rank injustice, and this, being the act of law, *nemini facit injuriam*.

Gibs. Cod. 763. (a) Lord Chief Justice *De Grey*, speaking of this right, saith, It appears in Bro. Presentment, 61. to be as old as *Edward the 3d's* time. It was exercised under *Henry 8.*, and *Q. Eliz.* The law concerning it was doubted in *Charles 2d's* but and since, time, finally determined in favour of the crown in King *William's* time, K. v. Bp. of London, 4 Mod. 202.

Burn's E. L. title Benefice, 128. title Bishops, 192. But in *Woodley v. Bp. of*

Grocers' Company v. Archbishop of Canterbury, 2 Black. R. 770. 3 Wils. 214. S. C.

Calland v. Troward, 2 H. Bl. 524. Judgment affirmed in *B. R.* And as the intervention of the prerogative presentation doth not satisfy or disappoint the turn of the otherwise rightful patron, neither doth it destroy the effect of a prior grant of the next presentation by the owner of the advowson.

6 Term R. 459. and afterwards in the House of Lords, May 16, 1796. According to the report of the case of Woodley v. Bishop of Exeter, Cro. Jac. 691. and Winch. R. 94. it was holden, that the right of the crown in this case defeats the right of a grantee who hath the next avoidance, for his right is only to the next, and the next he cannot have, and therefore shall have none. But this report we have already observed is of very doubtful authority. Lord Hobart, though at that time one of the judges by whom it was determined, takes no notice of it in his Reports. Lord Chief Justice *De Greysaith*, (2 Black. R. 774.) That case is not clearly settled to be law. And in an anonymous note in the margin of Dyer, 228. b. (which is apparently the same case) it is stated, that the court resolved, "that the grantee should have the next avoidance after the prerogative presentation, because that was the act of law, and the prerogative of the king, which excluded him from the first presentation, injures no one." But admitting such a determination to have been made, the court may have gone upon the peculiar terms of the devise, which in Winch's Entries, p. 877. are, "*Dedit et legavit cuidam Johanni Bassett, filio suo, primam et proximam advocacionem prædictæ ecclesiæ de L. quæ primo et proximè contingeret post mortem ipsius Arthuri*;" and which seem expressly to confine the power of presenting to the first turn.

Agreed *percur.* But if the incumbent of a *donative* is made a bishop, the king shall not present to the donative, because such a promotion doth not make an avoidance by *cession*, for the incumbent is the creature of the founder, and is not subject to ordinary and episcopal visitation.]

3. Of his Prerogative in creating Officers.

Dyer, 176. The king as the fountain of justice hath an undoubted prerogative in creating officers, and all officers are said to derive their authority mediately or immediately from him: those who derive their authority from him are called the officers of the crown, and are created by letters patent; such as the great officers of state, judges, &c., and there needs no greater or stronger evidence of a right in the crown herein, than that the king hath created all such officers time immemorial.

Lev. 219. Co. Lit. 5. 114. But though all such officers derive their authority from the crown, from whence the king is termed the universal officer and disposer of justice, yet it hath been held, that he hath not the office in him to execute it himself, but is only to grant or nominate; nor can the king grant any new powers or privileges to an such officers, but they must execute their offices according to the rules established and prescribed them by the law.

2 Inst. 540. Neither can the king create any new office inconsistent with our constitution, or prejudicial to the subject.

2 Sid. 141. And on this foundation it was held, that an office created by letters patent for the sole making of all bills, informations, and letters missive in the council of York, was unreasonable and void.

Mounson v. Leister. So it hath been held, that the king could not grant to any person to hold a court of equity, it being a special trust committed to the king, and not by him to be intrusted to any other except his Chancellor.

Hob. 65. So, a commission to seize the goods and imprison the bodies of all persons who should be notoriously suspected of felonies or trespasses, without any indictment or legal process against them, was held illegal and void.

So, commissions to assay weights and measures, being of new invention, were condemned by parliament (a). 4 Inst. 163. (a) 18 E. 3. c. 1. 4.

So, when one *Chute* petitioned the king to erect a new office for registering all strangers except merchant strangers, and to grant the said office to the petitioner with or without fees, it was resolved by all the judges, that the erection of such office for the benefit of a private person was against law. Co. 116.

So, it is held by Lord *Coke*, that the king could not authorize persons to take care of rivers and the fishery therein, according to the method prescribed by the statute of *Westm.* 2. (13 E. 1. st. 1.) c. 47. before the making of that statute. 2 Inst. 478.

[By stat. 22. G. 3. c. 82. if any office of the name, nature, description, or purpose of the offices thereby abolished, shall be established hereafter, the same shall be deemed and taken as a new office.]

Vide Head of "OFFICE AND OFFICERS."

4. *Of his Prerogative in making War and Peace.*

The power of making war or peace is *inter jura summi imperii*, and in *England* (a) is lodged singly in the king (b); though, as my Lord *Hale* says, it ever succeeds best when done by parliamentary advice. Hal. Hist. P. C. 159. 7 Co. 25. (a) The *jus gladii*, both military and civil, is one of the *jura majestatis*; and therefore no man can levy war in this kingdom without the king's commission. 3 Inst. 9. — (b) The disputes touching the disposition of the *militia* are now settled, and declared to be the right of the crown, by the statutes of 13 Car. 2. c. 6. and 15 & 14 Car. 2. c. 5. Hal. Hist. P. C. 150.

A general war, according to my Lord *Hale*, is of two kinds: Hal. Hist. P. C. 163.

1. *Bellum solemniter denunciatum.* 2. *Bellum non solemniter denunciatum.* The first is, when war is solemnly declared or proclaimed by our king against another prince or state, which is the most formal solemnity of a war now in use. 2dly, When a nation slips suddenly into a war without any solemnity, which happens by granting the letters of *marque*, by a foreign prince invading our coasts, or setting upon the king's navy at sea: and hereupon a real, though not a solemn war, may and hath formerly arisen; and therefore to (c) prove a nation to be at enmity with *England*, or to prove a person to be an *alien enemy*, there is no necessity of shewing any war proclaimed; but it may be averred, and so put upon the trial of the country (d), whether there was a war or not. (c) When the courts of justice are open, and the judges and ministers of the same may by law protect men from oppression and violence, and distribute justice to all, it is said to be time of peace; so, when by invasion, insurrection, and rebellions, &c. the peaceable course of justice is disturbed, then it is said to be time of war; and the trial hereof is by the records and judges of the courts of justice. Co. Lit. 249. ¶ Judge *Blackstone* says, that in order to make war completely effectual, it is necessary with us in *England* that it be publicly proclaimed by the king's authority, and then all parts of the nation are bound by it. 1 Black. Com. 258. But a plea of alien enemy has been held good, though no war had been proclaimed, by reason of open acts of hostility. Cro. Eliz. 142. And Sir *M. Foster* says, that a person may be indicted for treason in adhering to an enemy, without shewing any war proclaimed, and that public notoriety is sufficient evidence of the fact. Disc. 1. c. 2. s. 12. Therefore, although according to the law of nations it is necessary to a *justum bellum* that it should be proclaimed (Grotius de Jure B. & P. lib. 5. c. 5. s. 5. 11.; cf. *vide* Cicero de Off. lib. 1.) in order that it may appear to be a war of the community, and not of private individuals, yet the subjects of this country may be affected by the legal consequences of war, without any proclamation of it. (d) Owen, 45. [Cro. Eliz. 142. Freeman, 41.]

Hal. Hist.
P. C. 159.

(a) The difference between a league and truce is, that a truce is a cessation from war for a certain time, but a league is an absolute striking of peace.

4 Inst. 156. *vide* Molloy, c. 7, 8.
(b) In all leagues the municipal laws of each country are excepted.
2 Show. 369.

Hal. Hist.
P. C. 160.

Hagedorn v. Bell, 1 Maule & S. 450.

(c) *Corpus morbidum corpus tamen est; et civitas quamquam graviter ægrota civitas est, quamdiu manent leges manent judicia, et quæ alia necessaria sunt ut ibi jus exteri consequi possint, non minus quam privati inter se.* Grotius de Jure B. & P. lib. 3. c. 3. § 2.

(d) 1 Roll.
R. 152.

(e) Molloy, 30.
2 Roll. Abr.
175. *¶* *Vide tit. Soldiers.* *¶* —

No person can take the ship or goods of the adverse party unless

he hath a commission from the king, the admiral, or those that are specially appointed thereunto.

Peace is of two kinds: 1st, Positive or contracted. 2dly, Such a peace as is only a negation or absence of war. A positive peace is such as ariseth by contracts, capitulations, leagues, or truces between princes or states that have *jura summi imperii*, and is of two kinds. 1. Temporary, which is properly a truce (a), which is a cessation from war already begun; and then, the term being elapsed, the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual, *sine termino* or indefinite, which regularly continues according to the tenour or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a league, *foedus* (b), and makes the princes and states *confederati*; and though this may be variously diversified, according to the capitulations, conditions, and qualifications of such leagues, yet they are ordinarily of these kinds. 1st, Leagues offensive and defensive, which oblige the princes not only to a mutual defence, but also to be assisting to each other in their military aggresses upon others, and makes the enemies of one in effect the common enemies of both. 2dly, Defensive but not offensive, obliging each to succour and defend the other in cases of invasion or war by other princes. 3dly, Leagues of simple amity, whereby the one contracts not to invade, injure, or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions.

2. A peace, which is only a negation or absence of war, is where no league or articles of peace intervene, nor yet any denunciation of war; as among divers princes in the world who never capitulated one with another, and yet there is no state of war between them; and the general rule is, *ubi bellum non est pax est.*

¶ And although a neutral state may fall into the military possession of one of two belligerents still retaining her civil government, that does not necessarily constitute her an enemy of the other belligerent, if such other belligerent choose to permit a continuance of amity and commerce. Therefore *Hamburgh* was considered an independent state (c) in amity with *Great Britain* after the *French* had taken military possession of her, but the senate still exercising the civil government. *¶*

¶ *est, quamdiu manent leges manent judicia, et quæ alia necessaria sunt ut ibi jus exteri consequi possint, non minus quam privati inter se.* Grotius de Jure B. & P. lib. 3. c. 3. § 2.

The king, in consequence of his power in making war and peace, hath a prerogative in the coin and royal mines, in saltpetre and gunpowder: may enter into a man's lands to make fortifications (d); may lay on embargoes, grant letters of *marque* and reprisal (e), press soldiers, sailors (g), &c.; and though in many instances relating to these matters the strict letter of the law may be exceeded, yet from the necessity of order, government, and discipline, are they countenanced and allowed; *quod necessitas cogit defendit.*

unto. Hal. Hist. P. C. 162. Vern. 54. — By the law of the Admiralty, the property of a ship taken upon the high sea without letters of *marque*, vests in the king upon the taking. Carth. 599. — Clause in a charter which empowers the seizing the goods of every person is illegal and void. Show. 157. *Vide* 1 Black. Com. (g) 6 Co. 27. Hut. 154. — * As to the pressing of sailors, see Foster R.; the case of Alexander Broadfoot, fo. 154. and 1 Black. Com. 418; and see also Comb. 245.

¶ The power of impressing seafaring men for the sea service by the king's commission has been a matter of some dispute, and submitted to with great reluctance, though it hath very clearly and learnedly been shewn by Sir *Michael Foster* that the practice of impressing and granting powers to the admiralty for that purpose is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time, whence he concludes it to be part of the common law. The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 R. 2. c. 4. speaks of mariners being arrested and retained for the king's service, as of a thing well known and practised without dispute, and provides a remedy against their running away. By a later statute, if any waterman who uses the river *Thames* shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties. By another, no fisherman shall be taken by the queen's commission to serve as a mariner, but the commission shall be first brought to two justices of the peace inhabiting near the sea-coast where the mariners are to be taken, to the intent that the justices may choose out and return such a number of able-bodied men as in the commission are contained to serve her majesty. And by others, especial protections are allowed to seamen in particular circumstances to prevent them from being pressed. And ferrymen are also said to be privileged from being impressed at common law. All which do most evidently imply a power of impressing to reside somewhere, and, if anywhere, it must, from the spirit of the constitution, as well as from the frequent mention of the king's commission, reside in the crown alone.

The power of impressing can only be exercised on persons who have voluntarily chosen a seafaring life, and does not extend to landmen.

It has been decided, that keelmen employed in navigating rivers (a), carpenters employed on board ships on a coasting or other trade (b), seafaring men serving the office of headborough (c), or being freeholders (d) or liverymen of *London* (e), or watermen of *London* (g), are not exempted from impressment under the several statutes. And it does not appear that the captain or master of a coal and coasting vessel is exempted. (h)

(a) 1 East, 466.
(b) 15 East, 459.
(c) 5 Term R. 276.
(d) 5 East, 477.
(e) 9 East, 466.
(g) Cowp. 512.
(h) 13 East, 550. note; and see 14 East, 346. 5 Term R. 416. 7 Term R. 673.

The king has the power of granting protections against impressment, which is exercised by the board of admiralty; but these protections are revocable at pleasure whenever the public service appears to require it; and this notwithstanding they are granted for a specified time.¶

Ld. Raym.
283.
per Treby
C.J.

The king may declare war against one part of the subjects of a prince, and may except the latter part; as was done by King *William* in his declaration of war with *France*, where he excepted the *French* protestants; and of such proclamations all ought to take notice, because the war begins only by the king's proclamation.

5. *Of his Prerogative as Parens Patriæ in taking Care of Infants, Idiots, Lunatics, and Charitable Uses.*

|| *Vide* Head of
Infancy and
Age, Vol. IV. ||

The king, as *parens patriæ*, hath the protection of all his subjects; and in a particular manner is to take care of all those who by reason of their want of understanding are incapable of taking care of themselves and their affairs. By virtue of this high trust, infants, who by reason of their nonage are under incapacities, are under the protection of the crown; and hence arises allegiance, as a debt of gratitude, which can never be cancelled, though the subject owing it goes out of the kingdom, or swears allegiance to another prince.

1 P. Wms. 103.
|| *Vide* Head
Guardian,
Vol. IV. ||

This trust lodged in the king, and the jurisdiction exercised herein, originally belonged to the Court of Chancery, and now, upon the dissolution of the court of wards, is again devolved on that court. Hence it is every day's practice in that court to determine as to the right of guardianship, to punish abuses in relation to their persons, &c.

1 P. Wms.
706. in the
case of the
Duke of

If a person appointed guardian is attainted, or otherwise becomes incapable, the trust devolves on the great seal as the general guardian of all infants.

Ormond, who was appointed guardian to the Duke of *Beaufort*.

Vide Head of
Idiots and Lu-
natics, Vol. IV.

In the like manner and for the same reason it is, that idiots and lunatics, who are incapable of taking care of themselves, are provided for by the king as *pater patriæ*.

Vide Head of
Charitable
Uses and
Mortmain,
Vol. II.

In like manner in the case of charities, the king *pro bono publico* has an original right to superintend the care thereof; so that abstracted from the statute 43 Eliz. c. 4. relating to charitable uses, and antecedent to it as well as since, it has been every day's practice to file informations in Chancery in the Attorney-general's name, for the establishment of charities, &c.

1 P. Wms. 119.

6. *Of his Prerogative in Pardoning.*

Co. Lit. 114. b.
H. P. C. 104.
3 Inst. 233.
Show. 284.

This high prerogative is (a) inseparably incident to the crown, and the king is intrusted herewith upon a special confidence, that he will spare those only whose case, could it have been foreseen, the law itself may be presumed willing to have excepted out of its general rules, which the wisdom of man cannot possibly make so perfect as to suit every particular case.

(a) It is a personal trust and prerogative in him for a fountain of bounty and grace to his subjects, as he observes them deserving or useful to the public, which he can neither grant or otherwise extinguish; per *Holt* C. J. Ld. Raym. 214. *et per Rokeby* J. As he cannot but have the administration of public revenge, so he cannot but have a power to remit it by his pardons when he judges it proper. *Idem*.

Vide Title "PARDON."

7. *Of*

7. *Of Dispensations and Non Obstantes.*

The power and prerogative of dispensing with laws and granting *non obstantes*, hath always been looked upon with a jealous eye, and are said to have been first invented in *Rome* and brought into this kingdom by the pope and clergy.

But, though they have not been favoured in the courts of justice, yet it hath been always held, that the king had a prerogative in certain cases to grant dispensations and *non obstantes*, which is founded in *plenitudo potestatis*: and upon this reason, that it is impossible for law-makers by human prudence to foresee several particular cases that may happen, wherein a law that is good in general might be mischievous in some particular cases; and therefore, and for the public good, the law intrusts the king (who is intrusted with the execution of the law) to judge of such circumstances; and when such particular case happens, to exempt it out of the penalty of the general law.

The prevailing distinction herein hath been, that the king cannot by any previous licence or dispensation make an offence punishable which is *malum in se*; but that in certain matters, which are only *mala prohibita*, he may to certain persons and on some special occasions; and this distinction the C. J. *Vaughan* (a) admits, being well understood and rightly applied, is the best guide in these matters.

learning is fully discussed; and in Lev. 217.

On this distinction it was always held, that the king could not dispense with the laws against murder, adultery, stealing, incest, sacrilege, extortion, perjury, trespass, and others of the like kind (b); and that a pardon for any such like offence that was *malum in se* before it happened was void.

the king's grant to the Bishop of *Salisbury* and his successors having the custody of a prison; that they shall be quit of all escapes, &c. having been allowed in *cyre*, should be a good discharge from any fine for a negligent escape out of such prison, is doubted of in c. 37. § 28.

But, where a thing lawful in its own nature is made unlawful by act of parliament only, as the carrying bell-metal or beer, &c. out of the realm, importing certain merchandizes in foreign ships, &c., selling wines beyond a certain price, exporting wool to any other place than *Calais*, coining money of a base alloy, and other matters of the like nature; it seems formerly to have been taken for granted, that generally the king might dispense with it as to a particular time or place, or person, or even corporation aggregate, so far as the public was concerned in it.

Yet, where such dispensation could not but be attended with great inconvenience, as the introducing a monopoly, or frustrating the end for which the law was made, as the licensing of a particular person to import foreign cards or wines prohibited by parliament, and *à fortiori*, if it tended to suspend the whole statute in general, it was commonly agreed to be void.

Also, wherever an act of parliament gives a particular interest or right of action to the party grieved by the breach of it, as the statutes of mortmain, which give an entry to the next immediate

2 Roll. Abr.
179.
Dav. 69.
2 Mod. 261.

11 Co. 88.
Finch. 254.
Dyer, 54.
pl. 17.

12 Co. 29.
Dav. 75.
5 Co. 35.
(a) In the case
of Thomas
and Sorrel,
Vaugh. 350.
to 359.
where this
Sid. 6, 7. S. C.

Vaugh. 854.
(b) Hence the
resolution in
the Year-
Book 11 H. 7.
pl. 35. that

of a prison;
should be a good dis-
charge from any fine for a negligent escape out of such prison, is doubted of in 2 Hawk. P. C.

2 Hawk. P. C.
ubi supra, and
several autho-
rities there
cited.

2 Hawk. P. C.
ubi supra.

Hawk. P. C.
ubi supra.
Hob. 214.
Hard. 110.

lord for an alienation to a corporation ; the statutes against maintenance, forcible entries, carrying distresses out of the hundred, suffering one in execution to escape, &c. which give an action to the party grieved by the offence prohibited ; it seems to have been always agreed, that no charter by the king can be of any force to bar the right of the party grounded upon such statute ; because it is a settled rule, that the king cannot prejudice the interest of the patry.

2 Hawk. P. C.
ibid.

(a) 12 Co. 18.

Also, where a statute is express, that the king's charter against the purport of it, whether with or without a clause of *non obstante*, shall be void ; it is said by Sir *Ed. Coke* (a), that no clause of *non obstante* can dispense with it, unless it tend to restrain some prerogative solely and inseparably incident to the person of the king ; as the right of pardoning, or of commanding the service of the subject for the public weal ; which being, as he seems to argue, founded on the law of nature, are so far inseparable from the king, that by a clause of *non obstante* he may dispense with any statute whatsoever which tends to deprive him of them.

2 H. 7. 6. b.
vide 2 Hawk.
P. C. *ibid.*

On this foundation the resolution of the judges in the *Year-Book* H. 7. is said to be maintainable ; in which it is adjudged, that where the statute of 23 H. 6. c. 8. expressly enacts, that patents to sheriffs to continue longer than a year shall be void, and the party disabled to bear the office of sheriff, notwithstanding any clause of *non obstante* ; yet the king by the clause *non obstante* might make a good patent of such office for life.

In the reign of King *James* the Second, when the king's dispensing power was endeavoured to be extended, a difference was taken and attempted to be established in those cases, which was, that as to a general law made for public government, and in which all the king's subjects were equally interested, the king might dispense with it, but not where any right or interest vested in a particular person ; and it was said to be no objection to such dispensing power, that the law was made *pro bono publico* ; for that though it was *pro bono subditorum*, yet not being *singulorum*, but *populi complicati*, the king might dispense with it.

Comb. 21.

2 Show. 475.
pl. 440. Clift.
133.

Also the following points were determined in Sir *Ed. Hale's* case in the same reign. 1. That the king is sovereign or absolute prince. 2. That the laws of the land are the king's laws. 3. That to dispense with penal laws, where the subject hath no particular damage, for necessary and urgent occasions, is an inseparable prerogative of the king. 4. That the king is sole judge of such necessity. 5. That this trust residing in him came not from the people, but was a sovereign right of the king *ab antiquo*. 6. That the dispensation in this case, because it came within three months before any disability incurred, was a good bar to the plaintiff's action.

These resolutions being thought of dangerous consequence, as tending in effect to make the execution of the most necessary laws precarious, and merely dependent on the pleasure of the king.

[(a) It is remarkable, that

By the 1 W. & M. sess. 2. c. 2. it is declared and enacted, " That (a) *from and after this present parliament*, no dispensation

" by

“ by *non obstante* of or to any statute or any part thereof be
 “ allowed, but that the same shall be held void and of none
 “ effect, except a dispensation be allowed in such a statute.”

the conven-
 tion sum-
 moned by the
 Prince of

Orange did not, even when they had the making of their own terms in the *Declaration of Rights*, venture to condemn the dispensing power in general, which had been uniformly exercised by the former kings of *England*. They only condemned it so far, as it had been assumed and exercised of late. But in the *Bill of Rights*, which passed about a twelvemonth after, the parliament took care to secure themselves more effectually against a branch of prerogative, incompatible with all legal liberty and limitations; and they excluded, in positive terms, all dispensing power in the crown; yet, even then, the House of Lords rejected that clause of the bill which condemned the exercise of this power in former kings, and obliged the Commons to rest contented with abolishing it for the future. There needs no other proof of the irregular nature of the old *English* government than the subsistence of such a prerogative, always exercised and never questioned, till the acquisition of real liberty discovered, at last, the danger of it. Hume's Hist. vol. 8. p. 241, 242. See also the Journals,] [and Gray's Debates, vol. ix. p. 297, to 307. 314 to 322. 336 to 344. 396. Chandl. Deb. vol. i. p. 394. As to the dispensing power, see the note of Mr. Amos to Fortescue, *De Laudibus Leg. Ang.* c. ix., and the various authors there referred to.]]

As the above-mentioned case of *Sir Ed. Hale* is the most remarkable case on this subject, it may not be improper to insert it at large, as taken from a MS. report, together with the argument of *Sir Ed. Northey*.

This is an action of debt for 500*l.* founded on a conviction of the defendant for exercising the office of a colonel of a foot regiment, after neglect to take the oath of allegiance and supremacy enjoined to be taken by the statute 25 Car. 2. c. 2. by which statute the defendant hath forfeited the sum of 500*l.* to him that sues for the same.

Anthony Goden v. *Sir Ed. Hale*, Trin. 2 Jac. 2. in *B. R.*

The declaration sets forth, that the defendant *Sir Ed. Hale*, the 20th of Nov. ann. 1. regni of this king, at *Hackington* in the county of *Kent*, was advanced to be a colonel of a foot regiment in the said county (which the plaintiff avers to be a military office and place of trust under his said majesty, and by authority from him derived;) and that the defendant held and exercised the said office for three months then next following, and to the time of exhibiting the bill of the plaintiff, and did and doth inhabit in the said parish and county, and did not either in the Court of Chancery or in this court, in the next term or in the next quarter sessions of the peace holden for the said county of *Kent* or place where he did reside, or within three months after his admission to the same, take the several oaths of supremacy and allegiance; but did wholly neglect to do the same, and did continue, after his neglect, to execute the said office, and yet doth execute the same, contrary to the form of the statute in that case made and provided.

Vide Hume, x.

The declaration further sets forth, that the said *Sir Ed. Hale* the defendant 29th March last, at the assizes held at *Rochester* in the county of *Kent* before the *Ld. C. J. Jones* and *Mr. J. Withens*, justices of *oyer and terminer* for the said county, was indicted for the said neglect, and for executing the said office after the said neglect contrary to the form of the said statute; and thereon was in due form of law convicted, as by the record thereof may appear; and the plaintiff entitles himself to the said 500*l.* forfeited by the defendant by the said act on his said conviction, and saith the defendant hath not paid him the same.

To this declaration the defendant pleads in bar, that the king's majesty that now is, after the defendant's admission to the said office, and within the three months next ensuing, and before the next term or quarter sessions of the peace after the same, and before the exhibiting the bill of the plaintiff in this court, *viz.* the 9th day of *January* in the first year of the reign of his present majesty, his said majesty by his letters patent under the great seal of *England*, did dispense, pardon, remise, and discharge, to and with the said defendant, of and from taking the said oaths of allegiance and supremacy, and from receiving the sacrament according to the use of the church of *England*, and from subscribing the test mentioned in the act of 25 Car. 2. (c. 2.) or mentioned and contained in any other acts of parliament, and of and from all crimes, convictions, penalties, forfeitures, damages, and disabilities incurred or to incur at any time then after for executing the said office, after he should omit, neglect, or refuse to do and perform any of the said matters enjoined to be done by the said act; and further, that his said majesty by his said letters patent did grant unto the defendant, that he should be enabled to hold the said office without taking the said oaths or subscribing the said test, as if the said act had never been made.

To this plea the plaintiff demurred, and the defendant joined in demurrer.

Mr. Northey.

I am counsel with the plaintiff in this case, and am humbly to shew your lordship and the court the causes of this demurrer.

This action is grounded on the statute made 25 Car. 2. c. 2. which requires, that all and every person or persons, that should be admitted, entered, placed, or taken into any office or offices civil or military, or should receive any pay, salary, fee, or wages by reason of any patent or grant of his then majesty, or should have command or place of trust from or under his said late majesty, his heirs or successors, or by his or their authority, or by authority derived from him or them within this realm of *England*, &c. after the first day of *Easter* term 1673, and shall inhabit, be, or reside, when he or they is or are so admitted or placed, within the cities of *London* or *Westminster*, or within thirty miles of the same, shall take the several oaths of supremacy and allegiance in his majesty's high Court of Chancery or in the Court of King's Bench in the next term after such his or their admittance or admittances into the office or offices, employment or employments aforesaid; and that all and every such person or persons to be admitted as aforesaid, not having taken the said oaths, shall, at the quarter sessions of that county or place where he or they shall reside, next after such his admittance or admittances into any of the said respective offices or employments aforesaid, take the said several respective oaths as aforesaid, and shall receive the sacrament of the Lord's Supper, according to the usage of the church of *England*, within three months after his or their admittance into or receiving the said authority and employment, in some public church on some *Sunday* immediately after divine service or service and sermon, and shall subscribe the test in the said act mentioned at the time when he shall take the said oaths.

And

And by the said act it is further enacted, that all and every the person and persons aforesaid, that do or shall neglect or refuse to take the said oaths and sacrament in the said courts and places, and at the respective times as aforesaid, shall be *ipso facto* adjudged incapable and disabled in and to all intents and purposes whatsoever to have, occupy, and enjoy the said office or offices, employment or employments, &c. and every such office and place, employment and employments shall be void, and is by the said act adjudged void.

Then comes the clause of forfeiture, by which the plaintiff is entitled to this action, which is, that all and every such person or persons that shall neglect or refuse to take the said oaths, or the sacrament as aforesaid, within the times and in the places aforesaid, and yet after such neglect and refusal shall exercise any of the said offices or employments after the said terms expired wherein he or they ought to have done the same, being thereupon lawfully convicted in or upon any information, presentment, or indictment in any of the king's courts at *Westminster*, or at the assizes, every such person and persons shall be disabled from thenceforth to sue or use any action, bill, plaint, or information in course of law, or to prosecute any suit in any court of equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office within the realm of *England*, &c., and shall forfeit the sum of 500*l.* to be recovered by him or them that shall sue for the same, to be prosecuted by an action of debt, suit, bill, plaint, or information in any of his majesty's courts at *Westminster*, wherein no essoin, protection, or wager of law shall lie.

In this case, my lord, I shall lay down and endeavour to maintain these two things :—

First, That the plaintiff hath well entitled himself by his declaration to recover the 500*l.* demanded by him against the defendant, according to the said act 25 Car. 2. c. 2. of the late king.

Secondly, That the defendant hath not by his plea alleged any matter that can bar the plaintiff from the recovery of the same.

As to the first, I conceive, that by the said act four things are necessarily required before the informer can be entitled to bring an action for the 500*l.*

First, That such person hath been admitted into some office, place, or employment within the description and intention of the said act.

Secondly, That such person after his admission into such office hath neglected or refused to take the said oaths at the times and places by the said act directed.

Thirdly, That such person after such neglect or refusal hath continued to execute said office.

Fourthly, That such person be convicted thereupon in one of his majesty's courts at *Westminster*, or at the assizes, at the suit of the king, by information, presentment, or indictment.

The plaintiff hath shewn all these things in his declaration.

1. It is set forth, that the defendant was admitted to be colonel of a foot regiment, which is expressly averred to be a military office

office and a place of trust under his present majesty, and by authority from him derived, according to the words of the said act of parliament.

2. It is expressly shewn, that the defendant did neglect to take the oaths of allegiance and supremacy in the next term in the Court of Chancery or this court, or in the next quarter sessions for the county or place where he did then inhabit, or within three months next after his admission to the same, which are times and places limited and appointed by the said act for the taking of the said oaths.

3. It is expressly averred, that the defendant did execute the said office after the times expired, and his neglect to take the said oaths.

4. Lastly, it is set forth in the declaration, that the defendant was by indictment at the assizes in *Kent* before Sir *Thomas Jones* and Mr. Justice *Withens*, justices of *oyer and terminer* for the said county of *Kent*, lawfully convicted for executing the said office after his neglect to take the said oaths, contrary to the form of the said statute; which is a conviction by one of the means, *viz.* by indictment, and in one of the courts, *viz.* at the assizes, in the said statute mentioned.

These, my lord, I conceive are made necessary by the statute, but it is not incumbent on the informer to make them all appear to be so; for as to the three first, they must be proved on the information, presentment, or indictment at the king's suit, before such officer can be convicted; but, when there is a conviction, the informer need only shew the record thereof.

If then the plaintiff hath entitled himself to his action, the next thing to be considered is, the matter alleged by the defendant in bar thereof.

In speaking to this I shall consider two things.

First, Whether the defendant shall be now admitted to plead this dispensation in bar of this action, and whether he hath not lost the benefit of it, by not pleading of it in bar to the indictment whereon he hath been convicted.

Secondly, Admitting he may plead the same now, whether the same be good in law to enable the defendant to execute the said office without taking the said oaths, so that he shall be exempted from the penalty inflicted by the said act of parliament for executing the said office after his neglecting to take the oaths.

As to the first point, I shall observe to your lordship the times mentioned in the record now before you: the defendant was admitted to the office of colonel the 20th Nov. anno 1. of this king; the offence in executing the said office after his neglect to take the oaths of allegiance and supremacy, is alleged to be the 10th of *March*, anno 2. of this king; and the conviction for the same appears to have been the 29th of *March*, anno 2.; and the dispensation pleaded by the defendant was granted to him the 9th day of *Jan.* anno 1. of this king, which was before the offence and conviction; so that as to this point the case will be but this: —

An act of parliament doth enact, that he who doth neglect to
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take the oath of allegiance within the certain prefixed time, and shall be convict of the same by indictment, shall forfeit 500*l.* to him who will sue on such conviction for the same; the defendant neglects to take the said oath, having a dispensation of the same granted to him before the time lapsed for taking the said oath; and which (to make a case) is admitted to be a good excuse, and may be pleaded in bar of any indictment for that neglect.

The defendant is after indicted for that neglect, and pleads not guilty to the same; and an action is brought by the plaintiff against him for the 500*l.* on the said conviction, and the defendant pleads the said dispensation in bar. I conceive, with submission, he comes too late; for the defendant had his election to have pleaded the said dispensation in bar of the indictment, and to have relied on it; and that was his proper time to make use of the same or to waive it, and insist on his innocence, and plead not guilty; and when he pleads not guilty, and does not make use of the dispensation for his defence, the law construes it to be a waiving of it; and he shall at all times after be estopped by his plea and conviction thereon to say, that he did not waive the same.

To make this plain, I humbly submit to your lordship's consideration, that after the conviction the defendant could never have made use of his dispensation to have stayed the judgment on the same, which is the express opinion in the 11 H. 4. Bro. tit. *Chartres de Pardon*, pl. 15. the words of the book are, "He who pleads not guilty cannot plead a pardon afterwards, unless the pardon be of a later date than the time of his plea."

In 3 Cro. 4. *Margaret and Marshall's* case, the difference there taken makes out the reason of it to be what I have before offered. *Marshall* in the reign of Queen *Mary* had committed petit treason; in the 10 Eliz. there was a general pardon, notwithstanding which she was outlawed for the petit treason after, and she brought a writ of error to reverse the same; and it was there resolved, that she may assign the general pardon for error, because she had no day in court to have pleaded it, but always made default; but that it had been otherwise if she had ever appeared in court, and had not pleaded the same.

In a *scire facias* upon a recognizance, if the defendant appear, and having a release that he may plead, do not plead it and judgment be given against him, he hath totally lost the benefit of his release, and shall not be relieved in an *audita querela* on the same against the said judgment, for he hath waived the benefit of it himself; but, if judgment had been given against him by default on a *nil* returned, there, he should be relieved by *audita querela*; for that he never had any time before to have pleaded it: This is agreed, my lord, in the case cited of *Marshall* and in Roll. Abr. 306. where divers cases to this purpose are collected together.

By this I conceive it is very clear, that as to the king, the defendant by pleading not guilty to the indictment did thereby lose the benefit of his dispensation, and could not help himself by the same against the conviction on the said indictment, either in
arrest

arrest of judgment, or by error. In the next place, I conceive that the defendant shall be no more admitted to use the said dispensation against the plaintiff than he could against the king; for on the plaintiff's bringing his action for the 500*l.* forfeited, the statute vests the benefit of the conviction in him, and creates a privity between the plaintiff and defendant as much as if the plaintiff had been party to the record of the conviction; by the words of the statute this appears very plain, for the words are, *and being thereof convicted shall forfeit the sum of 500*l.* to be recovered by him who will sue for the same*; this action I take therefore to be in nature of an execution of that conviction, and therefore the defendant shall not be admitted to plead any matter precedent to the same in bar of this action.

The plaintiff in this action may, I conceive, be resembled to an administrator *de bonis non*, who by the statute 18 Car. 2. c. 8. may sue forth execution on a judgment obtained by an executor or administrator before him; and certainly no man ever thought but that statute put the administrator *de bonis non*, to all intents and purposes, in the same condition as the executor or administrator who obtained the judgment was in; and that the defendant cannot allege any matter whatsoever against him, which he could not have alleged against him who obtained the said judgment.

My lord, I conceive there is a great difference where a record of a conviction is the foundation of an action such as without which the action will not lie; and where it is an evidence only which the plaintiff may make use of or may let it alone, and yet maintain his action; as in case of a conviction on an indictment of battery, which is evidence the plaintiff in an action for the same battery may make use of, or maintain his declaration by other proof. In the first of these cases the record must be taken to be true according to the tenor of it, till it be reversed by error; but in the other case the defendant is not at all concluded by it, for the plaintiff doth not, nor can rely on the same as he doth on the first; for there the conviction is so much the foundation of the plaintiff's action, that I conceive he might have declared only on the same, and have set nothing out in his declaration, but that the defendant was indicted and convicted for the offence contained in the indictment.

If the defendant shall be admitted to plead this plea now, he shall thereby falsify the record of the conviction in the very point tried; which he shall never be admitted to do, as appears by Lord Coke's P. C. fol. 230.

For these reasons and authorities, I shall conclude as to the first point, that the defendant by pleading not guilty to the indictment, hath waived the benefit of his dispensation, and shall never have advantage of the same to avoid the execution of the judgment in the conviction on that indictment which is to be executed by this action according to the direction of the statute.

But admitting this point to be against the plaintiff, and that the defendant hath liberty to plead the dispensation to this action, I conceive it is no bar; but that, notwithstanding the same, the plaintiff shall recover; for that the dispensation was merely void

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in law and could not enable the defendant to execute the said office, without taking the said oaths, nor exempt him from the penalties inflicted by the said act on his executing the said office after his neglect to take the said oaths according to the said act.

I shall not trouble your lordship with a discourse on *non obstante* in general, nor how nor where they were brought into the world; and shall not deny, but agree that the king hath by his prerogative, a power of dispensing with penal laws in many cases; and it is a great use and advantage to the subject as well as to himself, that he hath such a power; for although acts of parliament pass with the greatest deliberation that can be yet the judgments of the law-makers are but finite and fallible, and they cannot possibly foresee all events that may happen; and that which was well intended and specious in the theory, may be fatal in the practice; and to particular persons there may be, without the aid of this prerogative, the greatest injustice many times done by the help of a law; but though the king have such a prerogative, yet that prerogative is bounded by the law; and with some acts of parliament the king cannot dispense at all to any persons in any cases; with other acts though he may dispense, yet not to all persons nor in all cases.

That the king cannot dispense with some acts of parliament to any person, will appear from 11 H. 7. fol. 11, 12. the king cannot dispense with a law that prohibits an act that is *malum in se*; as the king cannot license a man to kill another, nor do any nuisance to the common highway; and if such licences be granted, they are void.

The king cannot dispense with an act of parliament which is of public concernment, and in which the people have any interest; for that is so vested in them that the king cannot divest it. The statutes of 13 R. 2. c. 3., 15 R. 2. c. 5. and 2 H. 4. c. 11. being statutes declaring the jurisdiction of the court of the admiral, for that all the subjects of the realm have interest in them, cannot be dispensed with by any *non obstante*; this appears by Coke's Juris. of Courts, fol. 135. Whether the law now dispensed with be not of public concernment, and the people have not an interest in it, I shall leave to the consideration of the court, on consideration of the statute.

This I only offer to your lordship, to shew your lordship, that this great prerogative of the king may be bounded.

I shall confine myself in my further discourse touching the bounding of this great prerogative of the king, purely to the statute now before your lordship; and I shall lay down this rule, that wherever an act of parliament doth absolutely and directly enjoin and prohibit the doing of any action, and doth create a disability to any purpose to fall on any person on the doing or not doing of such act, (let the concern of such statute be what it will,) the king, with submission I conceive, by reason of the clause of disability, cannot dispense with such law by a *non obstante*, either before the doing or not doing such action enjoined or prohibited or after; although he might have dispensed with the same
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if such action had been prohibited only *sub modo*, as on a penalty given to the king. This I shall endeavour to make out by authorities; for that clearing the same will, I conceive, determine the question on this statute now before your lordship; which I shall then come shortly to consider.

By the statute 31 Eliz. c. 6. it is enacted, that every admission, institution, and induction, on any simoniacal contract to any ecclesiastical benefice, shall be utterly void; and the person so corruptly taking such benefice, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same. If a person be simoniacally inducted to any benefice, the same by this act immediately becomes void; and the incumbent is so absolutely disabled for ever after to be presented to that church, as that the king himself (to whom the law giveth the title of presentation in that case) cannot present him again to that living; for the act binds the king in that case, and he cannot dispense with the same; and this only by reason of the disability therein.

This, my lord, appears by Co. Lit. 120. 3 Inst. 154. where the difference between an act of parliament's making a disability, and prohibiting any matter *sub modo*, is taken; and so it hath been often resolved on the statute; Cro. Jac. 385. *The King against The Bishop of Norwich* and others, and the same case Hob. 75. are expressly so resolved; so is the case of *Smith v. Sherborn*, Moor, pl. 1299.

By the statute 5 E. 6. c. 16. it is enacted that every person that shall give or contract to give any sum of money for any office, or shall make any promise, agreement, or assurance for any office mentioned in the same act, shall immediately thereon be adjudged a disabled person in law to all intents and purposes to have and enjoy such office. Sir *Robert Vernon* being cofferer to King *James the First*, contracted with Sir *Arthur Ingram* to sell his office (the same being an office within the said act) to the said Sir *Arthur*, and agreed to surrender it, to the intent that Sir *Arthur* might obtain a grant thereof; which was done, and Sir *Arthur* obtained a grant from the king of the same: The office was adjudged after to be void; and that Sir *Arthur* was a person disabled by the statute to take that office; and that no *non obstante* could dispense with the said act to enable him. Co. Lit. 234. Hob. 75. Cro. Jac. 386.

From these cases it is plain, the king cannot dispense with an act enacting a disability on the doing or not doing any action, after the action enjoined or prohibited to be done is done, or omitted to be done, contrary to the act; and that if this dispensation to Sir *Ed. Hale* had come after his refusal to take the oaths, and his exercising the office contrary to the act, it had been ineffectual to enable him against this statute.

Now, my lord, I shall consider whether the king may dispense with such act enacting such disability on the doing or not doing any action, after the action enjoined or prohibited to be done is done, or omitted to be done, contrary to such statute; and I conceive he cannot; for, with submission, the reason why the king

cannot

cannot in the cases cited dispense with these persons is, not because disability is attached, but because the king cannot controul an act of parliament, and make a person capable against the express provision of the same; which he doth as much do when he grants a dispensation precedent to the offence, as when it is granted subsequent. This, my lord, I shall a little enlarge on when I come to consider the statute now in question.

As, for instance, if the king should license any person who hath an office within the statute of 5 & 6 E. 6. c. 16. to sell the same, and another to buy it *non obstante* the said statute of E. 6. this certainly would be a void *non obstante*, although it were before any contract made for such office; and such *non obstante* would not hinder, but that the statute would avoid the said office, and the purchaser would become and remain disabled to hold such office. This was agreed by all the judges who argued for the king's prerogative to dispense with penal laws in the case of *Thomas v. Sorrel*, touching wine-licences, which was in the Exchequer-chamber about ten years since; and so it doth appear by my Lord *Vaughan's* argument in his Rep. fol. 354. which cannot, I humbly conceive, be distinguished from this case now before your lordship.

Now, my lord, I shall consider this statute whereon this question arises; and with submission I conceive this dispensation of that statute, though granted before the offence committed, can no more be maintained to be lawful than can the dispensations in the cases before cited on the statute of the 5 & 6 E. 6. c. 16. of offices, and 31 Eliz. c. 6. of simony; but this shall be ineffectual for enabling the defendant against this act, for the same reasons that those dispensations were useless against the disabilities created by those laws.

For by this statute it is directed and positively enacted, That every person admitted to any office, &c. shall take the oaths of allegiance and supremacy, either in the Court of Chancery or in this court, in the next term after his admittance to the same, or at the quarter sessions for the county or place where he shall reside, next after such his admittance; and shall receive the sacrament within three months after his admission to the same.

Then comes the disabling cause, That every person that doth or shall neglect or refuse to take the said oaths and sacrament in the said courts and places, and at the respective times aforesaid, shall be *ipso facto* adjudged incapable and disabled in law to all intents and purposes whatsoever, to have, occupy, or enjoy the said office; and every such office shall be void, and is thereby void.

Every man by the common law had a double capacity as to offices.

1. He was capable to take the same.

2. He had a capacity to hold the same for any time whatsoever.

The statute works not at all upon the first capacity, but every person remains notwithstanding as capable of taking as ever; but it quite changes his capacity of holding, and annexes a condition

dition precedent to the same; on performing which condition only he shall be capable; and till that be performed, by judgment of this act he is incapable.

This, I conceive, may properly be called an incapacity; for that he, who is incapable to any one purpose, is as properly said to be a person incapable as if he was disabled to all purposes.

The intent of the statute appears to be the same as if it had been enacted in these words, That no man shall hold an office above three months, unless within the three months he take the oath of allegiance, in which case it would be plain, that a disability to hold beyond three months, would attach on every one who should accept an office so soon as he should accept the same; which could not be removed but by qualifying himself as the act directs.

If the dispensation pleaded will enable the defendant to hold the office without qualifying himself by taking the oaths, then may the king enable a man in a point wherein he is disabled by act of parliament; which is expressly contrary to the reason of the cases I before cited; and here it doth appear the disability was attached in the defendant before the dispensation granted; for he was admitted to the office the 28th *November*, and the dispensation was not granted till *January*; and therefore, according to what I have offered, it comes too late.

By the statute 7 Jac. c. 6. for taking the oath of allegiance, it is enacted, That every member of the House of Commons, at any parliament or session to be assembled, before he shall be permitted to enter into the said house, shall take the said oath before the persons mentioned in the said statute.

By the opinion of Lord *Vaughan*, the king cannot dispense with that act; for that every member, so soon as chosen, is *persona inabilis*, and shall not be permitted to enter the house without the oath taken.

My lord, by the very dispensation it appears, that the king's counsel, who drew it, were willing to make what provision they could against the disability incurred by the taking the said office of a colonel, which the defendant had not three months when the dispensation was granted; yet he is thereby expressly discharged from all disabilities incurred by the said act; which seems to admit there was a sort of incapacity then on the defendant; to remove which the dispensation cannot be of any avail for the authorities I have before cited.

I shall humbly offer this farther matter to your lordship's consideration, that this case as to the statute is *primæ impressionis*; and that this prerogative was never made use of herein since the making of the statute, although many persons at the time of the making of this act stood in need of the aid of it, and for want of which they lost their employments, and the late king the benefit of their services.

I shall in the next place consider the authorities of Sir *Ed. Coke* in his 12 Rep. 18. which I foresee will be objected to me, and
I shall

I shall state it, and give such answer to it as occurs to me, and submit the whole matter to your lordship's consideration.

There my Lord *Coke* saith, that no act can bind the king from any prerogative which is sole and inseparable to his person, but that he may dispense with it by a *non obstante*, as a sovereign power to command any of his subjects to serve him for the weal public; and that this royal power cannot be restrained by any act of parliament; and for that he relies on a case 2 H. 7. fol. 6. which is on the statute 23 H. 6. c. 8. which enacts, that all patents made or to be made of any office of a sheriff, &c., for a term of years, for life or longer, shall be void and of no effect, any clause or parole of *non obstante* put or to be put in such patents to be made notwithstanding; and further, whoever shall take upon him or them to accept or occupy such office of sheriff, by virtue of such grants or patents, shall stand perpetually disabled to be or bear the office of sheriff within any county in *England*; yet, saith my Lord *Coke*, there the king by his royal prerogative may command any person to serve him for the weal public as sheriff of any county for years or for life; so he saith it was resolved by all the judges of *England* in the Exchequer-chamber in that case.

This and some other matter of the like nature, which are put together by my Lord *Coke*, are, with submission, the only authorities in the law that seem to give countenance to this dispensation now before your lordship. I shall very briefly consider, whether that be any authority or not; and if it be, whether it differs from the case now before your lordship.

To the first, I conceive it is the single opinion of Sir *Ed. Coke*, but he is mistaken in the case on which he relies; for by the book 2 H. 7. 6. on which he relies, it appears plainly that there never was any such resolution as he cites, but a sudden opinion given, and at that time the judges declared they would not be bound by what they then said, but advised the king's counsel to consider well the point; and so they said they would; and by Bro. Abr. tit. Parl. 45. 109. where he rather repeats than abridges the cases, it appears, nothing more was ever done in that matter, but it rested and was never adjudged. The great foundation failing, the superstructure of Lord *Coke* thereon, and his opinion, must needs fall and be rejected as an opinion grounded on a palpable mistake.

But admit that case and the reason of it to be law, that the king cannot be deprived of the power of commanding any of his subjects to serve him, yet I think it differs quite from the case now before your lordship; and the reason of it can now be no rule in this case, for these reasons.

The statute 23 H. 6. c. 8. was an act purely restraining that power the king had of commanding, and was rather a disabling the king than the subject; for it took away the power the king had of granting the office for years, life and inheritance, and by consequence was a total depriving him of the use of some of his subjects at some times; and I may very well allow, that such act of parliament did not, nor can bind the king: but, my lord, in

the act of parliament now in question, the prerogative nor the power of the king is not in any manner touched; for the king may grant an office to any person, or may command any person to serve him, as he might have done before this law; and he is in no sort deprived of the use of his subject by any thing in the statute; for this statute is a direction and obligation on the subjects to qualify themselves according to the act, to obey the command the king shall lay on them; and there is nothing in this act that excuses any person from serving the king, when he by his royal command requires his service, but he is at his peril to qualify himself for that service and to do the same; and if he be one incapable, it is by his own voluntary neglect, and he is punishable by law for the same, as every other man is who without any reason refuses to serve the king in what station he is pleased to require his service in.

This, my lord, will appear plain from the resolution of the case of Sir *John Read*, which was in the Exchequer Hil. 27 & 28 Car. 2. Sir *John Read* was by the late king made sheriff of *Hertfordshire*, and Sir *John* was duly sworn into the said office; but after neglecting to take the oaths and receive the sacrament enjoined by the law now before your lordship, the office became void; whereupon an information was exhibited against Sir *John Read* in the Exchequer, setting forth the statute of 25 Car. 2. c. 9., and that he was appointed and sworn sheriff for that county, and did neglect to qualify himself by taking the oaths according to the said act, whereby the office became void by his voluntary neglect; and the public justice in the administration thereof in that county, as to the office of sheriff, was obstructed. On this information the said Sir *John Read* was convicted and fined in the said court; for the court there was of opinion that the statute never intended to put it in the power of any man by his own act to discharge himself of that duty he owed the king, but hath positively enacted that every officer shall qualify himself for his duty, the not doing of which is an offence for which he is punishable; so that from hence it is plain there is no resemblance between the sheriff's case and any case on this statute.

There is likewise another difference between the sheriff's case and this case at bar. In the sheriff's case, the dispensation is in the very same patent that the office is granted, and in the same clause, and enables the grantee before the disabilities are in any sort attached on him; but here the office was granted in *November* to the defendant, by which immediately, for the reasons I have before offered, he is disabled by this act; and in *January* after is this dispensation granted, which, for reasons I have before offered, I conceive, comes too late.

For these reasons and authorities I conclude, therefore, that this dispensation, granted to the defendant, is void in law.

¶ The king cannot by his charter exempt any class of subjects from duties imposed upon them by act of parliament. Therefore where a statute enacted that the lords lieutenant of the several counties should charge any person with horse and arms for the county

county where his estate should lie towards the maintenance of the militia; it was holden, that a charter granted to the college of physicians exempting the members "from bearing or providing arms to serve in the militia in *London* and *Westminster*, "or the suburbs within seven miles thereof," did not exonerate one of the members from the charge, though his estate lay within seven miles of *London*.

It seems that since the 27 H. 8. c. 24. § 2. the crown cannot delegate the power of creating justices of peace.||

3 Barn. & C.
767.
5 Dow. & R.
654.

8. *Of his Proclamations.*

It is plain that the king by his prerogative may in certain cases and special occasions make and issue out proclamations for the prevention of offences, to ratify and confirm an ancient law, or, as some books express it, *quoad terrorem populi*, to admonish them that they keep the laws on pain of his displeasure; and such proclamations being grounded on the laws of the realm are of great force.

Fortes. de
Laud. c. 9.
12 Co. 74, 75.
11 Co. 87.
Dalis. 20.
pl. 10. 2 Roll.
Abr. 209.
3 Inst. 162.

It is likewise clear, that the subject is obliged on pain of fine and imprisonment to obey every proclamation legally made; and that though the thing prohibited were an offence before, that yet the proclamation is a circumstance which highly aggravates it; and upon which alone the party disobeying may be punished.

12 Co. 74.
Hob. 251.

It is clearly agreed, that no private person (a) can make a proclamation of a public nature, except by custom, as is usual in some cities and boroughs; this being a prerogative act with which alone the king is intrusted.

Bro. Proclamat.
pl. 1.
12 Co. 75.
Crom. Jur. 41.
(a) Sir Ed-

mund Knightly, executor of Sir *William Spencer*; made proclamation in certain market towns, that the creditors should come in by a certain day and prove their debts; he was fined and imprisoned for this, because, as the book says, he did it publicly and without any authority. Bro. Proclamat. pl. 10.

But notwithstanding the king's prerogative herein, it seems clearly agreed, that the king cannot by his proclamation change any part of the common law, statutes, or customs of the realm; nor can he by his proclamation create any offence which was not an offence before; for that these things cannot be done without legislative power (b), of which in our constitution the king is but a part.

Dalis. 20.
pl. 10.
12 Co. 75.
12 Co. 87. b.
(b) By the
31 H. 8. c. 8.
(now repealed) it was
enacted, That

proclamations made by the king and the greater part of his council should have the force of acts of parliament; but there was a proviso, that such proclamation should not cross any statute or laudable custom of the realm. N. Bacon's Hist. 2 Part. fol. 215. || See tit. *Statute*, vol. 7. p. 436.; and Fortescue de *Laud. Leg. Ang.* (Amos's ed.), p. 59, 60. and the books there cited.||

And on this foundation it hath been held, that the king's proclamation prohibiting the importation of wines from *France* upon pain of forfeiture was against law and void; there being no war at that time subsisting between the two nations.

2 Inst. 63.
|| See tit. *Smuggling*, and
Customs, vol. 7.
p. 521.||
12 Co. 75.

So, where an act was made by which foreigners were licensed to merchandise within *London*, and *Henry the Fourth* by proclamation prohibited the execution of it, and ordered that it should be in suspense *usque ad proximum parlamentum*; this was held to be against law.

12 Co. 74.

Upon a conference between some lords of the privy council and the two chief justices (of which the Lord *Coke* was one) and Ch. B. and Baron *Altham*, the questions were, 1st, Whether the king by proclamation might prohibit new buildings in about *London*? 2dly, If the king might prohibit the making of starch of wheat? And the judges were of opinion, that the subject could not be restrained in these particulars by the king's proclamation.

Hob. 251.
Armsted's
case.

But, notwithstanding the above-mentioned opinion, there are instances of persons who have been sentenced in the Star-chamber upon proclamations against the increase of buildings; and particularly in *Hob.* where a person was fined in the Star-chamber for building without brick, though upon an old foundation; and it is there said, that such buildings had an ill effect from the danger of fire, consumption of timber, and difficulty of feeding, cleansing, and governing the city; and it was said in general, that proclamations were so far just as they were made *pro bono publico*, and for public utility.

3 Inst. 162.
Hal. Hist.
P.C. 163.
(a) Owen, 45.
Rast. Ent. 605.
|| *Vide ante*,
p. 433. ||

The king by proclamation may call or dissolve parliaments, may declare war or peace; for these are prerogative acts with which he is intrusted as the executive part of the law: but (a), if there be an actual war between us and a foreign nation, it is not necessary in pleading to shew that such war was proclaimed.

Co. Lit. 207. b.
5 Co. 114. b.
Dav. 21.
Hal. Hist.
P.C. 192. 197.
[(b) This value,
Sir W. Black-
stone thinks,
ought to be

The king by proclamation may legitimate foreign coin, and make it current money of this kingdom, according to the value imposed by such proclamation: he may legitimate base coin or mixt below the standard of sterling (b): he may enhance coin to a higher denomination or value; and may decry money that is current in use and payment (c); and in all these cases a proclamation-writ under the great seal is necessary.

by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. 1 Bl. Com. 278. (c) By stat. 14 G. 3. c. 70. all officers of the revenue are required to cut every piece of gold coin tendered to them, if it is not of the current weight according to the king's proclamation.]

Comp. In-
cumb. 354.

The king by proclamation may appoint fasts and days of thanksgiving and humiliation; and issue proclamations for preventing and punishing immorality and profaneness; and enjoin the reading of the same in churches and chapels.

[The king by proclamation may authorize the lords of the admiralty to grant letters of marque and reprisal, as was done in the commencement of the late war against the *Dutch*.]

Cro. Car. 180.
Keley v.
Manning;
et vide Roll.
R. 172.

A proclamation must be under the great seal, and if denied is to be tried by the record thereof: but, if a man pleads that he was prevented from doing a thing by proclamation, it seems the better opinion that he need not aver that such proclamation was under the great seal; for alleging that such proclamation was made, it shall be intended to have been duly made.

12 Co. 74.;
and see
12 East, 296.

|| A proclamation is not obligatory where it restrains the subject in matters on which the laws are silent, though the observance of such matters might be advantageous to the public; and therefore it has been determined, that the king cannot by proclamation, or otherwise, prohibit the erection of new buildings in and about *London*, or forbid the making of starch from wheat. ||

(E) How

(E) How the Rules of Law differ with respect to the King and a private Person : And herein,

1. *Of what Things incapable, from the Dignity of his Person and Office.*

FROM the dignity of his office and person the law presumes him (a) incapable of doing any wrong (*): but, if the king, command an unlawful act to be done, the offence of the instrument, as my Lord *Hale* says, is not thereby indemnified; for, though the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law; which, consequently, makes the act itself invalid, if (b) unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.

combat together at barriers in time of peace for trial of skill, and one kill the other, it is homicide; but if it were by the command of the king, not felony. 11 H. 7. 23. a.; *et vide* 3 Inst. 56. 60. || *Vide ante*, 486. || (*) In his politic capacity he is under the happy inability of doing wrong, because acting by his officers, and limited by law. Cons. on Law of Forfeiture, &c. 101.

The king cannot arrest in person nor imprison, nor can he command another to imprison; but it must be done by some order, writ, or precept, or process of some of his courts.

sit in judgment upon any indictment. 2 Hawk. P. C. c. 1. — Cannot be a witness. 2 Hal. Hist. P. C. 232.

The king cannot execute any office relating to the administration of justice, although all such offices derive their authority from the crown, and although he hath such offices in him (c) to grant to others.

(c) If lands with the office of forester be granted to *J. S.*, remainder to the king in fee, this is a good remainder, though the king cannot be an officer to any man, because he may grant it over. 1 H. 7. 31. Bro. Done, pl. 51.

The king cannot be seised to an use, because there is no means to compel him to perform it; for the Chancery has only a delegated power from the king over the consciences of his subjects; and the king, who is the universal judge of property, and who is equally concerned for the good of all his subjects ought to be perfectly indifferent, and not to take upon him the particular defence of any man's estate as a trustee.

If one hath the nomination to a church, and another the presentation, and such right of presentation doth accrue to the king, he that hath the nomination shall have all (d); by reason that it is indecent for the king to do any thing as servant to another.

case nominate to the Lord Chancellor, who in the name of the king shall present to the ordinary. Poph. 158.

The king cannot be tenant, nor can he hold by any services from his subjects; for his possessions are called *sacra patrimonialia* and *dominica coronæ regis*; and on this foundation it hath been adjudged, that where lands holden of the subject came to the possession of the king by the statute of 1 E. 6. c. 14. of *chantries*, and the king granted those lands over to another, though there was a saving in the statute of the donor, of the *ancient rents, services,*

(a) Cannot do any wrong, Co. Lit. 19. Co. 45.

11 Co. 72. 85. Bracton, l. 3. c. 9. Stamford. P. C. 102.

Hal. Hist.

P. C. 43, 44.

(b) If two men

the other, it is

11 H. 7. 23. a.; *et vide*

3 Inst. 56. 60. || *Vide ante*, 486. ||

(*) In his politic capacity he is under the happy inability of

doing wrong, because acting by his officers, and limited by law. Cons. on Law of Forfeiture, &c. 101.

2 Inst. 187.

2 Hal. Hist.

P. C. 131.

— Cannot

2 Hal.

2 Hal.

Bro. Prerog.

125.

Co. Lit. 3. b.

8 Co. 55.

2 Vent. 270.

(c) If lands with the office of forester be granted to *J. S.*, remainder to the king in fee, this is a good remainder, though the king cannot be an officer to any man, because he may grant it over. 1 H. 7. 31. Bro. Done, pl. 51.

it over. 1 H. 7. 31. Bro. Done, pl. 51.

Bro. Feof. to

Uses, 358.

Poph. 72.

Dyer, 383. pl. 5.

Cro. Jac. 50.

Hard. 468.

Bro. Feof. to

Uses, 358.

Poph. 72.

Dyer, 383. pl. 5.

Cro. Jac. 50.

Hard. 468.

Dyer, 48.

(d) But by

Dodderidge J.

the nominator

shall in such

case nominate to the Lord Chancellor, who in the name of the king shall present to the ordinary. Poph. 158.

Co. Lit. 1.

Dav. 2.

4 Leon. 40.

Dyer, 513.

And. 45.

Stroud's case;

et vide 1 Co.

47. 8 Co. 114.

b. Cro. Car.

82. 2 Roll. R. 246. Jon. 234. Lit. R. 43. *rices, &c.*, that yet the patentee should hold of the king, according to his patent, and not of the ancient lord; and that the saving in the statute, as to the services, was controlled and made void by the common law; so that the patentee was to pay the rent, by which the said lands were before holden, as a rent seek distrainable of common right, to the lord and his heirs, of whom the lands were before holden, but discharged of the services.

Cro. Car. 96, 97. Pigot, 74, 75. The king, in regard to decency and order, cannot suffer a common recovery; for in such recovery he must be either tenant or vouchee; and in both cases the demandant must count against him, and there must be judgment against him, which the law does not suffer; so, he cannot come in as tenant by receipt; but if the party have any warranty he must pray in aid.

Ld. Raym. 51. The king cannot be tenant at will; so that if he takes a lease at will, though he may determine his will, yet the tenant cannot otherwise do it but by surrender.

4 Inst. 335. Godolph. Repert. 76. The king may be appointed an executor; but, as it cannot be presumed that he has sufficient time and leisure to engage in a private concern, the law allows him to nominate such persons as he shall think proper to take upon them the execution of the trust; against whom all persons may bring their actions: also, the king may appoint others to take the accounts of such executors.

2. What Things enure to him in his natural, what in his political Capacity.

Plow. 234. in the case of Wilson v. Ld. Berkley. The king has two capacities, the one natural the other politic; in which last he is considered as a sole corporation, capable of taking in succession, as a bishop or dean. In his natural capacity it is said, that he may purchase lands to him and his heirs; and that such lands, as also lands descending to him from an ancestor, shall go to his heir, in case he is removed from the royal estate.

Co. Lit. 15. b. 7 Co. 10. 12. in Calvin's case. 9 Co. 123. But my Lord Coke says, that all the lands and possessions whereof the king is seised *jure coronæ*, shall *secundum jus coronæ* attend upon and follow the crown; and therefore, to whomsoever the crown descends, those lands and possessions descend also; and that the lands and the crown are *concomitantia*.

Co. Lit. 16. a. If the king purchase lands to him and his heirs, he is seised thereof in *jure coronæ*; *à fortiori*, when he purchases lands to him, his heirs and successors.

Plow. 205. a. Co. Lit. 15. b. So, if lands in gavelkind descend to the king and his brother, the king shall take one moiety and his brother the other; but, if the king dies, his moiety shall descend to his eldest son, and not according to the rules of descent in gavelkind; for the king was seised of his moiety *jure coronæ*, therefore it shall attend the crown, and, consequently, go to the eldest son.

7 Mod. 78. per Holt C. J. (a) The statute of 1 H. 4. provides, that The king can have nothing in his natural capacity, unless in right of his duchy, or an estate-tail, by the statute *de donis*, and duchy lands would now be in the crown if not kept separate by act of parliament. (a)

when the duchy lands come to the king, they shall not be under such government and regulation,

tion as the demesnes and possessions belonging to the crown; for the act says, *Quod talitèr, et tali modo et per tales officarios et ministros gubernentur, ac si ad culmen dignitatis regie assumpti minime fuissent.* Raym. 90. ¶ See the statutes 48 G. 5. c. 75.; 52 G. 3. c. 161.; 1 & 2 G. 4. c. 52. ¶

If the king has a title to present to a church which is void, and dies before presentment, his successor shall have the presentment, and not his executor. 2 Roll. Abr. 211.

So, if the king be seised of a ward and die, his successor shall have it, and not his executor. *Ibid.*

The treasure and other valuable chattels are so necessary and incident to the crown, that in case the king dies, they shall go with the crown to the successor, and not to the executors. 11 Co. 92. 2 Roll. Abr. 211.

king's bequeathing personal estate, see 39 & 40 G. 3. c. 88. *post*, p. 461. ¶

So, a lease for years to the king and his successors is good, and shall go accordingly, and not to his executors and administrators. Co. Lit. 90. a. 11 Co. 92. a.

The ancient jewels of the crown are heir looms, and shall descend to the next successor, and are not devisable by testament; but, it hath been said (*b*), that the king may dispose of them in his lifetime by letters-patent. Co. Lit. 18. b. (*b*) Cro. Car. 344.

If the king be seised in fee of an advowson, and he create the incumbent bishop, he shall present as patron, that being a title precedent to that of the prerogative. Ld. Raym. 26.

3. *Of the Difference in the Rules of Law as directing the King's Property, otherwise than that of a Subject.*

The king may reserve rent out of inheritances which are incorporeal, as commons, tithes, fairs, &c., because the king by his prerogative may distrain in all (*c*) other lands of the lessee for such rent; and having such remedy, the law adjudges the reservation good. Co. Lit. 47. Plow. 227. in Ld. Berkeley's case. (*c*) That this must be understood of all such other lands as his tenant has in his actual possession, and not in the possession of his lessee for life, years, or at will. 2 Inst. 184. 4 Inst. 119.; *et vide* 5 Co. 4. 56. 1 Roll. Abr. 670. 2 Roll. Abr. 159. Lane, 59. — Whether he may distrain on other lands, of the tenant that are under sequestration out of Chancery, *vide* 2 Vern. 714. 1 P. Wms. 306, 307. — That this prerogative shall not extend to the king's grantee. Bro. tit. Prerog. 68.

So, if a rent-charge is granted to the king to be issuing out of the manor of *D*., the king may distrain in any other the lands of the grantee. So, the king may distrain for a rent-seck, which in the case of a common person is not distrainable by common law. Bro. Prerog. 77. 3 Leon. 124. 125.

The king may reserve rent payable to a stranger, contrary to the rule of law, which makes void such reservation in the case of a common person. Moor, 162. Co. Lit. 145. 2 Roll. Abr. 447. ¶ See tit. *Rent*, vol. 7. ¶ Ld. Raym. 36.

But, where the king made a lease of his house belonging to his house-keeper of *Whitehall*, reserving a rent to the house-keeper for the time being, it was held an ill reservation; for though the king may reserve rent to a stranger, yet such a reservation as this is ill, because he cannot reserve rent to an officer who is removeable at the will of the king.

Co. Lit. 15. b. The rule of *possessio fratris* does not hold in the descent of the crown or its possessions, neither is half blood any impediment in such case ; for the brother of the half blood shall be preferred to the sister in the enjoyment of the crown, as the most capable person of the two, by the advantages and prerogative of his sex, to discharge the important and weighty business of the crown.

Co. Lit. 15. b. So, if the king hath issue a son and a daughter by one *venter*, and a son by another *venter*, and purchases lands and dies, and the eldest son enters and dies without issue, the daughter shall not inherit these lands nor any other fee-simple lands of the crown, but the younger brother shall have them together with the crown.

Co. Lit. 9.
Plow. 250.
S. P. and that
the adding
of successors in grants to the king was but of late time and a new devise ; *per Dyer C. J.*
Jenk. 209. 271. S. P. (a) So, a grant by the king without mentioning successors, shall bind the successors. Plow. 176. Yelv. 13.

Co. Lit. 21. b. If the king gives lands to a man and a woman and the heirs of their bodies, and the woman dies without issue, the man shall be tenant in tail *apres* possibility, &c. ; but, if the king gives lands to a man with a relation of his in frank-marriage, and the woman dies without issue, the man shall not be tenant *apres* possibility, &c., but his interest in the land ceases upon the death of his wife without issue. This is a privilege of the king's which is not extended to a common person ; and the reason of it may be this ; the wealth and demesne lands of the crown are not only necessary for the honour and credit, but also for the safety and protection of the nation ; and therefore in this particular case it is but reasonable, that if land applied to such particular uses and purposes be granted away, such grant should bind the king no longer than the consideration and cause of the grant continues ; and therefore, in the first case, the man may be tenant in tail *apres* possibility, &c., because the services, which were the cause of the gift, are still owing, and to be performed by the tenant to the king ; but in the last case, where the woman, who was the cause of the gift, dies without issue, the cause of the gift, which was the provision for the descendants of that marriage, ceases ; and, consequently, if the grant continued, the tenant would hold the land free from all services.

Dyer, 1. pl. 7.
Cro. Jac. 179,
180.
The king may grant a chose in action, as an obligation forfeited to him upon an outlawry, &c., and the grantee may sue by action in his own name, or by extent in the king's name, although there are not the usual words in the grant to sue in the king's name.

Lambert v.
Taylor,
4 Barn. & C.
138. 6 Dow.
& Ry. 90.
|| A grant under the sign manual is sufficient to pass the property in a chose in action to the crown's grantee ; and a promissory note may be assigned by the crown without indorsement ; since the assignment takes effect from a general rule of law, and not from the custom of merchants or other special custom.||

31 H. 7. 19.
Bro. Prerog.
40. || But see
the statute
7 Jac. 1. c. 15.||
Bro. Prerog.
So, a chose in action, as an obligation, may be granted or assigned to the king, and he may bring an action in his own name, though the deed of gift be not enrolled.

If a man enters into an obligation to two, and one of the obligees

gees assigns to the king, or is outlawed, the king may bring an action in his own name, and shall recover the whole debt (a) to his own use.

pl. 23.
Jenk. 65. S. P.
though one of
the obligees

might have released the obligation. Lucas R. 245. S. P. *per Parker C. J.* (a) If lands descend to the king and a common person, the king shall have but a moiety; for to take the whole would be a wrong, which the king cannot do by his prerogative. Plow. 247. a.

¶ For the king cannot, by reason of his dignity, be partner with a subject, and neither can he lose his right. However, in favour of commerce it has been recently holden, that, on an extent against one of several partners, only the interest of that one shall be taken. || 1 Wightw. 50.

Before the statute *de donis*, when the king created a conditional fee, there was no reversion but a possibility; and if the donee had issue and aliened, the king's possibility was barred as well as that of a common person; but after the statute *de donis* had turned that possibility into a reversion, and after common recoveries were allowed to be common conveyances, and to bar remainders and reversions, it became a question, how far a recovery could bar a remainder or reversion vested in the king. And herein the judges determined, that though a recovery suffered by tenant in tail barred the estate-tail, that yet it did not (b) divest any interest the king had in remainder or reversion, it being unreasonable to strip the king of any part of his revenue upon the consideration of an imaginary recompense; but they allowed that the estate-tail, as to the issue, was barred; for that otherwise the estate-tail in the subject must be perpetuated, which is against the policy of the law.

Bro. Assur.
pl. 6. Bro. tit.
Recovery, 31.
tit. Tail, 41.
Co. Lit. 372.
Plow. 483. 553.
Dyer, 344.
Moor, 344.
Piggot of Re-
coveries, 85.
(b) The act of
the party, as a
fine or com-
mon recovery,
shall never di-
vest any estate,
remainder or
reversion out
of the king;
but by act in

law a remainder or reversion may be divested out of the king. — As, if there be tenant in tail, remainder to *A.* in fee, tenant in tail discontinue in fee, and take back an estate to himself for life, remainder to the king in fee; tenant in tail die; the issue is remitted, and the remainder pulled out of the king, and vests in *A.* — So, if a recovery be on a good title against tenant in tail, and the king have the remainder by a defeasible title, there it shall divest the remainder out of the king, and restore and remit the right owners. — But, if a gift be made to *A.* in tail, remainder to *B.* in tail, remainder to the king in fee; if in this case *A.* suffer a common recovery, this bars *A.* and his issue, and the remainder to *B.*, but not the king's reversion; for that cannot be discontinued or put to a right, or plucked out of him by the act of a third person. Piggot of Recoveries, 86, 87. ¶ See *Mitford v. Elliot*, 1 Moo. R. 455. Cru. Dig. xxxiii. xxxiv. (3d edit.) ||

But in the reign of *Henry the Eighth* an act of parliament was made to invalidate even recoveries against the issue in tail, where the reversion or remainder was in the crown; the intention of which act was to perpetuate those estates in families which the king himself had given, or for money or other consideration had procured to be given, to any subject, as a reward for his services to the crown; that the descendants of that stock might never forsake the interest of the crown which had so liberally rewarded their ancestor's loyalty. 2 Jon. 252.

And therefore by the 34 & 35 H. 8. c. 20. it is enacted, that if the king give any of his own manors, lands, &c., or cause or procure another, in consideration of money or other lands, to give any manors, &c., to any of his subjects or servants in tail, in recompense of their service, remainder to the king in fee-simple or fee-tail, such estates-tail are not to be barred; nor shall any feigned recovery to be had by assent of parties against any

any tenant or tenants in tail of any lands, &c., whereof the reversion or remainder, at the time of such recovery had, shall be in the king, bind or conclude the heirs in tail; but after the death of every such tenant in tail, against whom such recovery shall be had, the heirs in tail may enter, hold and enjoy the lands, &c. recovered, according to the form of the gift in tail, the said recovery notwithstanding.

In the construction of this statute, the following opinions have been holden:—

Moor, 195.
Yelv. 149.
2 Co. 15.
Wiseman's
case.
2 Co. 15.
Co. Lit. 372.

That if a reversioner or remainder-man upon an estate-tail grant the reversion or remainder to the king, this is no security to the issue in tail, because the estate-tail was neither of the gift or other provision of the king, and consequently not within the act.

So, if a man make a gift in tail, and the crown descend on him, or if the king's ancestor, not being king, make a gift in tail, and the reversion descend on him, the estate-tail may be barred.

2 Co. 52.
Noy, 152.
Yelv. 149.
Leon. 8.

If a man makes a gift in tail, remainder in fee, he in remainder grants his estate to another for life, remainder to the king in fee, on condition to be void on payment of money; recovery by tenant in tail bars the king's remainder and condition; for the grant was void.

Piggot of Recoveries, 88,
89.

If a subject by the king's provision or procurement makes a gift in tail, and then grants the reversion to the king for life or years only, in this case the estate-tail, remainders, and reversions may be all barred; for the reversion or remainder in the king, must be in fee or in tail.

Piggot, 88.

If the king grant an estate-tail, reserving the reversion to himself, and after grant the reversion to another, tenant in tail may suffer a recovery, and thereby bar the reversion.

Raym. 288.
358.
2 Jon. 251.
Gardner v.
Bambridge.

Therefore where *Henry* the Eighth gave lands to *Michael Stanhope* and his wife and the heirs of their body, in consideration of services, &c. *Michael* died, and his son and heir petitioned the queen to grant the reversion to some persons in fee, to the intent that he might make a lease for ninety-nine years by way of mortgage: and entered into a recognizance to the queen, conditioned that nothing should be done, whilst the reversion was out of the crown, prejudicial to the crown; and accordingly the queen conveyed the reversion to the Lord *Burleigh* and Sir *Walter Mildmay*, in fee; then the son made a lease for ninety-nine years, and suffered a recovery; and then the trustees reconvey to the queen; it was resolved, 1st, That the grant of the queen was good. 2dly, That during the time the reversion was out of the crown, the son was not restrained from aliening within the statute, and so the recovery good to bind the issues; but a fine or recovery, after the regrant to the queen, would not have been good to bind the issue, as it seems; because that act doth not require that the reversion should continue always in the king (a), but it sufficeth if it be in him at the time of the fine levied or recovery suffered.

(a) *Qu. et vide*
Hard. 409.

2 Jon. 250,
251. Earl of

If tenant in tail of the gift of the king makes a gift in tail, the second donee is not within the statute; for his estate, as far as it could,

could, disaffirms the reversion of the king, though it could not take it out of him; and his possession was injurious to the estate given by the king.

Ormond's case
cited to have
been adjudged
by eleven
judges. 13 Car. 1.

King *Richard* the Third, by letters patent gave several lands to the Earl of *Derby* and the heirs male of his body, in consideration of great services to the crown, &c.: afterwards by a private act made 4 Jac. 1., several alterations were made in this estate; as that *Charles* then Earl of *Derby*, should hold and enjoy them for his life; and after his death, that they should go to *James* his son and heir apparent, and the heirs male of his body; and so to the second, third, &c. and seventh son of Earl *Charles*; and to several others in tail male, who by the limitation of the letters patent would have succeeded to the estate upon failure of issue male of Earl *Charles*; with power for Earl *Charles* and the sons successively to make leases for lives or years, and jointures for wives. After Earl *Charles*'s death, his son Earl *James* levied a fine of these lands and sold them to a stranger; yet upon special verdict in ejectment brought after his death by his son, it was resolved by all the judges in the Exchequer-chamber, except three, that the fine was no bar; for that the reversion continued in the crown, and that these estates given by 4 Jac. 1. were no new estates, but all within the compass of the first tail created by the letters patent, and only a distribution of the enjoyment of them, and all to the same persons who would be entitled under the letters patent; and the power to make leases was with conformity to the power of tenant in tail; and that to make jointures was in lieu of dower: besides, there was a saving to the king, and all other persons, all such rights, &c. so as the prerogative of the king, by his reversion to restrain the tenant in tail from barring his issue, was saved; and the eighth, ninth, and all other sons inheritable by virtue of the entail let in, though the first, &c., and seventh only were named; and the alterations were only in accidents, not in the substantial parts of the limitations; and so within 34 & 35 H. 8. c. 20.

Raym. 260.
286. 319. 350.
2 Jon. 249.
Earl of Derby's case.

If the king in consideration of money, or other consideration by way of provision, procure a subject to settle his lands on one of his servants in tail, for recompense of service, by deed of bargain and sale enrolled, with remainder to the king in fee; and all this appear on record; the tenant in tail cannot bar his issue, being protected by the express words of the statute.

Co. Lit. 372.
Piggot, 91.

It hath been held, that the latter words of this act, *viz. had done or suffered by or against any such tenant in tail*, must be intended where tenant in tail is party or privy to the act, be it by doing or suffering that which should work the bar, and not by mere permission. As, if tenant in tail of the gift of the king, reversion to the king, be disseised, and disseisor levy a fine, and five years pass, this bars the estate-tail; and so, if a collateral warranty be made by the ancestors of the donee, and the donee suffers the warranty to descend, without any entry made in the life of the ancestor, this binds; because he is not party or privy to any act either done or suffered by or against him.

11 Co. 78.
And. 46.
Co. Lit. 373.
Moor, 467.
Cro. Car. 13.
Cro. Eliz. 595.
Yelv. 72.
8 Co. 77.
Sid. 166.

2 H 7. 8.
 Bro. Prerog.
 pl. 101. || See
 tit. *Rent*, v. 7. ||
 (a) But this
 prerogative is
 not to be ex-
 tended to the
 duchy lands.
 Moor, 149. 154. 11.

4 Co. 73.
 Moor, 404.
 Cro. Eliz. 462.
 Dyer, 87.
 And. 304.

Moor, 210.
 Dyer, 87.

Co. Lit. 41.
 2 Roll. Abr.
 150.

If the king make a lease reserving rent, with a clause of re-entry for nonpayment, the king (*a*) is not obliged to make any demand previous to his re-entry, but the tenant is obliged to pay the rent for the preservation of his estate; because it is beneath the royal dignity of the crown to attend a subject, to demand the rent; but the law for the support of that dignity obliges every private person to attend the king with the services due to him.

But, if the king, in cases where he need not make a demand, assigns over the reversion, the patentee cannot enter for nonpayment without a previous demand; because the privilege is inseparably annexed to the person of the king for the support of his royal dignity; and therefore shall not be extended to cases where the king is no way concerned.

So, if a prebendary make a lease rendering rent, and if the rent be arrear and be demanded, that it shall be lawful for the prebendary to re-enter; if the reversion in this case come to the king, the king must demand the rent, though he shall be by his prerogative excused from an implied demand; for the implied demand is the act of the law, the other the express agreement of the parties, which the king's prerogative shall not defeat; therefore in the case of the king, if he make a lease reserving rent, with a proviso that if the rent be in arrear for such time, (being lawfully demanded, or demanded in due form) that then the lease shall be void; it seems, that not only the patentee of the reversion in this case, but also the king himself, whilst he continues the reversion in his own hands, is obliged to make an actual demand by reason of the express agreement for that purpose.

There can be no occupant of any of the king's possessions; and therefore if the king grants lands to *A.* during the life of *B.*, and *A.* dies, living *cestui que vie*, the laws allow no man to gain the possession which is now vacant by the death of *A.*, but preserves it for the king: for this reason, that he is presumed to be taken up in the public affairs of the kingdom, and therefore not at leisure to attend his own private concerns: also, the king's grants proceeding from his own bounty and liberality, none ought to have any benefit from them but those for whom he first designed them; and therefore when he made the grant to *A.* during the life of *B.*, though he intended *A.* should have the benefit of it during the life of *B.*, yet if *A.* dies before *B.* none can make himself a title under the grant, because it was made only to *A.*, nor ought any one by way of occupancy to take advantage of a grant made to *A.* for his particular services; because that were to extend the king's bounty further than he designed it, whereas such a grant in the case of a common person ought to be taken most strongly against the grantor, because he parted with his land for the life of *B.* upon a valuable consideration, and therefore is no sufferer if he does not enjoy it during the time for which he granted it away. Also, no man can make himself a title to the king's possessions, without matter of record; and therefore none can claim any of them as occupant, because that is an act in *pais*, and no matter of record.

If the king makes a lease reserving rent, the tenant must pay it without demand, either to his receiver for that purpose, or at the receipt of the Exchequer, as well as if by words of the lease the rent had been made payable at the Exchequer, or into the hands of his receiver; but, if the king grants the reversion, the patentee must demand the rent upon the land, that being the place appointed by law for a common person to demand it on.

Co. Lit. 201. b.
Cro. Eliz. 462.
Moor, 404.
4 Co. 73.
Dyer, 87.

If the king make a feoffment on condition, that upon payment by the king of 100*l.* such a day the feoffment shall be void, the feoffee must apply to the king at the day; for the king is not obliged to make a tender, as in the case of a common person.

Roll. R. 169.

The deed of a private person hath a relation only to the time of the delivery, and not to the time of the date: (*a*) but the king's charter hath relation to the time of the date; for being of record, it cannot be averred to have been executed on any time than that on which it bears date.

Plow. 491.
[(*a*) See Co.
Lit. 46. b.
Cowp. 714.
4 Barn. & C.
910.]

If the king presents to a church, and his clerk is admitted and instituted, yet before induction the king by his prerogative may revoke such presentation; nay the presentment of another is in law a repeal and revocation of such presentment, and that without any notice to the ordinary; but in the case of a common person, by presentation and institution he hath given up his power to the ordinary, and cannot afterwards vary, alter, or revoke his presentation. But some (*a*) books hold, that after a presentment only he may vary; and this seems to be the right distinction and better opinion at this day.

Vide Comp.
Incumb. 223,
224, and several
authorities
there cited.
(*a*) Latch, 254.
2 Roll. Abr.
354.
Dyer, 392.
Goulds. 163.

¶ By the 39 & 40 G. 3. c. 88. § 10., after reciting his majesty's gracious desire that all such personal estate and effects as his majesty shall be possessed of at his demise, and which he may dispose of by will, shall be subject to the payment of such debts as during his life are properly payable out of the privy-purse; and that it is reasonable that all such personal estate and effects as any of his majesty's successors shall be possessed of in like manner, shall be subject to the like charge; and it is expedient to fix what personal estate of his majesty and his successors is subject to testamentary disposition, and in what form such disposition shall be made; it is enacted and declared, that all such personal estate of his majesty and successors as consists of monies which may be issued or applied for the use of the privy-purse, or monies not appropriated to the public service, or goods or chattels which have not come to his majesty in right of the crown, shall be deemed personal estate of his majesty and his successors, subject to testamentary disposition; and that such last will shall be in writing under the sign manual of his majesty and his successors, and all and singular the personal estate so liable to testamentary disposition shall be liable to the payment of all debts properly payable out of the privy-purse; and that, subject thereto, the same personal estate and effects of his majesty and his successors, or so much as shall not be bequeathed as aforesaid, shall go in the same manner on the demise of his majesty and his successors as the same would have gone if this act had not been made.¶

39 & 40 G. 3.
c. 88. s. 10.

4. *That his Rights shall be preferred to a Subject's where they happen to meet.*

Co. Lit. 50. b. It is an established principle in law, that where the king's
4 Co. 55. right and that of a subject meet at one and the same time, the
9 Co. 129. king's shall be preferred.
Hard. 24.—

In case of concurrent titles between the king and subject, the rule is *detur digniori*. 2 Vent. 268.

3 Leon. 251. Hence it is said, that if there be a lord mesne and tenant, and the tenant pay the rent at the day to the mesne, before noon; and after on the same day the mesne die, his heir within age, the tenant shall pay it over again to the king.

Co. Lit. 50. b. If a woman marries and hath issue, and lands descend to the wife, and the husband enters, and after the wife is found an idiot by office, the lands shall be seized for the king, according to this maxim, that when the title of the king and a common person begin at one instant, the title of the king shall be preferred.

Co. Lit. 50. b. So if the woman had been the king's nief, and one had married her without the king's licence, &c., and lands had descended before or after issue, yet the king, upon office found, shall have them.
4 Co. 55.

Dyer, 108. Baron and feme joint purchasers of a term for years, the husband drowns himself, the lease is forfeited, and wife surviving shall not hold it against the king or his almoner; because the title of the king and a common person coming together, the king's shall be preferred.
Plow. 260.
Dame Hale's case.

5. *Of Acts of Parliament which extend to or bind not the King*

Plow. 136, Herein a general rule hath been laid down and established
137. in Lord *viz.* that where an act of parliament is made for the public good,
Berkley's case. the advancement of religion and justice, and to prevent injury
11 Co. 68. b. and wrong, the king shall be bound by such act, though not
5 Co. 14. particularly named therein.
7 Co. 32.

11 Co. 68. But where a statute is general, and thereby (a) any prerogative,
(a) And it right, title, or interest is devested or taken from the king, in
seems that such case the king shall not be bound (b), unless the statute is
the usual made by express words to extend to him.
saving of the

king's right, &c. is only *ex abundanti cautela*, and not of absolute necessity. Show. P. C. 179.
(b) But may take advantage of an act of parliament, though not particularly named. 11 Co.
68. b. Leon. 159.

On this foundation and these distinctions it hath been held,

Plow. 238. That the statute of *Westm.* 2. (13 Ed. 1. stat. 1.) *de donis* extends to and binds the king; as, where lands were given to the king and the heirs of his body, it was adjudged that the king's prerogative had not given him a greater estate than in the case of a common person; and that an alienation by him would be a tort and an injury to the donor, which the king cannot do.
&c. Lord
Berkley's
case, cited in
11 Co. 72.
5 Co. 14.
Co. 44.

11 Co. 75. So it hath been adjudged and also held in parliament, that the
Case of Mag- king is bound, though not named, by the 13 Eliz. c. 10. (c) which
dalen College. restrains ecclesiastical persons from making leases, &c., this being
5 Co. 15. b. a general law, and for the public good.
Roll. R. 151.

(c) The statute 1 Eliz. c. 19. which restrains bishops from making estates, &c. hath a proviso that

that it shall not extend to the king; which, my Lord *Coke* says, was of absolute necessity; for that otherwise the king would be bound by it. 5 Co. 54. b. — It seems the law was held otherwise on the stat. 13 Eliz. c. 10. and therefore where a lease was made to the king by a dean and chapter, and the king had assigned it over, after that the law came to be held that the king was bound, the assignee had his lease made good to him in Chancery against the statute, because he could not know the law in a matter so dubious. Roll. Abr. 378.

So the king is bound, though not named, by the statute 2 Inst. 681.
32 H. 8. c. 28. against discontinuances by husbands of their Show. R. 209.
wives' estates, &c., for this being an injury to the wife, it shall extend to the king, whose most immediate concern is to relieve his subjects from any injury or wrong.

So the king, though not named, is bound by the statute of 35 H. 6. 61.
Merton, 20 H. 3. c. 5. made against usury in doubling the rent, Plow. 236. b.
in the case of an infant heir who has made default in payment. 2 Inst. 89.
||And before
the 58 G. 3. c. 93. the crown could not enforce payment of a bill of exchange tainted with
usury in its original formation. See 4 Price R. 50.||

So the king, though not named, is bound by the 10 c. of the Plow. 236. b.
statute of *Merton*, 20 H. 3. which ordains, that suit to the lord 2 Inst. 99.
may be done by attorney, &c.

The king is bound by the 31 Eliz. c. 6. against simony; being Co. Lit. 120.
a law made for the advancement of religion.

So the king, though not named, is bound by the 27 Eliz. c. 4. 11 Co. 74. b.
against voluntary conveyances to defraud purchasers; so that
a voluntary conveyance to the king is as much void against a
subsequent purchaser for a valuable consideration, as in the case
of a common person.

Bound by the statute *Westm.* 1. (3 Ed. 1.) c. 5. that none shall 2 Inst. 169.
disturb elections upon pain of great forfeitures. 4 Mod. 207.

Bound by the statute of *Marlbridge*, (52 H. 3.) c. 22. that 2 Inst. 142.
none may distrain his freeholders without the king's writ. Show. R. 209.

By an act of parliament 22 Car. 2. c. 11. the parishes of St. 4 Mod. 207.
Michael, *Wood-street*, and St. *Mary*, *Staining*, in *London*, were Show. R. 208.
united and established as one parish church; and it was pro- Crooke's case
vided, that the first presentation should be made by the patron — at the end
of such of the said churches, the endowments whereof were of of the case it
the greatest value; the king was patron of St. *Mary*, *Staining*, is said, that
(of far less value), and a common person patron of St. *Michael*, there were
Wood-street, who presented Mr. *Crooke*; on a *caveat* entered two instances
against the institution, it was determined by civilians, by the in *London*
advice of lawyers at Doctors-Commons, that this statute though in where under
the affirmative, and without any negative words, extended to, colour of this
and so far bound the king, as to deprive him of any preference prerogative
he might have by his prerogative, as in cases where his interest the king's
is intermixed with others; and that the act of parliament giving presentee was
a new estate to the king, and prescribing the manner of enjoy- preferred;
ment, the method limited must take place of the king's prero- but this is
gative. said to have
been done by
Jefferies, and
never con-
tested.

But as acts of parliament are to be construed according to the Blow. 240.
subject-matter, and not to be extended further than the intention Hob. 146.
of the legislature; hence in a variety of cases we find it determined, 7 Co. 32.
that general words in an act shall not oust the king of his prero- Moor, 540.

Lit. § 140. As on the statute *quia emptores terrarum*, which enacts, *that none shall alien lands in fee to hold of himself*; yet it is held, that the king may give lands in fee to hold in frankalmoigne or other services.

Plow. 240. b. So the 12 c. Mag. Cha. which provides, *quod communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*, does not bind the king; but that he may bring an action of debt or *quare impedit* in *B. R.*

Plow. 240. a. So of the statute *Westm. 2.* (13 Ed. 1. stat. 1.) c. 17. which provides, that where divers inheritances by knight's services descend, *quod ille dominus de cætero habeat maritagium de quo antecessor suus prius fuerit feoffat.*

Plow. 240. b. Not bound by the statute of *Marlbridge* (52 H. 3.) c. 9.; but all coparceners, in respect of the lands descended on them, must each of them do service as before the making of the statute.

11 Co. 68. Not bound by the statutes of limitation (a), nor by the statute of *Westm. 2.* (13 Ed. 1. stat. 1.) c. 5. which makes a plenary for six months a good plea.

Plow. 244. Comp. Inc. 108. (a) *Vide* 3 Inst. 188. [Though the crown is not bound by the statute of limitations, yet a grant may be presumed from great length of possession. It was so done in the case of the Corporation of Hull v. Horner, Cowp. 102.: not that, in such cases, the court really think a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact, for the purpose and from a principle of quieting the possession *Per Lord Mansfield*, Cowp. 215.]

Lambert v. Taylor, 4 Barn. & C. 153. Rex v. Morrall, 6 Price, 24. || The crown is certainly not bound by the statute of limitations; and therefore where a note comes to the hands of the crown by forfeiture of the payee, the statute ceases to run from the time it vests in the crown. But if the statute has run out against the demand before the note vests in the crown, then the crown is barred.||

11 Co. 68. Nor by the statute 27 E. 1. (stat. 1. c. 4.) which gives the trial by *nisi prius* in the country.

Jon. 203. Neither the statute merchant, those concerning the staple, the statute of frauds, nor those relating to bankrupts, extend to, or bind the king.

Hob. 126. There are also statutes, which, as my Lord *Hobart* says, were made to put things in an orderly form, and to ease a sovereign of labour, but not to deprive him of power, which cannot be said to bind the king.

Dyer, 50. a. As the 27 H. 8. c. 27. which enacts that all grants concerning the court of augmentations should be under the seal of that court; yet grants under the great seal have been held good.

Hob. 146. So, the statute 25 H. 8. c. 21. which directs the manner of granting dispensations, though it says that dispensations shall not otherwise be granted; yet the king's power is not thereby restrained, but that by virtue of his prerogative he may grant them as before.

Dyer, 225. Hob. 146. So, on the statute 28 H. 8. c. 15. for the trial of piracy by commission, it hath been held, that the trial may be, though the Chancellor does not nominate the commissioners, as that act appoints.

So,

So, on the statute 9 E. 2. stat. 2. that the queen may make Dyer, 303.
sheriffs without the judges.

So, on 31 H. 6. c. 5. the office of alnage was granted by the Hob. 146.
queen, without the bill of the treasurer; and held good.

By a private act of parliament, 1 Jac. 2. the parish of St. James Show. P. C.
was taken out of the parish of St. Martin, and made an inde- 164. 4 Mod.
pendent parish; and it was provided by the statute, that Dr. 200.
Tenison, the then vicar of St. Martin's, should be the first rector 2 Salk. 540. pl. 2.
of St. James's parish; and that the patronage of the advowson Show. R. 413.
should belong to the bishop of London and the lord Jermin, 441. 493.
alternis vicibus; the first rector, after vacation, by Dr. *Tenison*, 5 Lev. 577. 582.
to be presented by the bishop of London, and the next by the Id. Raym. 25.
lord Jermin and his heirs, and so on. Dr. *Tenison* was promoted S. C. Lev.
to the bishopric of Lincoln, by which the church of St. James Ent. 544.
became void; and it was adjudged, that although it was by the Comb. 205.
statute expressly appointed, that the bishop of London should 500, 301.
present upon the avoidance, yet the statute designed only to Carth. 515.
direct the methods and turns between the patrons, and not to 2 Salk. 559.
exclude the king of his prerogative; and although this was a pl. 2. Holt,
church newly erected, yet the king having the prerogative to 585. pl. 1. be-
present to all churches where the incumbent is promoted, shall tween the
have it in this church when it is erected. Queen, and
Bishop of
London, and
Dr. Bird.

6. That no Laches can be imputed to him; and therein, of the
Maxim, Nullum Tempus occurrit Regi.

From the presumption that the king is daily employed in the Stamf. Prerog.
weighty and public affairs of government, it hath become an 52, 53. Plow.
established rule at common law, that no laches shall be imputed 145. 7 Co. 28.
to him, nor is he in any way to suffer in his interests, which are Jon. 79. Hard.
certain and permanent; and this his privilege *quod nullum tem-* 24. (a) *Vigi-*
pus occurrit regi (a), has been confirmed by the statute *de præ-* *lantibus et non*
rogativa regis. *dormientibus*
jura subve-

for the subject; but *nullum tempus occurrit regi*, is the king's plea; for there is no reason that
he should suffer by the negligence of his officers, or by their compacts or combinations with
the adverse party. Hob. 547.

Hence it was held, that if the king's villein had purchased Lit. § 178.
land, and aliened before entry by the king, yet, upon office found, Co. Lit. 118. a.
the king might have entered, *quia nullum tempus occurrit regi*;
though it was otherwise in the case of a common person.

So, in a writ of right of advowson brought by the king, the Co. Lit. 294.
tenant shall not tender the *di mark*, because *nullum tempus occurrit*
regi; and therefore the king shall allege, that he or his progenitor
was seised, without shewing any time.

So, an action of account lay at common law against the ex- Co. Lit. 90. b.
ecutors or administrators of the king's debtor or receiver; for
being supposed busied and employed in the weighty affairs of
the kingdom, it was not thought reasonable that he should suffer
in his treasure by an omission occasioned perhaps by such his
attendance.

For this reason it is that there can be no occupant against the Co. Lit. 41. b.
king; so that if the king grants lands to A. for the life of B., and

B. dies, no man by his entry can gain himself a title against the king; though it was otherwise in the case of a common person.

Co. Lit. 57.

So, there can be no tenant at sufferance against the king; but he who holdeth over is an intruder, because no laches can be imputed to the king for not entering.

Bro. tit. Dis-
seisin (4)
Hob. 522.
Roll. Abr. 659.

Therefore, if the king be seised in fee of the manor of *B.* and a stranger erect a shop in a vacant plot of it, and take the profit of it without paying any rent to the king; and after the king grant over the manor in fee, and the stranger continue in the shop and occupy it as before, this is no disseisin; for the first entry of the stranger was no disseisin, but an intrusion on the king's possession; for that the king's title appearing on record, the entry in *pais*, which is not an act of equal notoriety, will not divest it out of him: if then the king is not disseised, his conveyance of the freehold is good, and the grantee is seised by virtue of it; and, consequently, cannot be said to be disseised by the stranger who has made no entry on him after the king's conveyance, but only continued the old interest which he had before the grant; and so remains an intruder still, and liable to an action of trespass or ejectment for it.

Co. 69. 10 Co.
112. Dalt. Just.
303.

A person cannot be indicted on the statutes against forcible entries for entering into the king's possessions, because he cannot be disseised.

Plow. 245. a.
2 Leon. 31.

A descent cast is no plea against the king, nor does it take away his right of entry.

2 Inst. 168.
Plow. 243.

If the king's goods become wreck, the lord of the manor cannot take them, but the king may claim them after the year and the day; for this reason, that he is supposed employed in the public affairs, and therefore no lapse of time shall injure him.

49 E. 3. 4.
Kitchen, 81.

For this reason the lord of the manor cannot take the king's beasts as strays; as also that this privilege of waifs and strays is derived from the crown, and cannot be supposed to extend farther than a liberty to take the goods and cattle of a common person.

Plow. 243. a.

If a grant be made to the king of the next avoidance of a living, and a stranger upon the death of the then incumbent present, and his presentee continue in six months, and die, yet the king may present another, *quia nullum tempus occurrit regi*. So, if a grant had been made to the king of all such presentments as should happen within twenty years, and in the twenty years there happen ten presentments which are filled up by a stranger, yet the king shall present to them over again.

Bro. title Pre-
sentment (24).
Comp. In-
cumb. 118.

If the king be patron of a church, and he omit to present within six months, the ordinary cannot present for the lapse, but is only to sequester the profits, and serve the cure till the king thinks proper to present; but if in this case the ordinary collate his clerk, and afterwards the king present, the clerk so collated cannot be turned out without a *quare impedit*.

7 E. 4. 52.
Dyer, 290.
327, 360.

If the king presents to a church, and his clerk is admitted and instituted, yet the king may before induction repeal and revoke his presentation; and it is held in this case, that the presenting another

another is a repeal in law, without any other notice to the ordinary. (a)

all suspicion of being obtained by fraud in deceit of the king, it is proper that express mention of the first presentation. *Gibs. 795. Wats. c. 20.*]

So, where a title by lapse comes to the king, if the king doth present, and his presentee is instituted, yet the king may revoke his presentation, and so null the institution at any time before his clerk is inducted; or, if his clerk be instituted upon such title, and die before his induction, the king may present another, his turn not being served by the institution only of his clerk.

But, though the king may remove the patron's or stranger's clerk that comes in upon his lapse, yet, if such clerk happens to (a) die incumbent of the church before the king doth present, the king hath lost the advantage of the lapse, and shall not present afterwards, or remove the patron's second presentee, because the king is to have but one turn, and that the next; and if the law should be otherwise, the king, by suffering divers usurpations upon his lapse, might even disinherit the very patron: and the rule *nullum tempus occurrit regi*, is not to take place where the king is limited to a time certain.

or deprivation, unless such resignation were by fraud or covin." *Cro. Jac. 216. Owen, 89. 4 Leon. Case 351.** — * By stat. 9 G. 3. c. 16. (which is called the *Nullum tempus* act, and was brought into parliament by Sir *Geo. Saville*) the king shall not sue, &c. any person, &c. for any lands, &c. except liberties and franchises), or any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record, and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. — This extends not to estates in reversion, or remainder, or limited estates. — These lands shall be held on the usual tenures, &c. — Usual fee-farm rents confirmed. — Putting in charge, standing *insuper*, &c. good only when on verdict, demurrer, or hearing, the lands, &c. have been given, adjudged, or decreed to the king. [And prescription is now pleadable against the crown even in the case of franchises and offices; for by stat. 32 Geo. 3. c. 58. six years possession of a corporate office gives the corporator a prescriptive title upon an information in the nature of a *quo warranto*, exhibited by the attorney general or other officer on the behalf of the crown, by virtue of any royal prerogative, or otherwise. Neither is it competent to the crown to question any derivative title, where the person from whom it is derived was in exercise *de facto* of the office of franchise, in virtue of which he communicated the title for a like period of six years.] || The above statute 9 Geo. 3. c. 16. does not give a *title* to the first wrongful possessor but only bars the remedy of the crown against them, after sixty years continuing adverse possession. *Goodtitle v. Baldwin*, 11 East, 488. *Qu.* Whether the act applies to advowsons? 1 Jac. and W. 159.]]

|| If a bill of exchange be taken under an extent before it is due, and the party holding it on behalf of the crown neglect to present it for payment in due time, the drawer and indorser are not discharged; for no laches are imputed to the crown. ||

does not run against the king, sec *ante*, p. 464.

7. *Of his Prerogative in his Suits and Proceedings in Courts of Justice.*

[The king, though the chief and head of the kingdom, may redress any injuries he may receive from his subjects by such usual common law actions as are consistent with the royal prerogative and dignity. He may too sue in Chancery for a matter in equity.

A declaration for the king ought regularly to be in the name of his attorney general; though where it was in the name of the

[(a) But to free the second presentation of it should make

Leon. 156.
Wright v.
Bishop of Nor-
wich.

7 Co. 28.
Owen, 2. And
148. Cro.
Eliz. 44. Cro.
Jac. 55. 216.
Hetley, 125.
Buls. 28.
Moor, 269.
Fitzg. 30.

(a) Or, if the church becomes void by resignation

7 Co. 28. Owen, 89.
West on Ex-
tent, 29, 30.
(1st ed.) That
the statute of
limitations

2 Lev. 82.

king himself, *viz. coram domino rege venit dominus rex*, it was upon demurrer, for this cause, adjudged good.

2 Bl.Com. 258.

¶ **INQUESTS OF OFFICE.** But the more effectual means of asserting the rights of the crown, and redressing its injuries, are those which are obtained by the prerogative modes of process. Such is that by inquisition or inquest of office: which is an enquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii*, or by writ sent to them for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number; being either twelve, or less, or more.

Stamf. Pr. 55.
b.

Stamford lays it down, that in all cases where a subject shall not have possession, in deed or in law, without entry, the king will not be entitled without office found, or other matter of record.

Ibid.

As, if the king's tenant aliens in mortmain, or without licence, the king's title must be found by office.

Sembl. Lev.
1 R. Cro. Car.
175. Sir W. Jon. 78. 217.

So, if the king claims upon a forfeiture, or a condition (a) broken.

(a) Sav. 70. 2 Ro. 215.

Stamf. *ubi supra*.

So, if the king claims the lands of an idiot, lunatic, &c., the person ought to be found an idiot, &c. by office.

Ibid.

So, if he claims the year, day, and waste, of a felon attainted, or the temporalities of a bishop for a contempt.

Sav. 8.

So, if he claims a freehold or inheritance as forfeited for a contempt.

Attorney-
General v.
Wheeden,
Park. 267.

So, if he claims as forfeited to the crown, *choses en action*, which belonged to an alien enemy. And in such case, a peace before the inquisition taken discharges the forfeiture.

3 Bl. Com.
259.

(b) St. 2 & 3

E. 6. c. 8.

(c) Stat.

34 E. 3. c. 13.

36 E. 3. c. 13.

23 H. 6. c. 16.

1 H. 8. c. 8.

3 H. 8. c. 2.

(d) The King v.

Daly, 1 Ves.

269. ¶ See

Manning's Ex.

Prac. 54. and

12 East, 96.¶

These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he in general can neither take nor part from any thing. For it is part of the liberties of *England*, and greatly for the safety of the subject, that the king may not enter upon, nor seize any man's possessions, upon bare surmises without the intervention of a jury. And although a defendant is now permitted to traverse these inquests (b), and therefore they are not conclusive evidence, yet, as the legislature has directed (c), that inquisitions shall be taken publicly and in an open place, and has empowered every one to give evidence openly before the inquest, the court will (d), in some cases, order reasonable notice to be given of the issuing of such commission.

Attorney
General v.
Duplessis,
Park. 144.

¶ By 47 G. 3.
sess. 2. c. 24.

Where an estate is given to an alien, or in trust for an alien, though such estate doth not actually vest in the king, until an office is found, yet he hath, before office found, such a right to it as will entitle him to the assistance of a court of equity to enforce a discovery of the fact of alienage.

in all cases in which the king becomes entitled to lands by escheat, or by forfeiture, or by reason that the same had been purchased in trust for an alien, his majesty, by warrant under the sign manual, may direct the execution of the trusts, and make grants of the lands to trustees for the purpose of executing the same; and see 7 Ves. 71.; and the form of the warrant under sign manual, Chitt. on Prerog. p. 236.¶

If the office be found against the king, a *melius inquirendum*, or farther enquiry under the former commission, may be awarded. But in good discretion no *melius inquirendum* shall be awarded in such case, without sight of some record, or other pregnant matter for the king, to shew the former was mistaken. And by pregnant matter for the king is meant matter pregnant with evidence of the king's right.

Stoughter's case, 8 Co. 168. Knight *ex parte* Duplessis, 2 Ves. 555. The *melius inquirendum* is

grantable only on the part of the crown, and is given, because the crown cannot traverse, as the subject can. 5 Atk. 6. ¶ See Mann. Ex. Prac. 22.

But, if the *melius inquirendum* be found against the king, he is thereby precluded from having another *melius inquirendum*; for if this were allowed it would lead to infinity, for by the same reason that he might have a second, he might have them without end. However, if the first writ of *melius inquirendum* were repugnant in itself, if it did not give authority to find such an office as was found, as, where the writ was to enquire, whether at the time of the death of a person who died in the reign of Queen Elizabeth, the manor of O. was holden of the lord the king that now is, another writ of *melius inquirendum* may be awarded.

Stoughter's case, *ubisuprà*.

If the king's title be found to lands and tenements, the king shall be in possession by the office only, without seizure, if the possession be vacant, or if the title be found to a local office, or of which continual profit may be taken.

Stamf. Pr. 53, 54. 9 Co. 95. b. 4 Co. 58. a.

But, if the king's title be found by office to an incorporeal inheritance (as, an advowson, &c.), the king shall not be in possession before seizure; for if the king, after office, presents, the defendant, in a *quare impedit* may traverse the king's title without traversing the office.

9 Co. 95. b.

And in all cases where a common person is put to his action, there, upon an office found, the king is put to his *scire facias*; for an office entitles the king to an action only, and not to an entry. But, where a common person may enter or seize, there, an office without a *scire facias* shall suffice for the king.

9 Co. 26. b. Stamf. Pr. 55. a.

If the king do not seize within a year and a day after office found, he ought to have a *scire facias* before seizure.

Stamf. Pr. 54. b.

No office is necessary if the king's title appear by other matter of record.

Id. 56. a.

So, if a possession in law be cast upon the king, no office is necessary, but the king may seize without it. As, if the king has a title by descent in remainder or reverter; for the freehold is cast upon him by law. So, if he is entitled by escheat; or is entitled to the temporalities of a bishop in the time of vacation.

Id. 54. a. 4 Co. 58. Sav. 7. 9 Co. 95. b.

So, where the king ought to have chattels or profits of lands for a contempt, he may seize without office; as, upon an outlawry the goods of a prior alien. So, in the case of simony the king shall present without office. So, he shall nominate to an office void by st. 5. and 6 Ed. 6. c. 16.

Sav. 8. 2 Ventr. 270.

And by stat. 33 H. 8. c. 20. in case of attainder for high treason, the king shall have the forfeiture instantly, without any inquisition of office.

33 H. 8. c. 20.

¶ CROWN INFORMATION. Another prerogative process is an information,

2 Bl. Com. 261. ¶ See

Manning's
Exch. Prac.||

information, filed in the Exchequer by the attorney-general. This is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the Court of King's Bench, in that *this* is instituted to redress a private wrong, by which the property of the crown is affected, *that* is calculated to punish some public wrong, or heinous misdemeanor in the defendant.

||(a) See Mann.
Ex. Prac.
b. iii. ch. 3.
and as to in-
formations for
penalties on
the custom
acts, see
6 G. 4. c. 108. §§ 73, 74, 77, 78. 100. 84. 87. 98, 99.||

The most usual informations are those of *intrusion* and *debt*; *intrusion*, for any trespass committed on the lands of the crown, as, by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt*, (a) upon any contract for monies due to the king, or for any forfeiture due to the crown upon the breach of a penal statute.

There is also an information *in rem.*, when any goods are supposed to become the property of the crown, and no man appears to claim them, or to dispute the title of the king. As anciently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the king's officer for his use. Upon such seizure an information was filed in the Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of crown. And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the hand of justice.

Sav. 48.
|| See Mann.
Ex. Prac.
b. iii. ch. 2. ||
Semb. M.
370. 376.

An information of *intrusion* is in the nature of a trespass *quare clausum fregit*. It may be general therefore, that the king was seised of certain lands, without describing the particular species or quantity. So, on the other hand, it is sufficient for the defendant to plead only so much as shews that he has title to the possession; as where the defendant shewed that she had a jointure of a third part, without answering to the residue; for by that she had the possession of the whole in common with the king.

Dy. 238. b.
4 Inst. 116.
Not guilty
pleaded.
Sav. 68.

At common law, upon an information for *intrusion*, the king by his prerogative might put the defendant upon shewing his title specially. And, if he pleaded *not guilty*, he should be immediately put out of his possession: for that, regularly, the king's title appeareth of record, and therefore the defendant may take knowledge thereof, and the rather, for that in every information of *intrusion* it is specified of whose possessions the lands, &c. were.

Dy. 238. b.

If the defendant shews an insufficient title in form, the attorney-general may demur; but if the attorney-general in such case do not demur, but join issue on a fact alleged, which is found against him, he shall not afterwards take advantage of the defect.

By

By st. 21 Jac. 1. c. 14. if the king, or those claiming under him, or those under whose title the king claims, have not been in possession, or received the profits within twenty years, the defendant may plead the general issue, and shall not be ousted of his possession, till the title be found or adjudged for the king. 21 J. 1. c. 14.

If the plea allege several facts, the king by his prerogative may traverse them all, though a common person ought to traverse but one. Sav. 19.

So if the plea allege a title, which avoids the possession in the king supposed by the information, the king needs not maintain the information, but may traverse the title alleged by the plea. Sav. 61.

And it is sufficient, if the king by his replication, traverses so much of the title as encounters the information, without answering the whole title alleged by the defendant: as, to an information for intrusion in the moiety of a manor, the defendant says *A.* was seised of the whole, and died seised, by which there was a descent to the defendant; it sufficient to traverse *absque hoc*, that he died seised of such moiety. *Ibid.*

After judgment in an information for *intrusion*, execution shall be sometimes by injunction; or it may be by *amoveas manum*; and thereupon every party to the information, or claiming under him, shall be removed from the possession. But a stranger to the information shall not be debarred of his entry; for no judgment of seisin is given, nor does an *habere fucias seisinam* go.] Sav. 55. Hardr. 460. 462.

As the king is the fountain of justice, and all courts of justice derive their authority from him, hence he is supposed to be always present in court; and therefore it hath become an established principle of law, that the king cannot be nonsuit in any action or information in which he is sole plaintiff. Co. Lit. 139. 139. Bro. Nonsuit (68) Sav. 56.

But it seems that any informer *qui tam*, or plaintiff in a popular action, may be nonsuit, and thereby wholly determine the suit, as well in respect of the king as of himself. (*a*) Co. Lit. 139. 2 Roll. R. 53. 156. (*a*) But the king may afterwards proceed for his share of the penalty in the usual way as if no such suit had been instituted, provided the prosecution is commenced in due time. if no such suit

Also the king's attorney-general may enter a *nolle prosequi*, which has the effect of a nonsuit to any information or action brought by the king only. Co. Lit. 139. Sid. 420. Salk. 21. pl. 11. like

point, where it is said by the C. J. that the crown, notwithstanding a *nolle prosequi*, may award new process upon the same indictment. ||See 6 G. 4. c. 108. § 101.||

In an information for extortion, issue was joined, and the day the jury were returned, the king sent a writing under his sign manual to Sir *Thomas Fanshawe* clerk of the crown, to enter a cesser of prosecution: and *Palmer*, attorney-general, affirmed that the king may stay proceedings; yet notwithstanding the court proceeded to swear the jury, and said they were not to delay, for the great or little seal; whereupon the attorney entered a *nolle prosequi*. Vent. 33. The King v. Benson.

No prosecutor upon an indictment (*b*) can enter a *nolle prosequi* without leave of the attorney-general. Ld. Raym. 721.

entering *nolle prosequi* upon indictment began in *Charles* the Second's time. 6 Mod. 262. per *Holt* C. J. (*b*) That en-

4 Inst. 17.
Plow. 243.
Roll. R. 290.
[And in an

information upon a statute the king's prerogative to lay it in any county cannot be taken away without express negative words in the statute. 4 Inst. 172. Cro. Car. 525. 2 Str. 749. Parker. 182. || And see 6 G. 4. c. 108. § 78. ||

Vent. 17.
The King
v. Webb.

It is a rule of the common law; that the king by his prerogative may sue in what court he pleases; and therefore may bring a writ of right or a *quare impedit* in the Court of King's Bench.

In an action for embezzling the king's goods, which was laid in the declaration to be in *London*, it was moved for the king, that the county might be changed; and the court held, the king might choose his county, and might waive that which he had seemed to have elected before, as he may waive his demurrer and join issue.

Hil. 6 G. 2.
in *B. R. Rex*
v. Hallam, &c.

If a person be guilty of two capital offences, the king may elect which of them to try him on first; and accordingly, where two persons murdered the post-boy in *Lincolnshire*, and afterwards committed a robbery in *Wilts*, for which they were taken and in custody in *Wilts*; the attorney-general moved for a *habeas corpus* to the sheriff of *Wilts*, to deliver them to the sheriff of *Lincoln*, and another to the sheriff of *Lincoln* to receive them; which was granted; the court allowing the crown had such election.

Lamb v.
Gunman,
Parker, 143.

|| REMOVAL OF REVENUE SUITS INTO EXCHEQUER. || [Where the king's revenue is concerned in the event of a cause, it shall be removed from any other court where the action is brought into the office of Pleas of the Exchequer.

|| Vide 3 Anstr.
852. ||

Thus in an action between the duke of *Cleveland's* bailiff and some other persons of the town of *Rye*, upon a demand of prisage of wine, an issue was joined upon this question, whether the town of *Rye* was entitled by charter to be exempted from this claim of prisage? The king had a reversionary interest in this prisage, because it was granted to the duke of *Cleveland* in tail; and in respect of this interest it was holden, that the king had a right to desire that the cause might be removed into the Exchequer, and the cause was accordingly removed.

Jan. 29. 1754.
Anstr. 214.

Again, an action was brought against a Mr. *Pennington*, who was the collector at *Bristol*, for money had and received by him, and it appeared that the action was brought for money received by him on account of the duties on glass, whereupon the Court of Exchequer removed it, and ordered it to be tried in the Exchequer, and not in any other court; the question being, whether Mr. *Pennington* was entitled to retain that money so received as duties on glass or not?

An. 1777.
Ibid.

So, an action brought by Mr. *Baring* against *Sutlin*, one of the principal officers in the port of *London*, in order to get back monies which had been charged to him for duties upon some goods which he thought he was not liable to pay, was removed into the Court of Exchequer.

Ibid.

So, in an earlier period, in the year 1702, two actions were removed. One was an action of trespass, the other of trover: one was for entering a ship and seizing goods for nonpayment of duties, and the other was trover for the ship itself. Both these actions were removed; and the minute only says, "there being an information for the duties." Now an information for

Per *Eyre C.B.*

for the duties is nothing more than the king's action of debt; and therefore there was nothing properly of prerogative in that, except merely the form of suing by information, instead of the common action of debt: but the ground of removal must have been, that a part of the question in those actions would be, whether the duties were payable or no. If the duties were payable, then it might follow that the party might have a right to enter the ship and look for the goods, and might have a right to stop the ship and the goods till the duties were paid. If no duties were payable, this justification failed.

An action for trespass for taking goods by colour of a warrant to levy a penalty of 100*l.* forfeited by the plaintiff, he having been convicted on an information before the commissioners of excise, for not making due entries of teas sold by him, was removed into the Court of Exchequer, for that the action proposed to draw into question elsewhere that debt or forfeiture, wherein the king had an interest, a moiety thereof as soon as it was fixed, and vested by judgment becoming a regular debt to the crown.

Cawthorne v. Campbell,
Anstr. 205.

Again, an ejectment was brought in 1710, in the Court of King's Bench; and it was, as to part of it at least, for lands which were part of the queen's estate. There was an application to the Court of Exchequer to stay the proceedings, and the parties were heard upon it. The attorney-general attended, and after the hearing it was put off for a day or two; at length the entry is, that an injunction issued *pro dominâ reginâ*. So that the action was not removed, but simply an injunction went to stay proceedings. And the reason was, if the action had been removed the question could not have been tried, even in the Office of Pleas, because the queen's title cannot be tried in an ejectment. The queen was in possession; her hands must be removed by some other course of proceeding than an ejectment; and therefore it was fruitless to think of removing it, and it remained under an injunction. It may be said, that it might be as well left to the Queen's Bench to determine that the queen's lands could not be recovered in ejectment. To be sure they might if the prerogative of the queen had not been that the queen had a right to prevent that question from being discussed there.

Anstr. 215.

|| Where custom house officers were served with a writ of *clausum fregit* issuing out of the great sessions in *Wales* for a supposed trespass in executing process on an information, the writ of *clausum fregit* was ordered to be removed into the Exchequer.||

In re King-
man, 1 Price,
206.

|| KING'S PREROGATIVE IN PLEADINGS, &c. ||—The king may amend his declaration in the same term, but not in another term.

Vaugh. 65.
R. 15.
E. 4. 8. a.

|| An information may be amended at any time on payment of costs. 3 Anst. 714. Saville, 3 pl. 7. ||

The king may waive his replication in another term, when the defendant is ready to rejoin. 2 Ro. 41.

And in an information he may waive his demurrer to the defendant's plea, and reply to issue.

Cro. Car. 347.
Vaugh. 65.

Hardr. 455. pl. 522. a.

A defendant

Cro. Car. 347. A defendant cannot waive his plea, and plead the general issue without the consent of the attorney-general.

Stamf. 65. b. But after issue joined the king may in the same term waive
Vaugh. 65. the issue and demur or take another issue.

Hardr. 459. pl. 322. a. 13 E. 4. 8. a.

Semb. But if the king joins issue upon his title he cannot afterwards
Vaugh. 64. waive it to traverse the title of the defendant.
1 Mod. 276.

R. 13. E. 4. 8. a.

Vaugh. 62. Where the king's title appears to be no more than a bare
|| See Mann. suggestion, the king can no more than a common person (and
Ex. Prac. 110. for the same reasons), forsake his own title, and endeavour only
176. || the destroying of the defendant's title; for the weakening of the
defendant's title without more, can no more make a good title
to the king than it can to a common person.

Rex v. Musters, Where a defendant pleads a title against the crown, and the
Parker, 50. attorney-general will not reply or demur in a reasonable time,
the court will order judgment to be entered for the defendant,
unless the attorney-general upon being attended, will either
enter a *nolle prosequi* or proceed.

Rex v. Hare, If upon a *scire facias* out of the Petty-bag Office to repeal
1 Stra. 266. letters patent, one defendant pleads to issue, and as to the other
demurrer is joined, the king may bring on either the trial or the
demurrer first as he pleases.

Sav. 2. In the Exchequer no *nisi prius* shall be granted where the
king is a party unless the attorney-general consents to it.

Cro. Car. 348. So, the trial shall be at *nisi prius*, and not in bank, if the king
requires it, though it be upon an indictment removed by
certiorari.

Rowe v. Bren- || Where the crown is interested the attorney-general may
ton, 8 Barn. demand a trial at bar as of right. ||
& C. 737.

Cro. Car. 590. If a title appears upon record for the king, the court *ex*
officio shall adjudge it for him.

Semb. Hardr. If the attorney-general confesses the plea of the party, and
170. thereupon he is discharged, where the plea is no bar in law, the
king shall not be bound; for though a confession by the attorney-
general in a matter of fact binds the king, yet it is not so in a
matter of law.

Lake's case, It seems questionable, whether, after a *distringas* and a jury
4 Leon. 52. returned upon it, the attorney-general can at his pleasure stay
trial.

Hardr. 455. He cannot waive the issue after verdict.

Thel. Dig. The king cannot be sued by his subjects by writ, for he cannot
1. 4. c. 1. issue a command to himself; though it is said in some books (a)
(a) 22 E. 3. that before the time of Edward the First, the king might be sued
3. b. pl. 25. as a common person, the form being, "*Præcipe Henrico Regi*
24 E. 3. 55 b. *Angliæ.*"
pl. 40. 45 E. 3.
22. *Sed vide* Stamf. Pr. Reg. 42.

H. 9. H. 6. 3 & 4. Neither can any one vouch the king, for that is in nature of an
Thel. Dig. 1. 4. action. So, if a fine is to be levied by the king of lands, it must
c. 2. § 2. Cro. be by render, and not by writ of covenant.
Car. 96, 97.

¶ PETITION DE DROIT—MONSTRANS DE DROIT—TRAVERSE OF OFFICE.¶ The common law methods of obtaining redress or restitution from the crown of either real or personal property, are, 1. By *petition de droit*, or petition of right. 2. By *monstrans de droit*, manifestation or plea of right; both of which may be preferred or prosecuted either in the Chancery or Exchequer.

Stamford's opinion is expressly, that the *monstrans de droit* was given by 36 E. 3. and did not lie at common law, and in Anderson's report of the Sadler's case (1 And. 181.) it is affirmed by the court, that the *traverse* and *monstrans de droit* are both given by that statute. And of the same opinion is the Lord Keeper Sommers in his argument in the Banker's case. 11 St. Tr. 154.—It is said, that at this day a *monstrans de droit* lies only in the Chancery or Exchequer, except in a special case, as in Lady Broughton's case, where the *monstrans de droit* was brought in *B. R.* because the record of the conviction and seizure was there. Skin. 610.—A suit by petition may be to the king in parliament, or, according to Comyns (Dig. tit. Prerogative, (D) 80.), in any other court. If it be in parliament, it may be established by act of parliament, or pursued as in other cases. Stamf. Pr. 72. b. ¶ See Keilw. 154. Mann. Ex. Prac. 84. 86. (2d ed.)¶

There is also a remedy given by statute 2. E. 6. c. 8. and that is by way of traverse to the king's title.

At common law, when the king was seised of any estate of inheritance or freehold by any matter of record, were his title by matter of record judicial, as attainder; ministerial, as by office; or by conveyance of record, as by fine, deed enrolled, &c.; or by matter in fact, and found by office of record on oath, as by alienation in mortmain, purchase by alien born, &c., he who had right was put to his petition of right in nature of a real action to be restored to his freehold and inheritance.

And this method of proceeding by petition is proper, where the king seizes the goods or lands of a subject without due order of law, or enters into the lands of another without title or office found. Stamf. Pr. 72. a. b.

So, if he does not pay an annuity granted by him, or issuing out of lands in his hands; or does not pay a debt, wages, &c. Lord Sommers's Argument, 11 St. Tr. 154, 155.

So, if the king be entitled by a record not traversable, as by a recovery in the king's court, by assent, without title; or by an erroneous judgment; for error shall not be allowed without a petition. Stamf. Pr. 74. a.

And in all cases where the entry would be tolled, if the land were in the hands of a common person; or where the party controverts the king's title, the proceeding is by petition. Stamf. Pr. 74. b. Per Holt, 608.

And where a traverse or *monstrans de droit* does not lie, suit ought to be to the king by petition: as, if the king be entitled by double matter of record. But if *A.* be attainted in *B. R.*, and it be found by inquisition in the Exchequer that he was seised of the manor of *D.*, this will not be in judgment of law a double matter of record, so as to force the owner of the land to his petition, the record of the attainder not being in the same court with the inquisition. Stamf. Pr. 74. a. Bro. tit. Petition, pl. 35, 36. Lane, 58.

Where an estate is forfeited by attainder, &c. none can sue by petition before office found, for, till office, the estate is not vested in the king. Sir W. Jon. 78.

The party must be careful to state truly in the petition the whole Finch's L. 256.

Lord Som-
mers's Arg.
11 St. Tr. 149.

whole title of the king, else the petition will abate. For upon an issue in the petition found against the king, he shall be concluded for ever to claim by any of the points contained in the petition.

The manner of answering petitions, it should seem, was formerly very various: which variety did sometimes arise from the conclusion of the party's petition, sometimes from the nature of the thing; and sometimes from favour to the party; and according as the indorsement was, the party was sent into the Chancery, or the other courts. If the indorsement is general, *soit droit fait al partie*, which is now the usual indorsement, the petition must be delivered to the Chancellor of *England*, and then a commission (a) issues to enquire of the truth of the suggestion; and that being found, so that there is a record for him, thus warranted, he is let in to interplead with the king: but, if the indorsement is special, then the proceeding is to be according to the indorsement in any other court. The case *Mich. 10 H. 4. 4.* is full as to this matter. The king recovers in a *quare impedit* by default against one who was never summoned, the party cannot have a *writ of deceit* without a petition. If then, says the book, he conclude his petition generally, *que le roy lui face droit*, and the answer be general, it must go into the Chancery, that the right may be inquired of by commission; and upon the inquest found, an original writ must go directed to the justices to examine the *deceit*; otherwise the justices, before whom the suit was, cannot meddle: but, if he conclude his petition especially, *that it may please his highness to command his justices to proceed to the examination*, and the indorsement be accordingly, *that will give the justices a jurisdiction*.

(a) This not
necessary if
the attorney-
general con-
fesses the sug-
gestion. *Skin.*
608.

Fitzh. tit. Tra-
verse, pl. 51.
Bro. tit. Peti-
tion, pl. 34.

Menville's case.
Moor, 639.

Stamf. Pr.
73. b.

But, where no office is found to entitle the king, the party may pursue a petition without an inquisition for him.

After a commission whereon a title is found for the party, before he can interplead with the king, there ought to be a writ to enquire of the king's title; and this, in all cases, where land is in the king's hands, or granted to another: and in this last case there should be a *scire facias* also against the patentee.

Menville's
case. Moor,
639. The
writs of search
issue upon the
suggestion of
the attorney-general,
that there are in the Treasury
several records, charters, deeds,
muniments, &c. touching the king's
right to the estate in question. *Rast. Entr.* 462. a.

Where a petition disaffirms the king's possession, there ought to be four writs of search directed to the treasurer and chamberlains of the Exchequer; but, writs of search are not necessary where the petition affirms the king's possession; as upon a petition of right of dower.

4 Co. 55. a. b.

Where the right of the party, as well as the right of the crown, appeared upon the same record, or the right of the party appeared by another record of as high a nature as that upon which the right of the crown appeared, the party was entitled by the common law to have a *monstrans de droit*. Thus, if a conveyance be to the king, upon condition to be void, if a fine be levied, or a recognizance given, or other matter performed, which must be upon record; he who has made the conveyance, levied the fine, given the recognizance, &c. may have a *monstrans de droit* by the

the common law; for the recognizance appears by a record as high as the conveyance. So he may, though the performance of the condition be not upon record, if it be afterwards found by office.

So, if the title of the party be not found by the same or another record, whereupon he sues to the king by petition, and an inquisition is granted upon the petition finding his right, he afterwards may have a *monstrans de droit* by the common law. 4 Co. 57. b.

But, if the title of the party did not appear by the same record, which found a title for the king, or by a record of as high a nature, he could not have a *monstrans de droit* by the common law, but was forced to sue by petition. And this, though it appeared by the return of the sheriff, mayor, &c. to a *diem clausit extremum*, or other writ; for the return, though filed of record, is not so high as an office found *per sacramentum proborum hominum*. 4 Co. 55. b.

But, by stat. 36 E. 3. c. 13. where lands are seised by inquest of office before the escheator, and any man will make claim to them, the escheator shall send the inquest, within a month, into the Chancery, and a writ shall be delivered to him to certify the cause of seizure; and then the claimant shall be heard to traverse the office, *and shew his right*. And therefore, where an office is found, which is traversable by that statute, the party may have a *monstrans de droit*; and this, though he be not put out of possession by the office, or, though the king be entitled by matter *in pais* found by record; as, by alienation in mortmain, &c. 36 E. 3. c. 13. 4 Co. 59. a.

So, if the king be entitled by office, or matter of record, which is traversable, but, being true, cannot be traversed, the party may have a *monstrans de droit*. Stamf. Pr. 71. a.

But, where the king was entitled by double matter of record, the party could not have a *monstrans de droit* till it was given by the statute of 2 & 3 E. 6. c. 8.

The *monstrans de droit* recites the inquisition found for the king, and then shews the right of the party, which it offers to verify, and concludes with praying judgment, and an *amoveas manum*, and restitution of the land and tenements, and of the profits from the time of taking the inquisition. Co. Entr. 402.

If the attorney-general confesses the title of the party, or, if he replies, and afterwards confesses, or, if it be found for the party after verdict, or upon demurrer, the judgment is *quod manus domini regis amoveantur*, and that the party be restored to the possession of the premises, with the appurtenances, together with the mesne profits from the time of the caption of the inquisition not answered to the crown, *salvo jure domini regis*; which last clause is always added to judgments against the king, and is expressly required by stat. 2 & 3 E. 6. c. 8. And by this judgment the king is instantly out of possession. Co. Entr. 404. 406. b. Finch's L. 460. 2 Inst. 695. Finch's L. 459. The *amoveas manus* is the end of every suit, where a man comes to interplead with the king; for without

that judgment, the land will still remain in the king's possession. Keilw. 158. a.

But the party cannot have judgment in a *monstrans de droit*, though the king have no title, unless he can shew a title in himself. 2 Salk. 448.

Ibid. If the party suing the *monstrans de droit* may be nonsuited, the whole of this proceeding is quite anomalous.

For the party certainly appears upon the record in the character of a defendant: he shews his right in the form of a plea; the attorney-general replies; and the other party when he takes the issue *ponit se super patriam*, as on the other hand the attorney-general in that case *petit quod inquiretur per patriam*. And Lord Somers in his argument, 11 St. Tr. 154. says, "I take it to be generally true, that in all cases where the subject is in nature of a *plaintiff*, to recover any thing from the king, his only remedy, at common law, is to sue by *petition* to the person of the king. I say, when the subject comes as a *plaintiff*. For, when upon a title found for the king by *office*, the subject comes in to traverse the king's title, or to *shew his own right*, he comes in in the nature of a *defendant*; and is admitted to interplead in that case with the king in defence of his title, which otherwise would be defeated by finding the *office*." And in another part he says explicitly — "In this sort of proceeding (*viz.* a *monstrans de droit*) the subject is in the nature of a *defendant*, and comes in and pleads to a title found for the king." And note farther, that the case referred to from the Year-book, (4 H. 6. 11.) is of a *traverse* to an inquisition. Now it has been expressly determined in *The King v. Roberts*, 2 Str. 1208. that the traverser of an inquisition for the king is properly to be considered as a defendant, who opposes the title found for the crown, without setting up any title in himself, as he might do in a petition of right. And indeed it would be absurd, say the court, to construe the liberty of traversing, to give a power of delaying the crown; which must be, if the party is considered as having the common right of a *plaintiff*. The court therefore held in that case, that the record was well made up and carried down for trial by the prosecutor of the commission.

Co. Entr. 405.

The proceedings upon a *monstrans de droit* are had in the Petty-bag Office in the Court of Chancery, and are not enrolled as in other courts, but remain upon files in that office.

4 Co. 56. a.
Stamf. Pr.
60. b.

At common law, where the king was entitled by office, though untruly found, the party could not have a traverse to the office, nor could he avoid it without petition.

13 E. 4. 8. a.
4 Co. 55. a.
56. a.

Nor, where the king was entitled by any matter of record, judicial or ministerial, conveyance of record, or matter of fact found by office of record, notwithstanding the office concerned only a chattel real.

4 Co. 56. b.

But, where the office did not give a seisin or possession to the king, but only entitled him to an action for the recovery of the land, in such action the party might traverse the office by the common law. As, if an office finds, that the king's tenant has ceased for two years, or done waste, or made a feoffment by collusion, &c. whereby the king is entitled only to his action of *scire facias* against his tenant, in which the tenant may traverse the *cesser*, waste, collusion, &c.

Stamf. Pr.
60. a.
13 E. 4. 8. a.
4 E. 4. 24. a.

So, by the common law, an office or inquisition for goods and chattels personal might be traversed. As if *A.* be attainted of treason, or felony, or outlawed in debt, trespass, &c. and an inquisition find that he had such goods at the time of the felony or outlawry, a stranger, who has the property, may traverse it:

Sav. 130.
There were
two sorts of

So, offices of instruction only were traversable by the common law, as all offices under the Exchequer seal.

offices, one of *intituling*, and another of *instruction*. The office of *intituling* was always by inquisition found, by commission under the broad seal, for the king could not take but by matter of

of record: and this was a part of the liberty of *England*, that the king's officers might not enter upon other men's possessions till the jury had found the king's title; therefore, where the king's title appeared on record, his officers might enter without any office found; as, where the lands are held of the crown, and the tenant dies without heirs, the officers of the king may enter, because the tenure whereby the king's title appears is upon record; so, by the common law, where lands belong to nobody, the king's officers may enter, because by the law the land is in the crown; for the law entitles the king, where the property is in no man: but if any body else were in possession, the lands cannot be devested without matter of record. But notwithstanding, where the king is entitled by matter of record, there is no need of an office to entitle him; yet there were always offices of *instruction* found, (that is to say,) the escheator was bound, *virtute officii*, to hold an inquest, *by way of instruction*, and to return the same into the Exchequer: and this is by 34 E. 3. c. 15. as likewise 10 H. 6. c. 7.; and by that last statute such offices are to be returned either into the Chancery or Exchequer, within one month after the taking of the same, under the penalty of 40*l.*; and by 1 H. 8. c. 8. the escheators were to sit in open places, and the sheriffs were to return jurors, and the inquisition was to be taken by indenture, whereof one part was to remain with the foreman of the jury, and the other part was to be returned into the Chancery or Exchequer, within one month; and from the Chancery it was to be transcribed into the Exchequer. The reason why it was returned into Chancery, was, because that was a court that was always open, since the Chancellor was always an itinerant with the prince. The office of *instruction* might either be taken by the escheator, *virtute officii*, or it might be taken *by writ* from the Court of Exchequer, and both were equally offices of *instruction*: but by 35 H. 8. c. 22. the escheator was not to sit *virtute officii*, where the lands were 5*l.* *per annum* or above, on pain of 5*l.*, which statute was made to hinder escheators from seizing lands by virtue of their office, without a writ directed out of the Chancery or Exchequer; and it seems, that the office to entitle the crown must be by writ out of Chancery. But if the freehold was cast upon the crown, though the escheator could not seize, *virtute officii*, after the statute; yet he might have a writ of seizure from the Exchequer, and thereby take an office of instruction; because such lands, being in the king without office, were within the survey of the Court of Exchequer. — These offices of *instruction* settled the annual value of the lands, and by that value the escheators accounted; unless the court, upon putting them up to auction, found any person that would give more for the lands, and then they let them by lease under the Exchequer seal. Gilb. Excheq. 109.

By stat. 34 E. 3. c. 14. where lands or tenements were seized 34 E. 3. c. 14. into the king's hands by office of the escheator, on account of alienation without licence, or the tenant *in capite* dying, and leaving his heir within age, it was to be returned into Chancery; and if the tenant would *traverse the office* so taken by the king's commands, and say, that the lands were not seizable, he was to be received so to do, and process was to be sent into the King's Bench to try it according to law.

But this act extended only to offices found *virtute brevis*, or 4 Co. 57. a. *commissionis*; for the words are "taken by the king's command," so that an office taken *virtute officii* was out of the act.

It also extended only to the two cases above mentioned of alienation without licence and ward.

And farther, it extended only to a traverse, and not to a *monstrans de droit*, by which, although on the traverse the issue was found for the party, yet the judges could not proceed to judgment without a writ *de procedendo ad judicium*.

To remedy these inconveniences the statute of 36 E. 3. c. 13. was made, by which it is provided, that if land be seized by an office before the escheator returned into Chancery, any one, who challenges the land seized, shall be heard without delay to traverse the office, or otherwise to shew his right, and from thence sent before the king to make a final discussion without attending other commandment.

This last statute allows a traverse to all offices found before the escheator, or before commissioners. 4 Co. 57. b. Stamf. Pr.

And 61. a.

8 H. 6. c. 15.

And by stat. 8 H. 6. c. 16. it is extended to all aggrieved by the inquest, though not put out of possession by the escheator.

But, notwithstanding these statutes, persons were still liable to be precluded of their rights, by the untrue finding of offices. As, for instance, persons holding terms for years, or by copy of court-roll, were often put out of their possession by reason of inquisitions, or offices found before escheators, commissioners, and others, entitling the king to the wardship or custody of lands, or upon attainders for treason, felony, or otherwise; and this because such terms for years and interests in copyhold were not found: after which they had no remedy, during the king's possession, either by traverse or *monstrans de droit*, because such interests were only chattels in customary hold, and not freehold. In like manner persons having any rent, common, office, fee, or other profit *apprendre*, if such interest were not found in the office entitling the king, they had no remedy by traverse, or other speedy means, without great and excessive charges, during the king's right therein. To redress these hardships on the subject, it is declared by stat. 2 & 3 E. 6. c. 8. that all persons in the above cases shall enjoy their rights and interests, the same as if no office or inquisition had been found, or as they might if their interest had been regularly found at the same time in such inquisition or office. Remedy was given where a person was found untruly heir of the king's tenant, and the like. And where a person is untruly found lunatic, idiot, or dead, and in some other cases, it is enacted, that the party grieved shall have a traverse, and proceed to trial therein; and have like advantages as in other cases of traverse upon untrue inquisitions and offices. The same of untrue finding, where a person is attainted of treason, felony, or *præmunire*, the party grieved may have a traverse or *monstrans de droit*, without being driven to a petition of right. And in all traverses taken upon this act, it is directed, that the person pursuing his traverse shall sue out a writ of *scire facias*, one or more, as the case shall require, against such person as shall have an interest either by the king or by his patentee, in like manner as upon traverses and petitions in other cases, with like pleas to the defendants in the *scire facias*.

Rex v. Blunt,
Bunb. 104.

If a term for years is found and sold on an inquisition on an outlawry, a mortgagee not in possession shall be allowed to plead to the inquisition.

6 Price, 411.
7 Ves. 261.

|| So also may a person with whom the extendee has deposited his deeds by way of equitable mortgage, or to whom he has contracted to sell. ||

Rex v. Toller,
id. 123.

Upon outlawry inquisition thereon returned, *levari* issued, and money levied, he who has a statute-merchant, and is in possession of the land, may, on motion, have time to plead to the outlawry and inquisition; and, on giving security, have the money in the sheriff's hands repaid to him.

Watts v. Robinson, *id.* 220.

Where on an inquisition a man was found possessed of a term *jure uxoris*, and after his death it was sold on a *venditioni exponas*,
the

the widow was permitted to plead to the inquisition, though she had defended an ejectment brought by the purchaser, and filed a bill in Chancery.

If a man traverses an inquisition, the usual course of the court is to take security to the value of two years' profits of the land, because in that time it is intended the right of the crown and party will be determined.

Per Baron Montague. id. 25. || See Mann. Ex. Prac. 95.||

To an inquisition on an extent on an outlawry, the defendant, as terretenant may plead, that the party outlawed is dead, without setting forth a special title; for, upon affidavit of the fact, the attorney-general usually allows the plea, there being after the party's death no title subsisting in the crown.

Rex v. Barnfield, id. 102.

Where by office, or statute without office, a particular estate is vested in the king, he in reversion or remainder dependent upon that estate may, upon the determination of it, enter upon the king without traverse, or *amoveas manum*.

Linch v. Coote, 2 Salk. 469.

So, if it be found by inquisition that a person outlawed in a personal action was seised of lands, which *B.* claims, and the escheator take the profits by this false office; *B.* may disturb him without a traverse.]

Stamf. Pr. 67.

(F) Of the King's Grants and Letters Patent: And herein,

1. *What Things the King may grant: And therein,*

1. Of Grants arising from his Prerogative of Power, and which are inseparably annexed to the Crown.

FROM the great trust and confidence reposed in the king, and the high authority with which he is invested, the law hath inseparably annexed to the crown a power of granting and disposing of divers rights and privileges, which cannot be granted or established by any less authority. Of these there are some that have no existence till created, such as franchises, liberties, fairs, markets, hundreds, leets, parks, warrens, which the king (*a*) only by his prerogative can establish. (*b*)

Bro. Pat. 16. 2Roll.Abr.187. 9 Co. 25. 87. Co. Lit. 199. Godb. 254. Jenk. 79. 507. (a) And therefore a subject cannot build a castle or other

place of defence without the king's licence. *Co. Lit. 5. (b) May be created by ordinance, as my Lord Hobart expresses. Hob. 15.*

So, the king may grant *pontage* or *murage* to be taken by those who erect new bridges or walls; but the payment thereof shall continue no longer than the bridge remains useful, or the wall necessary for the defence of the subject.

Bro. Patent, 12. Noy, 176. Darcy v. Allen.

So, a grant of a ferry, and that every person going over shall pay a halfpenny, is good, being for the public utility; and the payment is in consideration of the particular benefit.

13 H. 4. 14. Bro. Patent, 12.

But the king cannot grant toll to be taken in the highways, which are to be free to all people; and therefore a toll-traverse

Bro. Patent, 100. Noy, 176.

or toll-thorough cannot commence by grant at this day, but must be claimed by prescription.

Moor, 476. And indeed in all grants of this kind, the good of the public
vide tit. Fairs and Markets, seems to be principally regarded, as appears by the writ of *ad*
quod damnum (a); and in this, that if the king creates or grants a
 vol. iv. fair or a market to a person, and afterwards grants another to
 (a) F.N.B. 220. another person to the prejudice of the first, the second grant is
 void.

Bro.Patent, 55. All extra-parochial tithes belong to the king by his prerogative,
 and may be granted by him.

7 Co. 17, 18. So, the king may grant a swan-mark or the game of wild swans
 in such a river, and such grant is good; but none can have a
 swan-mark unless he hath an estate of freehold of five marks
per ann.

Plow. 339. So, all royal mines belong to the king, and he may grant them,
 but it must be by express words.

Carter, 90. None but the king can erect a *beacon* or sea-mark, unless he
 hath a licence or a grant for that purpose.

Carter, 92. Where the king hath a suit to a mill *ratione prærogativæ*, he
 may grant it.

4 Inst. 87. All judicial offices which have been usually granted by the
 Sid. 338. crown, are of the *insignia majestatis*, and so inseparably annexed
 Co. Lit. 114. to the crown, that they cannot be granted by any less authority,
 Lev. 219. nor in any other manner, nor with other powers, than as warranted
 by the known and approved forms in such cases.

4 Inst. 165, 245. Hence commissions of a new invention, though under pretence
 of public good, have been condemned; as commissions to assay
 weights and measures.

2 Inst. 54. So, commissions to seize the goods and imprison the bodies
 of all persons who shall be notoriously suspected of felonies or
 trespasses, without any indictment or other legal process against
 them, have been held illegal and void.

4 Inst. 161. So it has been held, that the king could not authorize persons
 to take care of rivers and the fishery therein, according to the
 method prescribed by the statute *West. 2.* (13 Ed. 1. stat. 1.) c. 47.
 before the making of that statute.

2 Inst. 4. So a grant by *Henry* the Sixth to the corporation of dyers in
London, of a power to search, &c., and if they found any cloth
 dyed with logwood, that it should be forfeit, was adjudged void;
 (b) Sid. 441. it being against law that any forfeiture (b) should incur by let-
 Vent. 47. ters patent.

Lit. R. 304. The crown may grant cognizance of pleas to proceed *secundum*
 Hob. 48. *legem terræ*, but not to proceed by other laws; for that would be
 10 Mod. 125. to make new laws, which the crown, being but one branch of
 the legislative power, cannot do.

Hob. 65. The king cannot grant to any to hold a court of equity, be-
 Noy, 147. cause this is in derogation of the common law; and the Chan-
 2 Roll. Abr. cery in *Chester* and *Durham* are incidents to a county palatine
 192. which had *jura regalia*.

Vent. 407. A grant to the town of *Berwick* that they should be a county,
 but

but no grant of having a sheriff, was adjudged to be void, because there would be no officer to execute and do justice.

There are likewise personal prerogatives which the king only can grant, and which are of so high a nature as that they cannot be delegated to any other; such as the power of making an alien, a denizen, the power of pardoning felonies, &c.

[A grant by the king within time of legal memory to a town of the right of sending representatives to parliament is good without first incorporating such town. Thus, the city of *Westminster*, which hath never been incorporated, first sent members to parliament in the reign of *Edward the Sixth*.]

Dyer, 300.
Bro. Patent,
111.
Skin. 606.

Hargr. Co.
Lit. 109. b.
note 2.

2. Of Grants arising from his Interest.

It seems to be clearly agreed, that the king may alien, grant, or charge any branch of his revenue, in which he hath an estate of inheritance, as also his lands in fee-simple, though he is seised of them *jure coronæ*. (a) And this power is said to be founded on reasons of state, and arises from the nature of our constitution, by which the king is disabled to levy money on the subject without an act of parliament; so that if this power were not inherent in the crown, the kingdom might suffer by a sudden invasion, &c. Also, as rewards and punishments are the supporters of all governments, it is but highly reasonable that the crown should have the power of rewarding those who deserve well. And this hath been the constant usage of the kings of *England*, by granting out of the crown revenue pensions and estates to those whose services have been meritorious, as also to such of the nobility whose fortunes have come to decay.

Plow. 236. in
Ld. Berkley's
case. Vaugh.
62. Co. Lit.
19. 7 Co. 12.
||(a) See post.
490. By
1 G. 4. c. 1.
(the act settling the civil
list for the
life of G. 4.)
§ 12. it is pro-
vided, that
nothing in the
act contained
shall impair
the rights of
controul, man-

agement or direction exercised by the crown, relating to leases, grants, or assurances of the small branches of hereditary revenue; but that such rights shall continue to be exercised, subject to the restrictions and regulations in force at the death of his late majesty; and as to the regulations on the granting of pensions and leases, &c. of crown lands. See post. ||

Lands in ancient demesne, though they seemed most appropriate to the king's use of any of his revenues, (for the tenants had several privileges, all relating to the king, as not to be impleaded out of the manor, to be free of toll for all things concerning their sustenance and husbandry, not to be impannelled on any inquest,) were, notwithstanding all this, always alienable.

5 Mod. 55.
per Holt C.J.
vide tit. *Ad-*
cient Demesne.

The goods of felons, fugitives, persons outlawed, &c. waifs, strays, deodands, wreck, &c. are deemed the flowers of the crown, and distinguished by that name; and these the king clearly may grant; and between these and liberties and franchises, which have no existence till created, a distinction hath been established, *viz.* That if the first of these, and the possessions to which they are appendent or annexed, come to the crown, they sink to the crown, and the king is seised of them again *jure coronæ*; but if the possessions to which liberties or franchises, such as fairs, markets, &c. are appendent, come to the crown, yet these

9 Co. 25.
The Abbot of
Strata Mar-
cella's case.
Moor, 474.
Palm. 78.
And. 87.
Mod. 252.

last are not extinct, but continue to exist according to their first establishment.

Cro. Eliz. 463.
Heigham v.
Best.

If the king grants to *J. S.* felons' goods, or waifs and strays within his manor, *J. S.* shall have them in the lands of the freeholders; for they are liberties due to the king, which he may grant, and are not charges to the subject; for the king hath this right in every man's land, and therefore may grant it to another.

Yelv. 19.
Will. R. 690.

The forfeiture of goods and chattels in an outlawry in a personal action belongs to the king, which the king may, and usually does grant to the person who is at the expense of suing out the outlawry; yet this is but *ex gratia regis*, and not *debito justitiæ*.

Ld. Raym.
213, 214.

All fines for offences *de jure* belong to the king, because it is his correction, and the public revenge is in his hands; but the king may grant them to others.

5 Mod. 46.
Comb. 270.
Skin. 601.
pl. 11. The
Banker's case.
11 St. Tr. 136.

It was agreed in the Banker's case, that King *Charles* the Second having the revenue of excise vested in him, his heirs and successors, by act of parliament, might grant or charge the same or any part thereof; and that, accordingly, the letters patent and grant of 25,000*l.* *per ann.* out of the hereditary revenue of excise, for the payment of interest to Sir *Robert Vinor* and others, of whom the king had borrowed large sums of money, till such time as the principal debt should be discharged, were good and valid in law, and bound the king's successors; although it was objected that this revenue was granted by act of parliament; that it arose out of the purses of the people, and that it was given in lieu of wards, liveries, purveyances, &c. which were inheritances unalienable. But to these it was answered and resolved, that being given in fee, though by act of parliament, it must have the same incidents as other inheritances in fee have, one of which is to be alienable at pleasure; and as to its being granted in lieu of inheritances which were unalienable, that was held not to be material, as those inheritances were extinct, and so could not affect inheritances of another nature newly given: besides, those inheritances of wards, liveries, &c. were in effect alienable, for they might have been released or discharged.

[It should seem, that before the Revolution there was properly no public revenue, but that all the revenues, both ordinary and extraordinary, were the king's only, and wholly disposable at his pleasure. Upon the introduction of the funding system at the Revolution, appropriations became necessary, and therefore a certain portion only of the revenues hath been since that period subject to the immediate disposition of the crown, for the support of its honour and dignity. This, in the late reigns, consisted of an annuity granted by parliament, and the hereditary revenues of the crown, that is the produce of certain branches of the excise, the post-office, the duty on wine licences, the revenues of the remaining crown lands, the profits arising from courts of justice, and in King *William's* reign, the four and a half *per cent.* duties arising from *Barbadoes* and the *Leeward Islands*. But his present majesty having, soon after his accession, signified his consent

sent that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously accepted the limited sum of 800,000*l. per annum* for the support of his civil list, the hereditary and other revenues were carried into and made a part of the aggregate fund; and the aggregate fund was charged with the payment of the whole annuity to the crown of 800,000*l.* which being found insufficient, was increased in 1777 to 900,000*l. per annum.*

|| As to the civil list settled by 1 G. 4. c. 1. see *post.* 490.||

The power of the crown with respect to grants out of the civil list was till lately wholly unlimited, that part of it called the pension list being totally discretionary in its amount. This occasioned great disorders in the administration of the civil list, and by exhausting too great a part of the revenues, disappointed the just claims of those who had liens upon them, and reduced the crown to the painful necessity of making application to parliament to supply the deficiencies. His present majesty having therefore been graciously pleased to express to his parliament his desire to discharge the debt on his civil list, without any new burden upon the public, and to introduce a better order and economy in the civil list establishment, it was proposed to reduce the pension list, both in its gross quantity, and in its larger individual proportions to a certainty. It is therefore enacted by stat. 22 G. 3. c. 82. § 17. that "for the better regulation of the granting of pensions," (that is, of pensions chargeable upon the civil list, for this act affects only to regulate and reform the civil list establishment,) "and the prevention of abuse or excess therein, no pension exceeding the sum of three hundred pounds a year shall be granted to or for the use of any one person; and that the whole amount of the pensions granted in any one year shall not exceed six hundred pounds; a list of which, together with the names of the persons to whom the same are granted shall be laid before parliament in twenty days after the beginning of each session, until the whole pension list shall be reduced to ninety thousand pounds; which sum it shall not be lawful to exceed by more than five thousand pounds in the whole of all the grants: nor shall any pension to be granted after the said reduction to or for the use of any one person exceed the sum of one thousand two hundred pounds yearly, except to his majesty's royal family, or on an address of either house of parliament."

22 G. 3. c. 82. § 17.

And by § 18. reciting that "it had been usual that persons who have served the crown in foreign courts, had, after the expiration of their service, at his majesty's pleasure received such proportion of their former appointments, as to his majesty hath seemed expedient, it is enacted, That nothing in this act (a) contained relative to pensions shall be construed to extend to such allowance, either in present or in future, provided that the said persons do not severally enjoy some place or other profit from the crown to the amount of the pension usually allowed in such cases; provided that the list

§ 18.

|| (a) By 50 G. 3. c. 217. § 13. no pension shall be granted to an person for

having served " of the said pensions shall be laid in the manner before men-
in foreign " tioned before parliament."

courts within
less than ten years from the date of his appointment, during which time he shall have served not less than three years, and no such allowance shall exceed 2000*l. per annum*, and shall abate if he be appointed to any civil office of equal amount, and shall be subject to proportionate abatement if its value is less than the amount of such allowance; and by § 14. the grantee of any such pension shall be not less than thirty-five years old, and the secretary for foreign affairs must certify that he has not within ten years declined serving as a foreign minister unless for sufficient cause. But by 51 G. 3. c. 21. the above provisions do not apply to persons who, previous to the passing of that act, had served in foreign courts, nor to the 22 G. 3. c. 82. so far as respects the grant of allowances to persons who, previous to that act, had so served the crown.]]

§ 19.

By § 19. reciting that " much confusion and expense had arisen from having pensions paid at various places, and by various persons; and that a custom had prevailed of granting pensions on a private list during his majesty's pleasure, upon a supposition that in some cases it may not be expedient for the public good to divulge the names of the persons in the said list, or that it may be disagreeable to the persons receiving such payments to have it known that their distresses are so relieved, or for saving the expense of fees and taxes on small pensions; by means of which usage secret and dangerous corruption may hereafter be practised:" Reciting further, that "it is no disparagement for any persons to be relieved by the royal bounty in their distress, or for their desert, but on the contrary it is thought honourable on just cause to be thought worthy of reward, it is enacted, That no pension whatever on the civil establishment shall thereafter be paid but at the exchequer, and in the same manner as those pensions which were then paid and entered at the exchequer, under the head, title, and description of *Pensions*, and with the name of the person to whom, or in trust for whom the said pension is granted; and that those which are transferred thither by this act shall be subject to no taxes or fees whatever, except the taxes and fees to which before this act they were subject; any statute, law, or usage to the contrary notwithstanding: Nor shall any pension hereafter to be granted be charged at the exchequer with further or other fees than were heretofore paid on pensions to the paymaster of the pensions." It is, however, by § 21. permitted to the high treasurer, or first commissioner of the treasury for the time being, to return into the exchequer any pension or annuity without the name of the person to whom it is made payable, on his taking an oath, that according to the best of his knowledge, belief, and information, the pension or annuity so returned without a name by him into the exchequer is not directly or indirectly for the benefit, use, or behoof of any member of the house of commons, or so far as he is concerned, applicable, directly or indirectly, to the purpose of supporting or procuring an interest in any place returning members to parliament: upon taking which oath it is enacted by § 22. that the pension or annuity shall be paid at the exchequer

By stat.

25 G. 3. c. 61.
certain small
bounties of
the crown
therein men-
tioned payable
to persons
in low and
indigent cir-
cumstances,
are exempt
from the
operation of
this clause,
and the same
are allowed
to be paid as
they formerly
had been.

§ 21.

to the order of the high treasurer or first commissioner, whose receipt shall be accepted and taken as an acquittance for the same. But by § 23. if any such secret pension shall continue in the list for more than five years, the high treasurer or first commissioner of the treasury, or one of the secretaries, or one of the chief clerks of the treasury for the time being, shall make oath, before such pension shall be paid at the exchequer, that he believes that the person for whose use the said pension or annuity hath been granted is living.

§ 23.

In order to prevent, as much as may be, all abuses in the disposal of monies issued under the head of secret service money, or money for special service, the sum to be issued or paid from the civil list revenues for the purpose of secret service within this kingdom shall not exceed the sum of ten thousand pounds in any one year: and as to foreign secret service money, it is enacted, that when it shall be deemed expedient by the Treasury to issue, or in any manner to direct the payment of any money from the civil list revenues for that purpose, the same shall be issued and paid to one of his majesty's principal secretaries of state, or to the first commissioner of the admiralty, who shall for his discharge at the exchequer, within three years from the issuing of such money, produce the receipt of his majesty's minister, commissioner, or consul in foreign parts or of any commander in chief, or other commander of his majesty's navy or land forces, to whom the said money shall have been sent or given, that the same hath been received for the purpose for which the same hath been issued; which receipt shall be filed in the exchequer to charge the said minister, commissioner, &c., with the same; and the said receipt, on proof of the hand-writing, shall be sufficient to acquit and discharge the said secretary, &c., in their accounts at the exchequer. And by § 26. any foreign minister, &c. charged at the exchequer with the receipt of any secret service money, shall stand acquitted thereof, if within one year after his arrival in *Great Britain*, he shall either return the said money into the exchequer, or make oath before the barons of the exchequer, or one of them, that he has disbursed the money intrusted to him for foreign secret service, faithfully, according to the intent and purpose for which it was given, according to his best judgment for his majesty's service. And by § 27. whenever it shall be necessary for the secretary or secretaries of state, or first commissioner of the admiralty, to pay any money issued for foreign secret service, or for secret service in detecting, preventing, or defeating treasonable or other dangerous conspiracies against the state in any place within this kingdom, then it shall be sufficient to acquit and discharge such secretary, &c. or such secretary or secretaries, or the under-secretary of state in the office to which such secret service money hath been paid, or for the first commissioner of the admiralty, or the secretary of the admiralty, to make oath, that the money paid to him for foreign secret service, or for secret service in detecting, preventing, or defeating treasonable

§ 26.

§ 27.

able or other dangerous conspiracies against the state (*mutatis mutandis, as the case may be*), has been *bonâ fide* applied to the said purpose or purposes, and to no other; and that it hath not appeared to him convenient that the same should be paid abroad. By § 28. it is enacted, that no certain or stated sum shall be given or allowed out of the civil list revenues, under the name of secret service money, as had been theretofore the practice; but when any monies for secret service shall be deemed necessary by the commissioners of the treasury, the same shall be issued by their direction, as the occasion shall require, in the manner thereinbefore directed.

§ 29. And by § 29. whenever any money shall be issued for the purpose of any special service, or shall be given without provision of annual or other stated payment, but in a gross sum or sums, as to any secretary or secretaries of the treasury, or others, to be paid over to or for the use of any person or persons for special service, or as of royal bounty, the said money, together with the special service or services, or as of royal bounty, to which the same is applied, as also the name of the person or persons to whom it is paid, shall be entered in a book to be kept for that purpose in the treasury, in order to be produced to either house of parliament, if required. And for the better prevention of all practice by which such grants as of bounty may be made a colour under which pensions may be substantially granted, it is enacted by § 30. that any money so given as of royal bounty, to any person more than once in three years, the same is and shall be reputed a pension to all intents purposes whatsoever.

57 G. 3. c. 65. || By 57 Geo. 3. c. 65. it is enacted, that after two years from the passing of the act, his majesty may, under the sign manual, countersigned by three lords commissioners of the treasury, grant unto any person who shall have served his majesty not less than two years, as first lord of the treasury, or admiralty, or as secretary of state, or chancellor of the exchequer, a pension for life, not exceeding 3000*l.*, and at the expiration of any further period of two years from the passing of the act, may grant other like pensions to any other such persons until, at the expiration of twelve years from the passing of the act, six pensions shall have been granted, and after such six pensions of 3000*l.* shall have been granted, his majesty shall not grant any further pensions in respect of such offices: provided that when any such pension shall cease by death, &c. his majesty may grant other like pensions to any other such persons under the like restrictions, so that no greater number of pensions than are allowed by this act shall be in force at any one time, and so that after the expiration of twelve years no greater number than six such pensions shall be granted or existing at any one and the same time, except as in the act excepted.

§ 2. By § 2. his majesty is empowered to grant, after two years from the passing of the act, one other like pension of 3000*l.* to any such person as aforesaid, although such person shall not have held the office two years, and although the full number of pensions

pensions under the provisions of the act shall be in force: provided that every such pension shall be considered supernumerary, and shall, upon the ceasing of the first of any such pensions as shall be then in force under the provisions of the act, be deemed one of the pensions allowed by the act.

Section 3. empowers his majesty to grant pensions of 2000*l.* to persons having filled the offices of secretary for *Ireland*, or secretary at war, under the same restrictions and provisions as those in § 1. except that the period of service is five years, the pensions are not grantable till four years after the passing of the act, and the number of pensions allowed to be in force at once is only three.

§ 3.

By § 4. his majesty is empowered in a similar manner to grant pensions of 1500*l.* to persons holding the offices of joint secretary of the treasury, or first secretary of the admiralty, the period of service being five years, the pensions not being grantable till two years after the passing of the act, and not more than six of such pensions to be in force at once.

§ 4.

Section 5. relates to pensions to the chancellor of exchequer for *Ireland*.

§ 5.

By § 6. his majesty is empowered to grant pensions of 1000*l.* to any persons having filled the office of under secretary of state, or clerk of ordnance, or second secretary to the admiralty, under the regulations in § 1., the period of service being ten years, the pensions not to be grantable till the expiration of two years from the passing of the act, and not more than six such pensions to exist at once.

§ 6.

By § 7. in case any person shall have served in more than one of the classes of offices specified in the act, in respect whereof his majesty may grant a pension less than 3000*l.*, his majesty is empowered to grant to such person a pension not exceeding the pension annexed to the highest class of office in which such person has served, wherever his whole service in the several offices amounts to eight years, provided such person shall have served in such highest class for three years.

§ 7.

By § 8. every grant of a pension under this act to any person actually holding his office shall not take effect during his continuance in such office; and every such grant shall contain a provision for the suspension of such pension during the period of the person holding any office, place, or employment under his majesty, the profits of which shall be not less than double the amount of such pension; and shall also contain a provision for the abatement of one half of the pension during the time the pensioner shall hold any place under his majesty of equal amount with the pension, and no grant shall be valid without such provisions.||

§ 8.

The act ||22 G. 3. c. 82.|| next divides the payments of the civil list revenues into several distinct classes, and directs that no salary or pension shall be paid but in the order there prescribed. And it farther provides, that if any salary, fee, or pension, or any part thereof, remain in arrear at the usual time of payment,
at

22 G. 3. c. 82.

at the end of a period of two years, from want of cash belonging to the civil list revenues to pay and discharge the same, such arrear shall not be carried as a debt to the account of the year following, but shall be wholly lapsed and extinguished, as if the same had not been payable.

56 G. 3. c. 46.

|| By the 56 Geo. 3. c. 46. intituled *An Act for appropriating the civil list revenues, to ensure regular payment of the annual charges thereon, as specified in a schedule of the several classes thereof annexed*, the amount of the several classes are stated in a schedule (since amended by the 1 Geo. 4. c. 1.), and the treasury are to direct every quarter what sums shall be appropriated out of the civil list revenues to each distinct class, and the sums so appropriated are to be accordingly applied.

1 G. 4. c. 1.

By the 1 Geo. 4. c. 1., all the powers and provisions of the 1 Geo. 3. c. 1. 22 Geo. 3. c. 82. 25 Geo. 3. c. 61. 27 Geo. 3. c. 13. 33 Geo. 3. c. 34. (*Ir.*) 54 Geo. 3. c. 157. 56 Geo. 3. c. 46. 59 Geo. 3. c. 22. or of any other statute of *Great Britain* or *Ireland*, or of the United Kingdom in force at the demise of *George* the Third, are kept in force and applied to the civil list revenues, granted by that statute to His Majesty *George* the Fourth. And by § 7., wherever the total charge on the civil list exceeds 1,070,000*l.*, an account of the excess is to be submitted to parliament. The civil list settled by this act is 850,000*l.* in *England*, and 207,000*l.* in *Ireland*.||

1 Ann. c. 7.

The statute of 1 Ann. c. 7. which provides for the civil list establishment of that reign, restrains the power of the crown in the disposal of its land revenue, and enacts that no grant shall be made by the crown of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments (advowsons of churches and vicarages only excepted), whether belonging to the crown in right of the crown of *England*, or as part of the principality of *Wales*, or of the duchy or county palatine of *Lancaster*, or otherwise howsoever, for any longer term than one and thirty years or three lives, or some term determinable upon one, two, or three lives, and unless it be made to commence from the date or making thereof; and if to take effect in reversion, it do not, together with estate in possession, exceed three lives or the term of one and thirty years in the whole; unless the tenant be punishable for waste, and unless the ancient rent, or more, that hath been paid for the greater part of twenty years prior to the grant, be reserved upon it; and if no rent hath been paid before the grant, then unless there be reserved a reasonable rent, not under the third part of the clear yearly value of the estates comprised in the grant; and also such rents be made payable to the queen, her heirs or successors who shall make such grant, and to her or their heirs or successors, during the whole term of the continuance thereof. But where the greatest part of the yearly value of any tenements or hereditaments belonging to the crown shall, at the time of making any lease or grant thereof, consist of build-
ings thereon, which may want to be repaired or re-edified, in such
case,

case, to encourage the rebuilding or reparation thereof, it is provided that the crown may grant such tenements or hereditaments, for a term not exceeding fifty years or three lives, so as such grant be made to commence from the date or making thereof, or if in reversion, that it do not, with the estate in possession, exceed fifty years or three lives from the date or making thereof, and that it be under the other restrictions required in the grants of one and thirty years. But this proviso is repealed by stat. 34 Geo. 3. c. 75. except as to grants under the seals of the duchy and county palatine of *Lancaster*; and it is enacted, that where any land or ground belonging to the crown shall be deemed proper by the treasury for the erection of houses or other buildings thereon, or for necessary gardens, yards, curtilages, and other appurtenances to be enjoyed therewith (a), and shall be by their order directed to be appropriated to that use, and where the lessee shall agree and covenant to erect buildings thereon of greater yearly value than the land or ground so to be leased or granted, or where the greatest part of the yearly value of any tenements or hereditaments belonging to the crown doth or shall, at the time of making any grant thereof, consist of any buildings thereon, in any of those cases, the crown may grant the land or ground so directed to be set apart, or the tenements or hereditaments of the above description, for any term not exceeding ninety-nine years, or three lives, to be computed from the date of the grant, or if in reversion, not exceeding, together with the estate in possession, the like term of ninety-nine years, or three lives, to be computed in like manner from the date of the grant, so as when there shall happen to be any substantial building upon the ground to be demised, or that the buildings thereupon shall not require, or not be intended and agreed to be rebuilt, there be reserved an annual rent not less than two thirds of such annual sum as shall be deemed by the treasury a reasonable rent or consideration for such buildings and ground respectively, for the term intended to be granted, and so as there be paid to the use of the crown a fine to the amount of the remaining part of such annual sum, subject to a discount, which shall not be computed at a higher rate than the highest legal rate of interest at the time of making such grant; and when there shall happen to be no substantial building on such ground as the buildings thereon require, or shall be intended and agreed to be rebuilt, or other new buildings to be erected thereon, in that case there shall be reserved such annual rent as shall be deemed by the treasury a reasonable rent or consideration for such land and old buildings for the term intended to be granted, without taking any fine for the same; so as in every lease of land and buildings of this last description there be contained a covenant or condition on the part of the grantee, for the erecting of proper and substantial houses and buildings thereon, within a reasonable time, to be in each case limited for that purpose, and such other covenants for keeping buildings in repair, and doing all such other acts as the treasury shall think reasonable;

34 G. 3. c. 75. § 1. where ground of his majesty shall be deemed by the lords of the treasury, or the chancellor of the Duchy of *Lancaster* for the time being, fit for gardens or curtilages, &c. to be used with houses built on ground of his majesty, or any other proprietor, it shall be lawful for his majesty to demise such ground for any term not exceeding 99 years; provided (§ 2.) that no land, for garden, curtilage, &c. to be enjoyed with any houses, &c. under lease from his majesty, shall be granted for any term exceeding the term for which the houses, &c. are holden; and by § 3. no lease of any ground or land belonging to his majesty within the ordering or survey of the exchequer in *England* shall be granted for any life or lives; and by § 4. it shall be lawful to renew any such land demised

for garden, curtilage, &c. upon such terms as are prescribed by the 34 G. 3. c. 75. for the renewal of leases thereby authorised to be granted not exceeding 99 years.||

able; and so as all such rents be reserved to be paid free of all taxes and assessments during the whole term, except such rent or such part thereof, during such part of the term as the treasury shall think fit to be allowed, not exceeding in any case the term of three years: and so as every such grantee or lessee sign, seal, and deliver a counterpart of his grant or lease, which counterpart shall not be subject to any stamp duty.

34 G. 3. c. 75.

§ 4.

And it is further enacted, that on every grant, lease, or other assurance by the crown under the great seal, or seal of the exchequer of any manors, messuages, lands, tenements, rents, tithes, woods, or other hereditaments, (advowsons of churches and vicarages, and such tenements and grounds, with buildings erected thereon, as are hereby authorized to be granted for any term not exceeding ninety-nine years or three lives, and whereon any fine or fines shall be payable as aforesaid only excepted,) whereby any estate or interest whatever at law or in equity shall pass from the crown, there be reserved such clear annual rent as by the treasury shall be deemed reasonable, without taking any fine for the same; which rent shall be made payable to the crown during the whole term of the continuance thereof; but no such grant shall be good unless the grantee execute a counterpart thereof, such counterpart however not to be subject to any stamp duty.

§ 5.
||(a) See
48 G. 3. c. 75.
§ 7.||

With respect to the renewal of the crown leases, (a) it is enacted, that no lease or grant of any manors, messuages, lands, tenements, tithes, woods, or other hereditaments belonging to the crown, within the ordering and survey of the exchequer in *England*, shall be renewed, until within five years of the period of the expiration thereof, except such tenements and hereditaments as are authorized by this act to be granted for any term not exceeding ninety-nine years; nor shall any grant of any such tenements and hereditaments so authorized to be granted, be renewed until within twenty years of the period of the expiration thereof, nor any grant for lives, so long as there shall be more than one of such lives in being. However, where it shall appear to the satisfaction of the treasury, that any person, has, at any time before the passing of this act, entered into any covenants or engagements to obtain renewals at earlier periods, in confidence that the same could be renewed according to the ordinary practice in such cases, in that case a renewal may be made at a greater distance of time from the expiration of the lease so as to enable such person to perform his engagements: In like manner, where any person shall be the lessee of any tithes of any lands, or any profits issuing out of any lands, and shall be the owner of, or interested in such lands, the treasury may order a renewal of such lease at such times as shall appear to them convenient for the most beneficial enjoyment of such tithes or other profits together with such lands: and where it shall appear to the satisfaction of the treasury, that any lessee of lands belonging to the crown, has, before the passing

of

of this act, demised, or agreed to demise the same, for the purpose of improving them by building, and has entered into any covenants or engagements, in consequence whereof such person would, by reason of the improvements so made, be bound to pay, upon the renewal of any lease or grant of such lands, more than he would be entitled to receive from the under-lessees or lessee thereof; in such case, the treasury may make an abatement in the rent and fine to be reserved and paid to the crown in consequence of such improvements, and such lease or grant as shall be made (regard being had to such circumstances) shall be good and effectual. It is also provided, that where any wastes belonging to the crown shall be enclosed by the authority of parliament, or where any lands or grounds belonging to and held under any lease or grant from the crown under the great seal, or seal of the exchequer, shall be deemed by the treasury fit to be planted and appropriated to the growth of wood or timber, or any farm-house, or other substantial building, to be erected for the better management and improvement of any lands or grounds, or any pits, shafts, levels, watercourses, engines, or other works to be made for the better working of any mines, quarries, or collieries belonging to the crown, and holden as aforesaid, and where the term or estate in possession therein shall be deemed by the treasury to be insufficient to repay the cost and charges of such works and improvements, with reasonable profit and advantage to the parties making or causing the same to be made, or to their representatives or assigns, in all such cases it shall be lawful at any time hereafter to grant any further lease of any such houses or other buildings, land, or ground, for any term not exceeding the term hereby authorized to be granted; provided that there be reserved and made payable to the crown the rents above required, and that covenants or conditions be inserted therein on the part of the lessees, for erecting such new houses or other buildings, and performing such respective works and improvements, at the costs and charges of such lessees, within a reasonable time, to be in each case limited and appointed for that purpose, where such houses or buildings, or works and improvements, shall not have been previously erected or made. But no grant shall be made of any lands capable of survey until a survey shall be had, and estimate be made, of the improved annual value of the estate proposed to be granted, by a surveyor to be appointed by the treasury or surveyor-general of the land revenue, (a) which surveyor is to certify the same upon oath, and is also to state for what term of years it shall appear to him most beneficial for the interest of the crown to grant such holding or ground, regard being had to the quality and condition of the building then standing upon such ground, and of the buildings proposed to be erected thereon. But where the tenements proposed to be leased are of a fixed and unimproveable value, or where they are incapable of valuation by means of a survey or inspection, or where they are of such small value as not to be worth the expense of a survey, a lease of them

§ 7.

§ 8.

|| (a) The functions of the surveyors-general are now vested in the commissioners of his Majesty's woods, forests, and land revenue.

50 G. 3. c. 65. ||

§ 9.

may

may be granted or renewed, under the direction of the treasury, without any previous survey or estimate.

§ 21.

The act further provides, that the surveyor-general shall every three years, within thirty days after the commencement of the session of parliament, certify under his hand and seal to the king and both houses of parliament, what leases or grants of any part of the land-revenue of the crown shall have been made within that time, for what terms, and also the annual value of the tenements and hereditaments comprised in such leases, as returned on oath by the surveyors employed to survey the same, and the annual value by the last preceding survey thereof, (where there shall happen to be a former survey or valuation thereof in the custody or power of the surveyor-general,) what rents shall have been reserved upon, and what fines paid for every such lease, and the considerations for making them; and also, so far as the same can be done, the rents and fines which were reserved and paid upon or for the last preceding lease or grant of such tenements or hereditaments.

48 G. 3. c. 73.

¶ By 48 Geo. 3. c. 73. the surveyor-general may, with approbation of the treasury, contract for the surrender of any crown lease, or purchase and buy up any lease, or term of any messuages, &c. held of the crown, which may be convenient for the public service, and pay the consideration out of the monies arising from any sales theretofore made, and which may be vested in the bank of *England*, or which may thereafter arise from the sale of any property belonging to the crown under that act, or the recited acts.

§ 10.

By § 10. the chancellor and council of the duchy of *Lancaster* may sell and dispose, under the duchy seal, of crown manors in the duchy, consisting of manerial rights without lands, or with very small quantities of land, and manors in the duchy of which his majesty is not sole proprietor, and intermixed with the property of individuals, and lying remote from other crown property, and of ground or buildings appertaining to any castle or strong building now or lately used for a common gaol, or with any building used for holding the assizes, or for the court house or gaoler's house, or in which the magistrates for any district may claim to have rights, and of tythes in the duchy issuing out of the property of individuals, and of mills, fisheries, ferries, tolls, and stalls of markets, fairs, and wastes of the crown, upon which encroachments have been made by individuals, for the best prices which they can procure for the same: and by § 11. similar property, elsewhere situate, may be sold by the surveyor-general.

§ 13.

By § 13. the surveyor-general may agree with any persons, tenants of copyhold tenements held of the crown for the enfranchisement of such tenements, or with any persons (though not tenants of such copyholds) for the sale of the manerial rights of the crown therein, for the best price which can be procured, and which shall be approved by the treasury; and the tenements so agreed to be enfranchised, &c., and the consideration, shall be specified in a certificate

tificate to be granted for that purpose, &c., to be enrolled and attested in the form and manner, &c. contained in the 34 Geo. 3. c. 75. §. 11. as to the conveyance of fee-farm rents; and such certificate and receipt for the consideration money shall be enrolled in the court rolls of the manor, by the steward, or his lawful deputy, and after such enrolments and thenceforth the copyhold tenements included in such certificate shall be enfranchised, and the tenants freed and discharged from all claims and demands which may be made by his majesty, &c. or any persons claiming under him as lords of the manor, to which such tenements belonged, &c.: provided (§ 14.) that no such contract shall be made unless by special warrant issued for that purpose by the lords of the treasury.

§ 14.

By § 28, 29, 30. provisions are made for exchanging lands of the crown for lands of individuals, as to which see also 52 G. 3. c. 161. § 2. 4. and 1 & 2 G. 4. c. 52. § 4.||

§ 28, 29, 30.

Although the above statute of 1 Ann. c. 7. § 7. restrains the crown from alienating the hereditary revenues and duties thereby granted for the support of the civil list, yet it does not disable it from making such grants or leases of lands and hereditaments, parcel of the duchy of *Cornwall*, as it was authorized to make by stat. 12 W. 3. c. 13. or from granting away or restoring estates forfeited for treason or felony, seized upon outlawry, or taken in execution, or from making customary grants or admittances of copyhold estates. And the statute of 1 Geo. 3. c. 1. which carries the hereditary duties to the aggregate fund, confirms and establishes the above clauses of the statute of Queen *Anne*.

||And see
1 G. 4. c. 1.||

||By the 39 and 40 Geo. 3. c. 88. § 1. reciting the above statutes of Ann. and Geo. 3. restraining and regulating grants, leases, &c., of crown lands by the kings and queens of *England*, it is enacted, that none of the provisions and restrictions of the said acts shall extend to any manors, messuages, lands, tenements, or hereditaments, which have been or shall be purchased by his majesty, his heirs or successors, out of any monies issued for the use of the privy purse, or with any monies not appropriated to any public service, or to any manors, &c. which have or shall come to his majesty, his heirs or successors, by gift, devise, or descent from any ancestors, not being kings or queens of this realm.

59 & 40 G. 3.
c. 88.

And by § 4. his majesty, his heirs and successors are empowered by instrument under the sign-manual, attested by two or more witnesses, or by will attested by three or more witnesses, to grant, sell, give, or devise, any such manors, &c. as any of his majesty's subjects might grant, sell, give, or devise the same.

§ 4.

And by § 5., if no disposition by grant, will, or otherwise, shall be made in pursuance of this act of such manors, &c., then such manors, &c. shall, on the demise of his majesty, &c. descend and go in the same manner as if this act had not been made, subject to the provisions of § 10. as to so much thereof as shall be personal estate; and all such manors, &c. being of freehold tenure

§ 5.

in

in fee simple, which shall so descend on the demise of any king or queen, shall be subject to all the restrictions in the said recited acts as to crown lands.

§ 6. By § 6. All such manors, &c. vested in his majesty, &c. or any trustees for him, shall be subject to all such taxes and impositions, parliamentary and parochial, as the same would have been subject to in the hands of any subject; such taxes, &c. to be discharged out of his majesty's privy purse.

§ 9. By § 9., any queen consort is empowered, during the joint lives of the king and such queen consort, by deed or will to grant, alien, or devise any manors, &c. purchased by or in trust for her; and also by will to bequeath all chattels, real or personal, in all respects as if she were sole or unmarried.

§ 10. By § 10. it is enacted and declared, that all such personal estate of his majesty, &c. as shall consist of monies issued for the use of the privy purse, or not appropriated to any public service, or goods, chattels and effects not come to his majesty, &c. with or in right of the crown of this realm, shall be deemed personal estate subject to disposition by will; and such will shall be in writing, under the sign-manual, or shall not be valid; and all such personal estate shall be subject to such debts as are payable out of the privy purse and subject thereto; such personal estate not bequeathed or disposed of shall go in such manner on the demise of his majesty, &c. as if this act had not been made.

4 G. 4. c. 18.

By the 4 Geo. 4. c. 18. the powers of the last act are extended and applied to all manors, &c. whereof his majesty, his heirs or successors, or any trustees for him or them, at the time of his or their *accession to the crown*, were or should be seised or possessed, and which before such accession he or they might have legally granted, sold, given, or delivered.||

The act in *Barbadoes* was passed the 12th of *Sept.* 1663. *Vide stat.* 1 Ann. c. 7. Comm. Journ. 30 March 1702. See debates in the House of Lords, in *March* 1795, upon the pensions granted out of this fund to Lord *Auckland* and Mr. *Burke*. — The right of the crown to levy these duties, by virtue of the prerogative only in the newly ceded

The duty of four and a half *per centum* arising from *Barbadoes* and the *Leeward Islands*, was a perpetual and irrevocable revenue granted to King *Charles II.* his heirs and successors, originally by an act of the assembly of *Barbadoes*, and afterwards by similar acts of the assemblies of the other *British Leeward Islands*, charged upon all dead commodities the growth of the islands shipped to any part of the world. It appears to have been granted in exchange for an acknowledgment of forty pounds of cotton *per head*, and all other duties, rents, and arrears of rent due to the proprietor or grantee of the above islands, for quieting the possessions of the inhabitants of the islands, for a full confirmation of their estates and tenures, for holding their several plantations to them and their heirs for ever in free and common socage, and in consideration of the great charges necessary for maintaining the honour and dignity of his majesty's authority there, the public meetings of the sessions, the often attendance of the council, and the reparations of the forts and other public charges incumbent upon the government. These duties were, during part of King *William's* reign, appropriated with the other hereditary revenues of the crown for the support of the civil list, but were disappropriated in the commencement of the succeeding

succeeding reign. This disappropriation seems to have taken place in consequence of an address from the House of Commons to the queen, grounded upon a petition to that House from the merchants and planters of *Barbadoes*, praying that the duties may be applied to the local purposes of the islands, with which, as it may be supposed, the queen promised a compliance. But notwithstanding this resolution and address of the House of Commons, and consequent declaration from the throne, these duties have not in fact been, or been considered to be, appropriated merely to the service of the islands, but are holden to be an entirely open fund, applicable to any purposes, which the bounty of the crown may direct, or its necessities may require.

cies, was finally ceded to *Great Britain* by the definitive treaty of peace at *Paris* on the 10th of *February* 1765. The chief stipulation material to the present purpose in favour of the inhabitants, as well by the treaty as by the articles of capitulation, was this — That, as they would become, by their surrender, subjects of *Great Britain*, they should enjoy their properties and privileges, and pay taxes, in like manner as the rest of his majesty's subjects of the other *British Leeward Islands*. The island and its dependencies being thus become a *British* colony, one of the first measures of government was to issue a proclamation under the great seal, bearing date the 7th day of *October* 1763, wherein, amongst other things, it is declared, "That the king, by letters patent under the great seal, had given express power and direction to the governor, as soon as the state and circumstances of the colony would admit thereof, with the advice and consent of the council, and the representatives of the people, to make, constitute, and ordain laws, statutes, and ordinances, for the good government thereof, as near as may be agreeably to the laws of *England*, and under such regulations and restrictions as are used in the other *British* colonies." This proclamation was followed by another, dated the 26th of *March* 1764, inviting purchasers upon certain terms and conditions. The governor thus said to have been appointed, was General *Melville*, whose commission however did not bear date until the 9th of *April* 1764, and the assembly which he was directed to summon met for the first time in 1765. But before that time, indeed before the departure of the governor from *England*, letters patent were issued under the great seal, bearing date the 20th of *July* 1764, which after reciting, that the above duty of four and a half *per centum* was payable in *Barbadoes*, and in all the *British Leeward Islands*; and the expediency and importance to the other islands that the like duty should take place in *Grenada*, orders and directs, by virtue of the prerogative royal, that from and after the 29th day of *September* then next, the duty of four and a half *per centum* in specie should be raised and paid to the king, his heirs and successors, upon all dead commodities, the growth and produce of *Grenada*, that should be shipped off from the same, in lieu of all customs and duties formerly paid to the *French* king. The question therefore submitted to the court was, Whether it was competent to the crown, under the above circumstances, to levy this duty merely by virtue of the prerogative royal? The determination of the court was against the crown, but it rested solely on the circumstance of the proclamations of *October* 1763, and *March* 1764, being of prior date to the letters patent, by which means the king had precluded himself from the exercise of legislative authority over *Grenada*, before the letters patent were issued. "Through inattention," said Lord *Mansfield*, "of the king's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last act is contradictory to, and a violation of the first, and is therefore void; and the duty can only now be levied, by an act of the assembly of the island, or by an act of the parliament of *Great Britain*." But, although the question in this case was immediately determined upon the inversion of the order of the instruments, yet the noble and learned judge, in delivering the judgment of the court, went very fully into the law upon the subject. His lordship stated these six propositions as clear, and in which the counsel on both sides were perfectly agreed. 1st, A country conquered by the *British* arms becomes a dominion the king in right of his crown; and therefore necessarily subject to the legislature, the parliament of *Great Britain*. 2d, The conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens. 3d, The articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable, according to their true intent and meaning. 4th, The law and legislative government of every dominion equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, put himself under the law of the place.

islands upon the peace of 1765 was very fully discussed in the case of *Campbell and Hall, Cowp.* 204. That case was as follows: — The island of *Grenada* surrendered by capitulation in 1762, and, with its dependencies

An Englishman in *Ireland*, *Minorca*, the *Isle of Man*, or the Plantations, has no privilege distinct from the natives. 5th, The laws of a conquered country continue in force until they are altered by the conqueror: the absurd exception as to *Pagans*, mentioned in Calvin's case, shews the universality and antiquity of the maxim. For that distinction could not exist before the *Christian* æra, and in all probability arose from the mad enthusiasm of the *Crusades*. 6th, If the king, that is, the king without the concurrence of parliament, has a power to alter the old and introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles; he cannot exempt an inhabitant from that particular dominion; as, for instance, from the laws of trade, or from the power of parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put. As to the question, Whether the king had of *himself* the power to substitute the present duties instead of the imposts formerly paid to the *French* king, between the 10th *February* 1763, the day the treaty of peace was signed, and the 7th of *October* 1763, the day on which the first proclamation bears date, his lordship said, "It is left by the constitution to the king's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword, or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection, and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted, that the king may change part or the whole of the law or political form of government of a conquered dominion." His lordship then went into the history of the conquests made by the crown of *England*, and in the course of his enquiry took notice of the opinion delivered by Sir *Philip Yorke* and Sir *Clement Wearge* respecting *Jamaica*. In 1722, the assembly of that island being refractory, it was referred to those two great law officers to know, "what could be done if the assembly should obstinately continue to withhold all the usual supplies." They reported thus: "If *Jamaica* was still to be considered as a *conquered island*, the king had a right to *levy taxes* upon the inhabitants; but, if it was to be considered in the *same right* as the *other colonies*, no tax could be imposed on the inhabitants, but by an assembly of the island, or by an act of parliament."

The forfeited estates in *Scotland*, which were annexed to the crown by the statute of 25 Geo. 2. c. 41. are disannexed therefrom by the statute of 24 Geo. 3. sess. 2. c. 57. for the purpose of enabling his majesty to grant them to the heirs of the former proprietors.]

3. How far the King must have an Interest, in order to enable him to grant.

3 Co. 55. b.
56. a.
[(a) Grants of the crown lands are now restrained by stat. 1 Ann. c. 7. *suprà*; ¶ *et vide* 59 & 40 G. 3. c. 88. 4 G. 4. c. 18. *suprà*.]

There are three kinds of inheritances which the king may grant, though different as to the manner; which difference arise from the nature of his interest. 1st, All his lands, tenements, rents, commons, &c. he may grant in possession, reversion, or remainder. (a) 2dly, A corody in a religious house, or presentation to a church, which he can only grant in possession, or when the corody or the church become vacant; for of these he hath only the presentation or recommendation, and therefore cannot grant them in reversion. 3dly, Offices which he may grant, but cannot himself occupy.

5 Co. 93.
Berwick's case. Moor, 393. S. C.

If the king grants for three lives, *habendum a die consecrationis literarum patentium*, this is void; because an estate of freehold cannot commence *in futuro*, and letters patent under the great seal amount to a livery; and if the freehold should pass immediately from a day to come, then the king would have a particular interest in the mean time without any donor, which is against the rules of law.

Upon

Upon a grant of the office of a searcher in the port of *Plymouth*, it was adjudged, that the king may grant an estate in an office to commence *in futuro*, or upon a contingency; for he hath no inheritance in the office or the execution of it, but in point of interest only to grant; and it was said in this case, that there was a diversity between offices in fee existing, and such as were granted only for life; which being as a new thing created might, as a rent *de novo*, be granted to commence *in futuro*.

The king may grant that which is not actually in him at the time of the grant; as the marriage of a ward (*a*), *quando acciderit*; although he had the ward in right of his prerogative.

liveries, purveyances, &c. were always in effect alienable, as they might be released or discharged. 5 Mod. 56. Skin. 605. *per Holt C. J.* in his argument in the Banker's case. — But the king cannot grant land when it shall escheat. Raym. 241. — Whether he can grant land when it shall become derelict. Raym. 241. 2 Lev. 171.

The king cannot grant an annuity, for his person is not chargeable as the person of a subject; but, if he grant it out of his excise, or any branch of his revenue, it is good, for there is somewhat therewith chargeable.

4. Grants tending to a Monopoly; and therein, of Things of a new Invention.

The king's grant of a monopoly, as of the sole buying, selling, working, making, or using of any commodity, is not only void by the common law, but the persons procuring such grants are said to be punishable by fine and imprisonment.

And indeed the freedom of trade and labour is of such consequence, that as no person can by his own act totally debar himself of this privilege, much less can he be restrained by the king's letters patent.

But notwithstanding this, it is agreed, that the king may for a reasonable time grant to a person the sole use of any art first invented by him; and this it seems the king might do at common law, and is therefore a matter excepted out of the statute of monopolies, 21 Jac. 1. c. 3. by which it is provided, "That no declaration in the statute shall extend to any letters patent and grants of privilege for the term of fourteen years or under, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use (*b*); so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters patent or grants of such privilege; but that the same shall be of such force as they should be if the said act had never been made, and of none other."

4 Mod. 275.
The King v.
Kemp. 2 Salk.
465. pl. 2.
Carth. 350.
Comb. 334.
S. C. Ld.
Raym. 49.
Skin. 46. pl. 4.

Dyer, 108.
2 Roll. Abr. 198.
Jenk. 246.
(a) Wards,

Salk. 58. pl. 1.
per Barones
Scaccar.

Vide tit. Mo-
monopoly, vol. v.

5 Mod. 128.
Noy, 182.

21 Jac. 1. c. 3.

[(b) See 10
Barn. & C. 22.]

In the construction of this branch of the above-mentioned statute, the following points have been held:

3 Inst. 184.

[(a) But *quære* of this, for where the question was,

That no new invention concerning the working any manufacture is within the meaning of this exception, unless it be substantially new, and not barely an additional improvement of an old one. (a)

Whether an addition to the old stocking-frame was the subject of a patent? Lord *Mansfield* said, that if the general question of law, *viz.* that there can be *no patent for an addition*, be with the defendant, that was open on the record, and he might move in arrest of judgment; but that that objection would go to repeal almost every patent that was ever granted: there was a verdict for the plaintiff, and 500*l.* damages; which was acquiesced in. *Morris v. Bransom*, Sitt. West. East. 1776. Bull. N. P. 76. And since that case, it hath been the generally received opinion in *Westminster-Hall*, that a patent for an *addition* is good. But then it must be for the *addition* only, and not for the old machine too. 2 H. Bl. 489. and *Rex v. Elsee*, Sitt. West. Mich. 1785, *coram Buller J.* Bull. N. P. 78. (last edition.) ||11 East R. 109. n. *Hornblower v. Boulton*, 8 Term R. 95. *acc.*; *et vide post*, p. 503.]]

3 Inst. 184.

That no old manufacture in use before can be prohibited in any grant of the sole use of any such new invention.

10 Mod. 131.

That if a patent be granted in case of a new invention, the king cannot grant a second patent; for the charter is granted as an encouragement to invention and industry, and to secure the patentee in the profits for a reasonable time; but when that is expired, the public is to have the benefit of the discovery.

3 Inst. 184.

[(b) This notion is now exploded.]

It is held by my Lord *Coke*, that a new invention to do as much work in a day by an engine as formerly used to employ many hands (b), is not within the said exception; because it is inconvenient in turning so many labouring men to idleness.

2 Salk. 447.

[2 H. Bl. 491. S. C. cited by *Eyre C. J.*]

If the invention be new in *England*, though the thing was practised before beyond sea, the patent is good; because the act intended to encourage new devices useful to the kingdom; and it is not material whether the discovery be owing to study or travel.

Harmar v.

Playne, 14 Ves. 130.

||The Court of Chancery will grant an injunction upon possession under a patent until the right can be tried, even though it is subject to considerable doubt.

Ibid. 133.

A patent for improvements to a machine is valid; but it will not restrain the use of the original machine without improvements.

Ex parte Fox, 1 Ves. & B. 67.

A patent will be granted for an improved engine which does not infringe on an existing patent: but if the improvements cannot be used without the engine for which the existing patent was granted, the improver must wait the expiration of the first patent: but no costs will be allowed where the caveat is reasonable. ||

3 Mod. 77.

[Where a patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention

If a man invent a new art, and another happen to learn it before the inventor can obtain a patent, a patent afterwards obtained is void. (c)

person who has learnt it has not disclosed it.] ||See *Lewis v. Marling*, 10 Barn. & C. 22. ||

Skin. 204.

[Where a patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention

If a person obtains a patent for a new invention, and another makes use of the invention without the licence or consent of the patentee, an action lies against him.

his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention

invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification. *Per Buller J.* 1 Term R. 607.]

[It will not impeach the validity of a patent that another person first made the discovery which is the subject of it, if in truth the patentee were the first who made it public, for it was the disclosure of new inventions which the statute meant to encourage. It is therefore a provision, and indispensable condition in all patents, that the patentee shall ascertain the nature of his invention, and in what manner it is to be performed: the specification is the price which the patentee is to pay for his monopoly. It hath been laid down, therefore, that the patentee must disclose the secret and specify the invention in such a way, that other artists of the same trade may be taught to do the thing for which the patent is granted, by following the directions of the specification, without any new addition or invention of their own. He must describe it so that the public may, after the expiration of the term, have the use of the invention in as cheap and beneficial a way as the patentee himself uses it; and therefore, if the specification describes many parts of an instrument or machine, and the patentee uses only a few of them, or does not state how they are to be put together and used, the patent is void. And if the specification be in any part materially false or defective, if there be any ambiguity affectually introduced into it, or any thing which tends to mislead the public, if the patentee say, that by one process he can produce three things, and fail in any one; or the specification direct the same thing to be produced several ways, or by several different ingredients, and any one of them fail; in these cases the patent is against the law, and cannot be supported. In a case before Lord *Mansfield* for infringing a patent for steel trusses, it appeared that the patentee, in tempering the steel, rubbed it with tallow, which was of some use in the operation; and because this was omitted, the specification was holden to be insufficient, and the patent was avoided. So, in an action for infringing the plaintiff's patent for making patent yellow; three objections were made to the patent: 1st, That after directing that lead should be calcined, it directed another ingredient, namely *minium*, to be taken, which would not answer the purpose, as it did not say whether it was to be calcined or fused, and by reference to the preceding words it would be to be calcined, which would not answer, as fusion was necessary. 2dly, That it directed any kind of fossil-salt to be taken, whereas only one kind of fossil-salt, namely, *sal gem*, would answer the purpose, because it must be a marine salt. (a) 3dly, That all the things together did not produce the effect; for the patent was to do three things, but this produced but one only. These were allowed to be decisive objections to the patent, and that it was void.

The above act of parliament having excepted only patents of the sole working or making any manner of *new manufactures*, it

2 H. Bl. 470.;
||and see
10 Barn. & C.
22.|| Rex v.
Arkwright,
Sitt. West.
Trin. 1785.
Bull. N. P. 78.
(last edit.)

Liardet v.
Johnson, Sitt.
West. Hil.
1778. Bull.
N. P. 79.
Turner v.
Winter,
1 Term R. 602.

||(a) See *Dan-*
son & Lloyd,
33.||

hath been said that the foundation of all patents must be the *manufacture* itself; that there can be no patent for a mere principle, nor for the mere application or mode of doing a thing, for a method only, without having carried it into effect, and produced some new substance. On the other hand it hath been said, that though there can be no patent for a mere principle, yet for a principle so far embodied and connected with corporal substances as to be in a condition to act, and to produce effects in any art, trade, mystery, or manual occupation, there may be a patent; that a *method* may of itself be the subject of a patent: that Mr. *Hartley's* patent was solely for a *method* of securing buildings from fire: that it was not for making the plates of iron, for those were in use before: that it was not for the effect produced, for that was merely negative; but it was for his *method* of disposing the plates of iron so as to produce the proposed effect: that new methods of manufacturing articles in common use, for which a variety of patents have been granted, where the sole merit and the whole effect produced are the saving of time and expense, and thereby lowering the price of the article and introducing it into more general use, may be said to be *manufactures* in one of the common acceptations of the word, as we speak of the manufactory of glass or any other thing of that kind: that the patents in these cases cannot be for the effect produced, for it is either no substance at all, or what is exactly the same thing, as to the question upon a patent, no new substance, but an old one produced advantageously for the public: that it cannot be for the mechanism, for there is no new mechanism employed: it must then be for the *method*; that is, in the words of Lord *Mansfield*, for *method* detached from all *physical existence* whatever. Such were some of the topics of argument discussed in the Court of Common Pleas in the following case, upon which the judges of that court were equally divided.

Boulton &
Watt v. Bull,
2 H. Bl. 463.

A patent was granted to the plaintiff *Watt* for a *new invented method* of lessening the consumption of steam and fuel in fire-engines. The specification stated, that the *method* consisted of certain *principles*, and described the mode of applying those principles to the purposes of the invention: and an act of parliament reciting the patent to have been for the making and vending of *certain engines* invented by *Watt*, extended to him for a longer term than fourteen years, the privilege of *making, constructing, and selling the said engines*. The jury found that this invention was a new and useful invention, and that the privilege vested in *Watt* and his assigns by the act of parliament was infringed by the defendant as charged in the declaration. They also found that the specification was of itself sufficient to enable a mechanic acquainted with the fire-engines previously in use to construct fire-engines producing the effect of lessening the consumption of fire and steam in fire engines upon the principle invented by the plaintiff *Watt*. The questions proposed for the opinion of the court were, 1st, Whether the patent was good in law,

law, and continued by the act of parliament? 2d, Whether the specification was in point of law sufficient to support the patent?

In consequence of the difference of opinion in the Court of Common Pleas upon this case, it was afterwards moved to dissolve the injunction which had been obtained for the purpose of trying the validity of the patent in an action; but the Chancellor said that there must be another action, and that the injunction in the mean time must be continued, and that he could not impose any terms upon the patentees in bringing the action. 3 Ves. jun. 140. Accordingly, another action was brought in the Court of Common Pleas, which came to be tried at the sittings in *London*, Dec. 16th, 1796, before the Lord Chief *Eyre*, when a verdict was found for the plaintiff with nominal damages.]

¶ The defendants then brought a writ of error into the Court of King's Bench, which came on to be argued in *Hilary* Term 1799, and it was contended for the plaintiffs in error, 1st, That the invention was not of any organized instrument or manufacture, but of mere abstract principles. 2d, That the specification was insufficient. But the court, after elaborate argument, were with the defendant in error on both points, and affirmed the judgment of the Court of C. B. The court seemed to admit, that a patent for a mere philosophical *principle* would be void, but considered that a patent for a definite improvement, and an addition to an old machine, was good.

Hornblower
v. Boulton,
8 Term R. 95.

In a recent case of *scire facias* to repeal a patent, the invention was called "a new or improved method of drying and preparing malt;" and the specification stated that the invention consisted in heating malt to 400° and upwards of Fahrenheit, according to processes after described, and so treating it, that the greater part of the saccharine and amylaceous principles of the grain became changed into a substance resembling grain of a deep brown colour, and readily soluble in hot or cold water. It then proceeded to state several modes of performing this operation; but it did not describe any new machine invented for that purpose, nor the state, whether moist or dry, in which the malt was to be submitted to the process; nor the utmost degree of heat which might be safely used, nor the length of time to be employed; nor the exact criterion by which it was to be known when the process was accomplished. The court held the patent void, inasmuch as, 1st, the specification was not sufficiently precise; and 2d, the patent appeared to be for a different thing from that mentioned in the specification: for "a new method of drying and preparing malt," appeared to designate a mode of drying and preparing malt for making beer; whereas the specification set forth a mode of giving to malt, previously prepared, the qualities of being soluble in water, and colouring the liquor in which it was dissolved.

Rex v.
Wheeler,
2 Barn. & A.
345.

So where the patent was for a machine for making paper in single sheets, without seam or joining, from one to twelve feet wide,

Bloxam v.
Else, 6 Barn.
& C. 169.

wide, and from one to forty-five feet in length, it was held that this imported, that paper varying in width between those extremes, should be made by the same machine; and the patentee at the time of taking out the patent, not having any machine capable of producing paper of different widths, the patent was held void.

Savory v.
Price, Ry. &
Moo. 1.

So where the patent was for making a neutral salt, under the name of *Seidlitz Powder*, and the specification stated that the powder was to be made of three ingredients, mixed in certain proportions, and set out three detailed recipes, No. 1. No. 2. No. 3., for making each of the ingredients; but it appeared in evidence that these ingredients were, in fact, substances well known, and sold at the chemists, called "*Rochelle salts*," "*carbonate of soda*," and "*tartaric acid*," the union of which, in the manner prescribed, would produce *Seidlitz Powder*, the specification was held bad by Lord *Tenterden*; since, instead of explaining to the public, in a simple way, the composition of the powder, it led them to suppose a laborious process requisite to produce each of the ingredients.

Wood v.
Zimmer,
Holt Ca. 58.

So if the specification omit any ingredient in the production of the article which, though not necessary, is a more expeditious and beneficial mode of producing it, the patent is void.

Rex v. Met-
calf, 2 Stark.
Ca. 249.

So where the patent was for a *tapering brush*, and it appeared that the brush only differed from common brushes in the circumstance of the hairs or bristles being purposely made of unequal length, it was held that the description was improper, and the patent void.

Cochrane v.
Smethurst,
1 Stark. Ca.
208.

So also where the patent was for an improved mode of lighting cities, towns, and villages, and the specification described merely an improved street-lamp, the patent was held by *Le Blanc J.* too general in its terms.

Rex v. Ark-
wright, cited
11 East, 109.
Rex v. Elsee,
ibid. nota.

It was formerly laid down by Mr. *J. Buller*, that if the invention consisted in an improvement only, and the patent were for the whole machine, it was void.

Harmar v.
Playne,
11 East, 101.

But in a case where a person had obtained a patent for a manufacturing machine, of which he duly enrolled a specification, and afterwards obtained another patent for improvements in the said machine, with the usual proviso, that the patent should be void if the patentee did not enrol a specification, particularly describing and ascertaining the nature of the said invention, and in what manner the same was to be performed; it was held, that a specification containing a full description of the whole machine so improved, but not distinguishing the new improved parts from the old parts, or referring to the former specification, otherwise than as the second patent referred to the first, was a performance of the condition. In this case Lord *Ellenborough* observed, that the difficulty which pressed most against the specification was, whether the mode of making it was not calculated to mislead a person looking at it, and to induce him to suppose that the term for which the patent was granted might extend to pre-
clude

clude the imitation of other parts of the machine than those for which the new patent was granted, since he could only tell by comparing it with some other patent, what were the new and what the old parts. And the force of this observation does not appear to be removed by what was said by *Le Blanc J.*, that "suppose the specification had merely described the improvements, still the party must have referred to the original specification, or have brought a full knowledge of it with him, before he could understand truly how to adapt the new parts described to the old machine." But the real objection to the specification did not rest on the original machine being described, for that might be necessary for the purpose of understanding the improvement, but on the two being blended together, so that it was impossible, by mere reference to the new specification to separate the old invention from the improvement, so as to see distinctly how much was protected by the first patent, and how much by the second. And surely the proviso would have been better complied with had the new specification distinctly pointed out where the original invention ended, and the improvements began. This would have satisfied both the objects to be attained by a specification, 1st, that of explaining to the public the invention, in order to their adopting and using it; and 2d, that of clearly identifying what it is that is protected by the patent.

Subsequent cases also confirm the doctrine, that a specification for an improvement must not set out the whole machine as the invention of the patentee. And if the description of the instrument makes no distinction between the old and new parts, it has been held that it is not helped by a plate annexed, containing a detached representation of the parts in which the improvement consists.

The patent, however, will not be vitiated, though the inventor, between the time of taking out the patent and the making of the specification, make improvements in his machine, and then in the specification claim the machine so improved.

The invention must be new and useful, of which a jury are to judge; and if a patent is obtained for several inventions, the whole patent is void if any one of them want novelty.

624. *Brunton v. Hawkes*, 4 Barn. & A. 541.

But if one part of the machine for which the patent is obtained turn out to be *useless*, this will not vitiate the patent, if the specification do not state that part to be essential.

If, on the other hand, one part of the described invention be not *new*, the patent will be void.

3 *Brod. & B.* 5. 6 *Moo.* 71.

And as the patentee is bound by the terms of his specification, if he sums up the principle of his invention therein, and if this principle turns out to be not new, the patent cannot be supported, although it appear that the application of the principle is new.

Bovill v. Moore,
2 *Marsh*, 211.
Macfarlane v. Price,
1 *Stark.* 199.

Crossley v. Beverley,
9 *Barn. & C.*
63.

Hill v. Thompson, 2 *Moore*,
424. 8 *Taunt.*
375. 3 *Meriv.*

Lewis v. Marling, 10 *Barn.*
& *C.* 22.

Campion v. Benyon,
6 *Moo.* 71.

Rex v. Cutler,
1 *Stark.* 354.
Vide Godson on Patents.

Lewis v. Mar-
ling, 10 Barn.
& C. 22.

The invention, however, may be considered as new, notwithstanding a model and specification of such a machine has before been brought into the country, and seen by several persons, if it do not appear that the patentee ever saw such model, &c., or that any machine was ever brought into use from it. ||

5. Grants of the sole Liberty of Printing.

Carter, 89.

Mod. 256.

Skin. 233.

pl. 3.

3 Mod. 77.

Vern. 275.

|| See Sir W.

Evans's re-
marks on the

cases. Evans's

Statutes, vol. 2. part 3. class 1. ||

The king's prerogative in granting letters patent for a privilege of printing hath in many instances been disputed, and his power herein greatly doubted on this foundation and these reasons, that grants of this kind which exclude all other persons, and confine this liberty or privilege to the patentees, tend to a monopoly in enhancing the prices of books, restraining trade, discouraging industry, and in making the patentees careless and remiss in their duty.

(a) Carter, 90. it is said that fifty such patents have been granted since *Edward the Sixth's* time. — And that before such grants this business

But notwithstanding these reasons, and the uncertainty that appears in some of the cases in the books on this subject, it seems the better opinion, that the king hath a peculiar prerogative in printing, which hath been countenanced and allowed in all ages (a), and seems established on the fundamental maxims of government as being a matter of a public nature (b), first introduced by the kings of *England* (c); and in which an unrestrained liberty might be of dangerous consequence to the public. (d)

was managed by the king's servants. (b) In 3 Mod. 75. a difference is made between things of a public nature and those only of public use; and on this distinction the court inclined to think that the letters patent granted for the sole printing of blank warrants, bonds, and indentures were not good, these being only of public use, and not so in their nature. (c) The art of printing was first at *Harlem*, the news of it came to *Henry the Sixth*, who at the desire of the archbishop brought it over at his own charge at the expense of 1500 marks; the person assigned for this service was a merchant. Carter, 91. — Said to be introduced by *Henry the Sixth*. Skin. 234. — And that the king printed the Bible at his own charge. Vern. 275. (d) Printing is a conveyance by which men communicate their notions in the most public manner and with the most lasting impression; and therefore if they are good, this is a means to spread them and to give them a more diffusive influence; and if they are bad notions, this is likewise a method to spread the mischief wider. Skin. 234.

Moor, 637.

Noy, 173.

Accordingly we find this prerogative admitted in the case of *Darcy v. Allen*, the great case of monopolies, and the reason thereof given by *Dodderidge*, who argued against monopolies, because it is necessary for the peace and safety of the realm.

Mod. 256.

[(e) But if there was no certain author

It seems agreed, that if a book has no certain author, the king has the property of the copy (e), and may grant it to whom he pleases; hence almanacks are deemed prerogative copies. (g)

the property would not be the king's, but common. 4 Burr. 2402.] (g) So, of the translation of the Bible, Year-books, Common Prayer, and Statute-book. Lucas, 105. 2 Chan. Ca. 76.

Carter, 89.

Mich. 18 Car. 2.

10 Mod. 106.

S. C. cited to have been de-

In the 15th year of *James the First*, a patent for printing law books was granted to one *Moor*, which came to Colonel *Atkins* on his marriage with *Moor's* daughter. The Company of Stationers obtained copies of Roll's Abridgment, which they printed; and this

this being complained of in Chancery by Colonel *Atkins*, an injunction was awarded, not only against those of the company (*viz. Tylton and Roper*) who were principally concerned, but against every member thereof; and this matter coming afterwards before a committee of parliament, it was there likewise determined in favour of the patentee. And in this case it was said, that the king hath a particular prerogative over law-books, and that so he would have had if the art of printing had never been known.

invented the fiction that printing was a flower of the crown acquired by *Henry the Sixth* by purchase, the first printer in *England* having been brought to *Oxford* by Archbishop *Bourchier*, at that king's expense. 1 Bl. R. 115.]

But the case of the greatest weight on this head, is that of *Roper and Streater*, which was this: *Roper* bought of the executors of Justice *Croke* the third part of his reports, which he printed; Colonel *Streater* had a grant for years from the crown for printing all law books, and printed upon *Roper*; on which *Roper* brought an action on the statute 13 & 14 Car. 2. c. 33. *Streater* pleaded the king's grant; and on demurrer it was adjudged in *B. R.* for the plaintiff against the validity of the patent on these reasons: that this patent tended to a monopoly; that it was of a large extent; that printing was a handicraft trade, and no more to be restrained than other trades; that it was difficult to ascertain what should be called a law-book; that the words in the patent, *touching or concerning the common or statute law*, were loose and uncertain; that if this were to be considered as an office, the grant for years could not be good, as it would go to executors and administrators; and that there was no adequate remedy in the way of redress in case of abuses by unskilfulness, selling dear, printing ill, &c. But this judgment was reversed on a writ of error in parliament, for the following reasons: that the invention of printing was new; that this privilege had been always allowed, which was a strong argument in its favour, although it could not be said to amount to a prescription, as printing was introduced within time of memory; that it concerned the state, and was matter of public care; that it was in nature of a proclamation, which none but the king could make; that the king had the making of judges, serjeants, and officers of the law; that as to the uncertainty, these words in the patent were to be taken *secundum subjectam materiam*, and not to be extended to a book containing a quotation of law, but where the principal design was to treat on that subject; that as to its being an office, it was not so properly an office as an employment, which may well enough be managed by executors or administrators; and that, as to abuses, these like all others were punishable at common law, or the patent itself might be repealed by *sci. fa.* (a)

14 Car. 2. c. 33. appears to have been renewed from time to time, and to have expired in the reign of *William the Third*. As the act prohibited the printing of law-books, without the licence of the Lord Chancellor, the two Chief Justices, and the Chief Baron, it became the practice to prefix such a licence to all reports published after that period, in which it was usual for the rest of the Judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. The same form of licence and testimonial continued till

creed in Chancery in favour of the patentees, and affirmed in the House of Lords. [It was this Colonel *Atkins*, who upon this occasion

Skin. 234. S. C. cited and said to have been so determined in *B. R.* Mich. 22 Car. 2. but reversed in the House of Lords. 2 Show. 260. S. C. cited as adjudged Mich. 24. Car. 2. and there the judgment given in *B. R.* is called a sudden judgment, and said to be reversed in parliament. 10 Mod. 106. S. C. cited, and there said, that the validity of the patent is now established by the judgment in parliament. Vern. 120. S. C. cited and said it was not now to be shaken.

(a) Though it cannot properly be called an office, yet it is a trust, and a *sci. fa.* will lie to repeal the grant. 3 Mod. 77. ||The 13 &

the reign of *George* the Second, when the Judges seem to have come to a resolution not to grant any more of them. See preface to Douglas R. Sir *James Burrow* offered an apology for publishing his reports without an *imprimatur*. See Burrow R. Pref. viii.; and see Lord *Bacon's* proposal to revise the office of Reporter. In *Gurney v. Longman*, the publisher of Lord *Melville's* Trial applied for an injunction against publication of it, on the ground of an exclusive right, derived under the authority of the House of Lords, and Lord *Erskine* granted the injunction until the hearing, without deciding on the question of right. See 15 Vesey, 493. Evans, Stat. vol. 2. p. 20. *notâ.*||

Mod. 256.

3 Keb. 792.

S. C. 2 Show.

260. 3 Mod. 76.

S. C. cited, and

alike judgment

said to be given

in the case of

the Stationers'

Company v.

Wright, for printing psalters and psalms. Hil. 35 Car. 2. Skin. 234. 10 Mod. 106. like point, but no judgment.

2 Show. 258.

(a) An injunct-

ion was refused

to stay the sale

of English

Bibles, and to

quiet the right

of patentees,

because not a plain right; and therefore an issue directed. Vern. 120. — So, where the University of Oxford claimed by patent a right of printing Bibles, though the Lord Keeper was of opinion that the University patent extended to no more than were for their own use, or to some small number to compensate their charge, yet he refused to grant an injunction until the right was settled by a trial at law. Vern. 275.; *et vide* 2 Chan. Ca. 76. 93. *et qu.* as to these cases; for injunctions seem frequently to have been since granted in favour of patentees and owners of books, upon producing the patent in court under the great seal. ||See 6 Ves. 689.||

10 Mod. 105.

4 Burr. 2402.

2 Rl. R. 1004.

In consequence

of this decision,

an act was pas-

sed, which,

after reciting

" that the

" power of

" granting a

" liberty to

" print alma-

" nacks and

" other books

" was hereto-

fore supposed to be an inherent right in the crown; and that the crown had, by different charters under the great seal, granted to the Universities of *Oxford* and *Cambridge*, among other things, the privilege of printing almanacks; and that the universities had demised to the Company of Stationers of the city of *London*, their privileges of vending almanacks and calendars, and had received an annual sum of one thousand pounds and upwards as a consideration for such privilege; and that the sum so received by them had been laid out and expended in promoting different branches of literature and science, to the great increase of religion and learning, and the general benefit and advantage of these realms; and that the privilege or right of printing almanacks had been, by a late decision at law, found to have

" been

In an action of debt by the Company of Stationers against *Seymour*, for printing *Gadbury's* almanack, it was adjudged that the letters patent granted that company for the sole printing of almanacks, were good; and though the jury found that the almanack so printed contained some additions; yet having likewise found, that the said almanack had all the essential parts of the almanack that is printed before the Book of Common Prayer, the additions were looked upon as immaterial.

So, an injunction was granted against *Lee*, on the application of the Stationers' Company, to restrain him from selling primers, psalters, almanacks, and singing psalms imported from *Holland*; the sole privilege of printing these belonging to that company; and that without any trial directed as to the validity of the patent. (a)

[But notwithstanding the above decisions, this prerogative right to the printing of almanacks was strongly inclined against by the Court of King's Bench in the case of the Stationers' Company against *Partridge*. No judgment indeed was given in that case, but it stood over, that the company might see if they could make it like the case of the Common Prayer Book, whether they could shew that the right of the crown had any foundation in property; and it was never moved afterwards. However, in a later case of the Stationers' Company against *Carnan*, the question hath been again brought forward, and the right of the crown to make such exclusive grant to the company hath been expressly denied by the Court of Common Pleas on a case sent out of Chancery for their opinion.

"been a common right, over which the crown had no controul, and consequently the Universities no power to demise the same to any particular person or body of men, whereby the payment so made to them by the Company of Stationers had ceased and been discontinued;" enacts, that 500*l.* a year shall be paid to each of the universities out of the monies arising by the duties upon almanacks. Stat. 21 G. 3. c. 56. § 10. ||A bill brought in by Lord North, for revesting in the Universities the exclusive right of printing almanacks, was opposed at the bar of the House of Commons by Mr. *Erskine*, on behalf of *Carnan*, and was lost by a majority of 45 votes. See *Erskine's Speeches*, vol. 1. Com. Journ. vol. 37. p. 358. ||

In the case of *Baskett v. University of Cambridge*, the prerogative right of printing acts of parliament was sanctioned by a decision of the Court of King's Bench. That case arose upon a bill filed by the plaintiffs for an injunction to restrain the defendants from printing and selling a book, entitled "An exact Abridgment of all the Acts of Parliament relating to the Excise on Beer," &c. Both parties claimed under letters patent from the crown, the plaintiffs as the king's printers. The court were of opinion, that during the term granted by the letters patent to the plaintiffs, they were entitled to the right of printing acts of parliament, and abridgments of acts of parliament, exclusive of all other persons, not authorized to print the same by prior grants from the crown. But they thought that by the letters patent granted to the University they were INTRUSTED with a concurrent authority to print acts of parliament, and abridgments of acts of parliament, within the University, upon the terms in those letters patent. 1 Bl. R. 105. 2 Burr. 661.

And the following case establishes the exclusive right of the crown to print acts of parliament and books of divine service beyond all controversy. We are enabled to lay before our readers the judgment of the court as delivered by the Lord Chief Baron *Skinner*.

This is a case in which *Charles Eyre* and *William Strahan* are plaintiffs, and *Thomas Carnan* is the defendant.

This bill was brought to restrain the defendant from printing and publishing a Form of Prayer, which had been ordered by his Majesty to be read in all churches; and for an account of the profits which have arisen from his sale of it.

The bill states, that the plaintiffs held the office of king's printer, which was granted the 19th of December, the 2nd of King George the First, to *John Baskett* for thirty years in reversion after two terms which were then existing, the last of which expired the 21st of January 1770, when the grant to *Baskett* took effect in possession. The grant, which was read, imports to be a grant to *John Baskett* of the office of Printer to his Majesty, and his successors, of (among other things) all Bibles and Testaments in the English language; and all Books of Common Prayer and Administrations of the Sacraments, and other Rites and Ceremonies of the Church of England, in all volumes whatsoever heretofore printed by the king's printer, or to be printed by his command; and of all other books which he, his heirs or successors, should order to be used for the service of God in the Church of England.

The interest in this grant was assigned by *Baskett* to *John Eyre*, under

Eyre & Strahan v. Carnan, in the Exchequer, May 7th, 1781. ||See the Universities of Oxford and Cambridge v. Richardson, 6 Ves. 689. ||

under whom the plaintiffs claim the benefit of it; the plaintiff *Eyre* in two-thirds, and the plaintiff *Strahan* in the other third.

The bill states, that in *December* 1779 a Form of Prayer was ordered by his majesty to be used in all churches and chapels throughout *England* and *Wales* upon the 4th *February* 1780; that it was printed by the plaintiffs, and a sufficient number thereof circulated for sale at sixpence each, which was a reasonable price, and at which they had been formerly sold.

That the defendant *Carnan* had printed and sold a great number of them; and upon this ground the plaintiffs pray an injunction and account. The defendant *Carnan*, in his answer, admitted the printing and selling, and he submitted to an account if the plaintiffs had the exclusive right of printing such Form of Prayer.

An injunction was granted upon filing the bill to stop the publication.

The question now is, Whether the court ought to direct the account which is prayed by the bill, for as to the continuance of the injunction in such a case, it is a mere matter of form?

Two objections are made by the defendant to this part of the relief: One is, that the price for which the plaintiffs have sold it was not a reasonable price; the second, that the right is doubtful.

As to the price, though it is proved that it might be afforded at a cheaper rate, yet it is likewise in proof that the price which has been taken by the plaintiffs is the same which had been used to be taken for like Forms of Prayer so printed; and therefore we think this not a sufficient ground for denying the account.

The next objection is to the plaintiffs' right. It has been said that courts of equity never proceed in such case to decree accounts but upon clear and undoubted rights.

That the present right, if it be one, has never received the sanction of any legal determination. That though in the great question concerning literary property the Judges considered and treated the exclusive right of the crown to print acts of state and books of divine service as an acknowledged right, yet they put it upon different grounds, some upon the grounds of prerogative, others upon the ground of property; and as it is now determined that property cannot be the ground of such a right, the right itself consequently becomes doubtful. In the argument of the question respecting literary property in the House of Lords, in the case of *Miller* and *Taylor*, it was assumed by all the Judges that the king's copy-right continued after publication, and from thence some of them drew arguments in support of that right of an author after publication, insisting that property in the composition was the foundation of both; others denied that property, in the strict legal sense of the word, was the foundation of the right of the crown; but they all agreed that the crown had this right. The right therefore seemed to have been in effect recognized and established in this memorable case by the unanimous opinion of the Judges, though they differed respecting the origin of it. This is certain

certain respecting such origin, that it has ever been a trust reposed in the king, as executive magistrate, and the supreme head of the church, to promulgate to the people all those civil and religious ordinances which were to be the rule of their civil and religious obedience. There are traces of the ancient mode of promulgating the ordinances of the state yet remaining to us, suited to the gloominess of the times when few who heard them could have read them; the king's officers transmitted authentic copies of them to the sheriffs, who caused them to be publicly read in their county court. When the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the people were supplied with copies by the king's command by his patentee. This seemed a very obvious and reasonable extent of that duty which lay upon the crown to furnish the people with the authentic text of their ordinances. Our courts of justice seem to have so considered it when they established it as a rule of evidence, that acts of parliament printed by the king's printer should be deemed authentic, and read in evidence as such. As to the promulgation of religious ordinances by the king's command, or by his patentee, it is not to be expected that instances should be found of the execution of this trust by the crown during the papal usurpation of the supreme authority over all ecclesiastical matters in this kingdom. It appears, however, by a grant made in the 34th year of King *Henry the Eighth*, to *Richard Grafton* and *Edward Whitchurch*, of the sole right of printing the Mass-book and certain other books of divine service, that such books had never at that time been printed in *England*, but had been brought into this kingdom from other countries, probably from *Rome*; though, as the grant recites, printing was at that time arrived at great perfection here. This grant, which bears date the 28th *January*, the 34th year of *Henry the Eighth*, is to be found in *Rymer*, vol. 14. p. 766. The period between the time of the re-establishment of the supremacy of the crown and the completion of the Reformation under Queen *Elizabeth*, considering the fluctuating state of religion, was not likely to afford, and in fact has not afforded, any instance of the superintending care of the crown in printing books of divine service, except that which I have alluded to, and which I have referred to chiefly to shew how the demand of the public for such books had been supplied before that time, namely, from foreign countries, and under the direction of a foreign power; but in the first year of Queen *Elizabeth*, the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the acts of parliament, which had some time before been granted, and from that time they have been regularly granted together, and enjoyed by the king's patentee. Long usage, referable to such an origin, ought not to be shaken lightly, if there was no authority to support it; but in the case of *Baskett* against the University of *Cambridge*, the right of printing acts of parliament received the sanction of the Court of King's Bench; and
in

in the case of *Millar* and *Taylor*, before alluded to, both the rights, as well that respecting acts of parliament as that respecting books of divine service, were fully acknowledged. The privilege of the patentee has in fact been always executed with the exclusion of all other printers: it is therefore, in consideration of law, a monopoly; but it is a monopoly supported by long usage, and standing upon very special grounds of necessity and public utility; for it is of manifest public utility to place in proper hands the right of such publication, as well upon account of the special care and superintendence which a trust of such importance necessarily requires, as because the exclusive right of doing or authorizing any acts in which the public is interested implies an obligation to exercise that right in such manner as to answer the purposes for which it was given; and consequently, the right now in question imposes upon the crown an obligation to publish and disperse as many books of divine service as the interest of religion and the demands of the public require. It appears, then, that the right claimed by the plaintiffs, under the grant to *John Baskett*, is founded in public convenience, is supported by long usage, and that it has been acknowledged by the unanimous opinion of all the Judges. Under such circumstances, we think it is not now to be considered as a doubtful right. If it is not doubtful, the plaintiffs are entitled to the account which is prayed; and which the court must accordingly decree. It is a matter of form to direct the continuance of the injunction; for in a case of this kind there is an end of all the effects of it; the defendant, therefore, must be decreed to account according to the prayer of the bill; and as the defendant has, by thus printing the books of divine service, invaded the rights which the plaintiffs and the king's patentees have been long in the uninterrupted possession of, the account must be with costs.]

2 Inst. 744.
(a) Repealed
by 12 G. 2.
c. 36. § 3.

Here it may be proper to take notice of the acts of parliament relative to this matter, and the rather as they have been urged as arguments for the king's prerogative in these concerns. The first statute is that of 25 H. 8. c. 15. (a), which expressly provides, in cases of books, that the Lord Chancellor, Lord Treasurer, or any of the Chief Justices, may set and limit the prices as well of books as of binding.

In the statute 21 Jac. 1. c. 3. (§. 10.) against illegal and mischievous monopolies, it is particularly declared, that this statute should not extend to, or any ways impeach, patents for sole printing theretofore made or then after to be made.

Mod. 2. 57.
2 Show. 260.
[By this statute
(which expired
in 1692) it was
enacted, that
no private
person what-

The statute 14 Car. 2. (now expired) recites, that printing is a matter of public care, and every where countenances the sole privilege of printing, and seems to be founded on the king's prerogative; but was a hard law, and injurious to the liberty of the subject, in restraining the number of presses, licensing books, and imposing penalties and forfeitures.

soever should print or cause to be printed any book or pamphlet, unless the same should be first entered in the book of the Registrar of the Company of Stationers in London; except
acts

acts of parliament, proclamations, and such other books and papers as should be appointed to be printed by virtue of the king's sign manual, or under the hand of one of the Secretaries of State; and unless the same should be first licensed by the several persons therein directed; that is to say, all books concerning the common law were to be printed by the allowance of the Lord Chancellor, the Lord Chief Justices and Lord Chief Baron, or one of them; of history concerning the state of this realm, or other books concerning any affairs of state, by one of the Secretaries of State; of heraldry, by appointment of the Earl Marshal, or, if there should be no Earl Marshal, then by two of the Kings of Arms; all other books, whether of divinity, physick, philosophy, or other science or art whatsoever, by the Archbishop of *Canterbury*, or Bishop of *London*, or by their appointment respectively; or, in the universities, by the Chancellor, or Vice-Chancellor there, provided that the said Chancellors or Vice-Chancellors should not meddle either with books of common law, or matters of state or government, nor any book the right of printing which solely and properly belonged to any particular person. And the printers were to set their names, and declare the name of the author if required. But there was a proviso, that nothing therein should extend to infringe any the just rights and privileges of either of the said universities, touching the licensing or printing of books therein; nor should extend to prejudice the just rights and privileges granted by the king, or any of his royal predecessors, to any person or persons under the great seal or otherwise, but that they might exercise such rights and privileges according to their respective grants.]

By the 8 Ann. c. 19. "The author of any book not yet printed, and his assigns, shall have the sole liberty of printing it for fourteen years, to commence from the day of publishing thereof; and (a) if any person within the said time shall print, reprint, or import any such book without the consent of the proprietor in writing signed in the presence of two credible witnesses, or shall knowingly publish it without such consent, the offender shall forfeit the books and sheets to the proprietor, who shall forthwith damask and make them waste paper, and shall forfeit 1*d.* for every sheet found in his custody, either printed or printing, one moiety to the crown, the other to him who will sue in any court at *Westminster*."

(a) It seems also a good foundation for an action at common law, or for an application to a court of equity; but in order to entitle the party to the penalty in the statute, the terms of the

act as to registering the book in the Stationers' Company, &c. must be complied with. [For the property does not vest before the book is registered. 2 Atk. 95. See also stat. 15 G. 3. c. 54. § 6.]

[And the act further directs, that if at the end of that term, the author himself be still living, the right shall then return to him for another term of the same duration.]

Soon after the union with *Ireland* an act was passed establishing a law of copyright throughout the United Kingdom, the main provisions of which are similar to those of the 8 Ann. c. 19., and by the 54 G. 3. c. 156. the author's copyright is extended to twenty-eight years from the day of publication, and with a further term for the residue of his life in the event of his being alive at the expiration of the twenty-eight years.

41 G. 3. c. 107.

54 G. 3. c. 156.

And by the eighth section: if the author of any book which shall not have been published fourteen years at the passing of this act shall be then living, and shall die before the expiration of the first fourteen years, his representatives shall have a further term of fourteen years after the expiration of the first term.||

§ 8.

[It was determined by the Court of King's Bench in the great case of *Millar v. Taylor*, *Yates J. dissent.* that an exclusive right in authors existed by the common law. But afterwards

4 Burr. 2303.

Stat. 15 G. 3.
c. 54.

in the case of *Donaldson v. Becket*, before the House of Lords, which was finally determined 12th *February* 1774, it was holden that no copyright subsists in authors after the expiration of the several terms created by the above statute of *Queen Anne*. In consequence of this decision an act was passed in the following year for enabling the two universities in *England*, the four universities in *Scotland*, and the colleges of *Eton*, *Westminster*, and *Winchester*, to hold in perpetuity their copyright in books given or bequeathed to them by authors or their representatives, upon trust that the profits arising from the printing or reprinting of such books shall be applied as a fund for the advancement of learning and other beneficial purposes of education.

Carnan v.
Bowles,
2 Br. Ch. R.
80. *Ibid*.

Although a plaintiff should establish his right only as to a *part* of a work, yet the Court of Chancery will grant an injunction to restrain the publication of such part. If an author has sold *all his interest in the copyright* he has no resulting right at the end of the first fourteen years, as against his own assignee, and will be enjoined from republishing.

Dilly v. Doig,
2 Ves. jun. 486.

If there are several invasions of a copyright by different persons, the proprietor cannot join them all in one bill, but must file separate bills against each.

2 Russell R.
607.; and see
ante p. 507, 508.

|| It seems to be illegal to publish *part* of a cause depending in a court of justice. ||

See farther, tit. "INJUNCTION," Vol. III. p. 651.] || And as to the general copyright of authors, which has no connection with this title, *vide Godson on Patents and Copyright*. ||

2. *Of the Construction of the King's Grants and Letters Patent, as to their being good or void; and herein, of the King's being deceived in his Grant.*

Plow. 333.
Co. 44.
6 Co. 55.
7 Co. 12.
8 Co. 56.
(a) 2 Co. 24.
8 Co. 145.
Hob. 224.
Pollexf. 418.
[*Qu.* Whether
the king, proceeding by and with the advice of parliament, is in that situation, in respect of which he is under the special protection of the law, and can be considered to be deceived in his grant? 2 H. Bl. 500.]

As the king's grants proceed chiefly from his own bounty, and his letters patent are records of a high nature, they ought to contain the utmost truth and certainty, and have in all times been construed most favourably for the king (a) contrary to the grants of common persons; and accordingly in a great variety of cases we find uncertainty, misrecitals, false suggestions, and all such matters as shew that the king was deceived in his grant, held such reasons as have been sufficient to vitiate the grants.

In a matter therefore in which such great exactness has been required, it may be necessary in the first place to lay down the following general rules:

(b) 5 Mod. 297.
2 Salk. 560.
Carth. 440.
Skin. 651. pl. 1.
Ld. Raym. 292.
S. C.

First, That in the construction of letters patent every false recital in a part material will not vitiate the grant, if the king's intent sufficiently appears; this was so held in the case of *The King and Bishop of Chester* (b), where the grant was made to a person as a knight, who in truth was no knight; and though the grant was held void for this reason in *B. R.* yet the judgment was reversed in parliament.

Secondly,

Secondly, That if the king is not deceived by the false suggestions of the party, but only mistaken by his own surmises, this will not vitiate his grant; and so was the resolution in the case of *The King v. Kemp*. (a)

(a) 4 Mod. 277.
Carth. 350.
Comb. 334.
Salk. 465. pl. 2.
Skin. 446. pl. 4.
Ld. Raym. 50. S. C.

Thirdly, That though the king mistakes either in matter of law or fact, yet if this is not any part of the consideration of the grant it will not vitiate it; and so is Lord *Chandos's* case (b), which was thus: *Henry* the Seventh granted to Lord *Chandos* a manor in tail, and the same king by other letters patent reciting the former grant, and that the said Lord *Chandos* had surrendered the same to be cancelled, and that the same had been cancelled, by reason whereof the king was and is seised in fee, did grant the said manor to husband and wife, and to the heirs of the husband, &c. Now, though by the surrender of the first letters patent the estate-tail was not determined, and so the king not seised of the manor in fee as he recited he was in the second grant — for he had only a reversion in fee expectant upon the determination of the estate-tail — yet the cause, viz. by virtue whereof we are seised in fee, being what the king collected to be the consequence of the surrender, and not at all owing to the misinformation of the party, either as to the entail or surrender, the mistake which he made being no part of the consideration, the grant was held good. (c)

(b) 6 Co. 55.
Ld. Chandos's case. (c) It is said the king may grant without any consideration. Hob. 230. — So, if the consideration be not a full one, it is no objection; for kings are supposed to be bountiful. Vern. 279. — If the king be deceived in a consideration real executory it will avoid the grant: but

not in a consideration personal executed. Freem. 332. For this difference, vide 5 Co. 95. Jenk. 504. 10 Co. 67.; but in 5 Co. 94. Berwick's case, it is said to be a maxim, that if the consideration which is for the benefit of the king, be it executory or executed, or be it of record or not of record, if he be not true or not truly performed, or if any prejudice may arise to the king by reason of the nonperformance thereof, the letters patent are void; et vide Moor, 395. Hob. 221. 3 Leon. 248. Plow. 454. Skin. 663. Lane, 3. 76. Dyer, 252.

Fourthly, That the words *ex certâ scientiâ et mero motu*, in the king's charters and letters patent, do occasion them to be taken in the most benign and liberal sense, according to the intent of the king expressed in his grant.

Bro. Patents, pl. 80.
Plow. 337.
6 Co. 56.
7 Co. 14.

3 Leon. 249. — But, where the king in his grant recites a thing which is false; that shall not make the patent good, although the words be *ex certâ scientiâ et mero motu*. 10 Co. 112. 3 Leon. 249. Plow. 502. 3 Co. 4. Savil, 5. 37. Dyer, 500. 2 Salk. 561. || In *Rex v. Capper*, 5 Price, 217. it was doubted whether the words *ex certâ scientiâ et mero motu* reduced a royal grant to the same rules of construction as a private grant. ||

Fifthly, That though in some cases general words of a grant may be qualified by the recital, yet if the king's intent is plainly expressed in the granting part, it shall enure according to that, and is not to be restrained by the recital.

So held in the case of the king and Bishop of Chester, which is grounded on

Legatt's case, 10 Co. 112.

In a *quare impedit*, it was found by a special verdict, that King *Henry* the Eighth was seised in fee of the manor of *Leyburn* in *Kent*, to which the advowson of the church of *Leyburn* is appendant (which manor came to the king by the dissolution of monasteries, having been part of the possessions of the abbot of *Gray* Church),

Mod. 195.
2 Mod. 1.
2 Keb. 442.
The King v. Sir Francis Clark.

Church), and that he granted the manor to the archbishop of *Canterbury* and his successors, saving the advowson; afterwards the archbishop regranted the manor and the advowson to the king, his heirs, and successors; after which the king grants the manor with the appurtenances, and this advowson (naming it in particular) which lately did belong to the archbishop of *Canterbury* and to the abbot of *Gray Church*, together with all privileges, profits, commodities, &c. in as ample manner as they came to the king's hands by the grant of the archbishop, or by colour or pretence of any grant from the archbishop, or by surrender of the late abbot of *Gray Church*, or as amply as they are now or at any time were in our hands, to Sir *Edward North* and his heirs; and the question was, Whether by this grant the advowson did pass? and adjudged that it did; for though here was a falsity or misrecital, the advowson never having been in the hands of the archbishop, yet that not being material, as the king could not be said to be deceived, having granted the advowson expressly by name, it was adjudged *ut supra*.

In the argument of the above case, the following points were laid down as supported by the authorities in the margin:

Cro. Eliz. 34. 1. Where a particular certainty precedes, it shall not be destroyed by an uncertainty or a mistake coming after.
48. Yelv. 42.
3 Leon. 162.
And. 148. 2 Godb. 423. Markham's case. 10 Co. Legatt's case.

21 E. 4. 49. 2. That there is a difference when the king mistakes his title to the prejudice of his tenure or profit, and when he is mistaken only in some description of his grant, which is but supplemental, and not material nor issuable.
33 H. 7. 6.
36 H. 8. 37.
9 E. 4. 11, 12.
Lane, 111.
2 Co. 54.

Bulst. 4. Dyer, 3. That distinct words of relation in the king's grant are good to pass away any thing.
350. 9 Co. 24.
10 Co. 4. Whistler's case.

2 Inst. 446, 447. 6 Co. 4. That when the king's grants are upon a valuable consideration, they shall be construed favourably for the patentee for the honour of the king.
Sir John Moline's case.
10 Co. 65.

Hob. 220. One *Southwell* and his wife being seised of the parsonage of *Horsham* to them and the heirs of the husband, by deed dated 10th *May*, granted the same to King *Henry* the Eighth in consideration whereof the same king, by his letters patent, dated the 21st *July* following, granted the vicarage of *Harley* to them and the heirs of the husband; after which, and on the 26th *July* following, the deed 10th *May* was enrolled; and it was objected, that the king was deceived in the consideration, as nothing passed by the deed before enrolment, and therefore the grant void; but notwithstanding this it was held, that here was no deceit in effect, that though the deed could not be pleaded as such before enrolled, yet it took its force and effect from the execution; and to that the enrolment shall have relation, so as to make it good *ab initio*.
Needler v. Bishop of Winchester.

If the king recites the consideration to be the services of the patentee, though none were done by him, or if he recites that a manor came to him by escheat, when in truth it was his inheritance; these will not vitiate the grant; *secus*, if they are the surmises of the party.

Plow. 455.
Sir Thomas
Wroth's case.

Queen *Elizabeth* being seised of a great waste in the parish of *Chipnam*, granted a moiety of a yard-land in the said waste to the mayor and burgesses of *Chipnam*, without any certainty, name or description; and afterwards granted the said waste to *H.* And it was adjudged, that this first grant was void, not only against the queen, but against the second patentee, for incertainty; and (a) that it could not, as in case of a common person, be made good by any election of the patentee.

Leon. 50.
Sir Walter
Hungerford's
case. (a) 12 Co.
86.L.P.; *et vide*
title *Election*.

Edward the Sixth granted *totam illam rectoriam de Dale, ac omnes decimas, &c. quæ quidem omnia et singula præmissa* are of the true yearly value of 32*l.*, and at the time of this grant there was a farm in the parish of *Dale* in lease under a yearly rent; and though the words *quæ quidem omnia, &c.* refer only to tithes of that yearly value, and it might be the king intended to pass no more, yet having granted *totam illam rectoriam* generally, it was adjudged, that the tithes of that farm should pass, though it made it more than 32*l. per ann.*

2 Roll. R. 118.
Dixon's case.

If the king grants *totum illud manerium suum, sive totam illam rectoriam sive advocatationem, &c.* if he had a manor and no rectory, or an advowson and no rectory, or a manor or a rectory improper, yet that which he had shall pass, because it was the effect of the grant; and in this case a rule was laid down, *viz.* that (b) if the king's grant may be taken to two intents, one of which may be good, and the other not, it shall be construed to such intent that the grant may take effect.

8 Co. 167.
Lane, 39.
Cumberland's
case. (b) Dav.
45. 7 Co. 14.
5 Mod. 301.

If the king grants a manor with such privileges and franchises as the dean and chapter of *St. Paul's* formerly enjoyed therein, it is a good grant because of the certainty to which it relates.

Cro. Eliz. 512,
513. Lord
Darcie's case.

So, a grant of a manor, *habend.* to the grantee and his heirs *adeo plenè et integrè*, as it came to the hands of the king by the attainder of *J. S.*, or as is contained in such letters patent, or the like, is good according to the rule, *id certum est quod certum reddi potest.*

10 Co. 63.
Whistler's
case.

¶ But where a liberty in a certain manor was granted to *A.*, who granted the manor with all liberties, &c. to the crown, and the crown granted the manor again to *B.*, with all liberties, &c. in as full and ample manner as *A.* had it, such regrant did not pass the liberty to *B.*, notwithstanding the words of reference; for the franchise became extinct by reunion to the crown, and being so it could not be created *de novo* by mere general words.¶

Rex v. Capper,
5 Price, 258.;
et vide Attorney
Gen. v. Marq.
of Downshire,
ibid. 269.

King *Edward* the Sixth being seised of the manor of *Cleobery*, then late parcel of the possessions of the late Earl of *March*, whereof a great wood was parcel, grants this wood to the Lord *Paget* in fee; from the Lord *Paget* it came to the Lord *Seymour*, and by his attainder it returned to *Edward* the Sixth again; from

Dyer, 362.
Co. Ent. 383.
The Queen v.
Thornton.

Edward the Sixth the manor and wood came again to *Queen Mary*, and from her to *Queen Elizabeth*, who grants to the *Earl of Leicester* this manor, *nuper parcell. possessionum nuper comitis Marchiæ, et omnia al' ter' bosc' et hæreditamenta manerio præd' spectant', vel ut pars, parcell' sive membrum inde antehac habita, cognita sive reputata existen'*; and it was adjudged that these woods did pass.

Pollexf. 410.
Freem. 207.
Lee v.
Browne.

Sir Francis Fortescue being seised of a manor, grants the same to the *Earl of Denbigh*, except such lands as were then held for life by copy; afterwards the inheritance of this copyhold was granted to the *Earl of Denbigh*, and then the copyholder dies, and the *Earl* grants by copy again, and afterwards forfeited all to the king, who granted the manor and every part and parcel thereof, or that is reputed parcel thereof, to the *Earl of Clarendon*; and the question was, Whether this copyhold, having been thus severed, passed by the words *reputed parcel*, or not? and adjudged that it did.

Plow. 336.
(a) Mines
royal, amercement
royal,
escheats royal,
shall not pass
by general words,

If the king grants to *J. S.* lands and the mines therein contained, and royal mines are found in them, they shall not pass; for the king's grant shall not be taken to a double intent (a); and the most obvious intent is, that they should only pass the common mines that are grantable to a common person.

8 H. 4. 2. pl. 2.
Raym. 242.
cited; et vide
Roll. R. 399.
Sid. 142. 2 Mod. 107.

So, a grant of *bona felonum*, &c. will not pass the goods of one who stands mute and will not plead.

Rex v. Capper,
5 Price, 217.

|| And a grant of *bona et catalla felonum* will not pass stock or money in the funds, for they are not goods and chattels. ||

Attorney
General v.
Lord Stawell,
Anstr. 592.

[The king granted to a ranger of a forest all manner of wood blown or thrown down by the wind, and all dead wood, and the boughs and branches of trees and wood in the forest, cut off or thrown down, and house-bote and fire-bote, for himself and the foresters and keepers. It was adjudged, that under these words, branches cut from trees felled for his majesty's use did not pass.]

10 Co. 64.

By the statute of 17 E. 2. (stat. 1.) *de Prærogativâ Regis*, the king's gift or grant of land, manors, *cum pertinentiis*, conveyeth not knight's fees, advowsons, or dowers, without express words, though it be otherwise in case of a common person.

10 Co. 64.
Plow. 251.

But, if a manor with an advowson appendant be in the hands of the king by escheat or by purchase, and he at this day give it as entirely as *J. S.* held it before it came into our hands by way of escheat, or as *J. S.* held who enfeoffed us, in such case the advowson shall pass without saying in the charter *cum feodis et advocacionibus*; because the law in such case intends that the king is apprised of his right.

Latch. 248.
(b) The king's
grant of the
vicarage of
D. will not pass

So, if the king grants *ecclesiam*, the advowson passes, the (b) intent, and not the precise words, being to be regarded in the king's grants.

the vicarage of which the king was seised. Cro. Eliz. 163.

A grant

A grant of stewardship of several manors by name, without mentioning in what county, has been held good, though uncertain; notwithstanding it was objected that the king may have divers manors of the same name, and no issue can be taken which manors the king intended to pass. (a)

what counties the manors lie, as the plaintiff did in the Earl of Shrewsbury's case, and if the other party plead *non concessit*, upon trial of the issue, the circumstances (mentioned by the court) may be given in evidence, to prove what manor was granted. *Vide* 9 Co. 47. a.

9 Co. 42.
4 Mod. 279.
cited.
(a) In pleading it ought to be alleged in

So, a grant to the Earl of Rutland, *a tempore plenæ ætatis*, when in truth he was of age long before, was adjudged a good patent, because it was the intent of the king that it should commence from that time; and if that could not be, then for the time to come.

8 Co. 45.
4 Mod. 279.
cited.

If the king, being tenant in tail or for life, grants *totum statum suum*, nothing passes.

Co. 46.

So if the king, being seised in fee, grants the lands or a rent, and limits no particular estate in the gift, the grant is void, and the patentee has no freehold, either for his own life or for the life of the king, nor even an estate at will; because most grants proceeding from the application of the subject, they ought to know what they ask; and if that do not appear, nothing shall pass from the king by reason of the uncertainty.

Dav. 47.
45 Roll.
Abr. 845.
Co. 45.

So, if lands are given by the king's letters patent to a man and his heirs male, this is void, for there can be no such tenure; and therefore the king is deceived in his grant. (b)

Co. Lit. 27. a
Jenk. 199.
(b) *Contra* of
armories or

arms granted by the king to a man for reward of service, as the same is descendible to the heirs male lineal or collateral. Co. Lit. 27. a.

So, if the king possessed of a chattel interest grants it in fee, this is void.

3 Lev. 134.
Travel v.
Garteret.

¶ In 1631, the crown granted the soil along the coast of *Hants* between high and low water marks. In 1784, certain persons claiming under this grant erected wharfs, docks, &c. between high and low water marks in *Portsmouth* harbour; held that no good title could be made under the crown grant to this particular spot, for the crown had been in possession for 150 years after the grant, which possession raised a presumption against the grant itself, and there was no sufficient adverse possession on the part of the claimants to rebut it.¶

Parmeter v.
Attorney Gen.
1 Dow. P. C.
516. and see
Chad v. Tilsed,
2 Bro. &
Bing. 403.

3. *Where the King's Grantee shall partake of his Prerogative.*

A *chose in action* may be assigned to the king, as also granted or assigned by him; and in this latter case, the grantee may either sue in his own or in the king's name. But it is said (c) to be most usual to sue in the king's name, in order to take advantage of his prerogative.

Dyer, 1. pl. 7,
8. in marg.
Keilw. 169.
(c) 1 P.
Wms. 252.
2 Ves. 181.

J. S. attainted of treason, and being possessed of certain obligations which became forfeited, the king granted them to the wife (a) without any words enabling her to sue for them in her

Dyer, 30.
Sav. 2.
(a) Owen,
113. Cro. Jac.
82. like point.

own name; and she having sued in her own name, it was held, that she well might; for the law allowing the grant good, gives by implication the grantee the necessary means of attaining the benefit of it.

Cro. Jac. 179.
The King v.
Twine, Sav.
133.
(a) 2 Lev. 49,
50. Bro. Dis-
seis. 65.

So, where *J. S.* in an action on the case recovered 4000*l.* damages, and afterwards became outlawed in a personal action; and the king having granted this 4000*l.* it was held, that the grantee may levy this debt by action in his own name, or by extent in the king's name; though he has no words in his grant to sue it in the king's name, as is usual in such case; but in this case an assignment by the king's patentee was held void. (a)

(b) That the
king's paten-
tee shall not
take advantage
of the maxim
*nullum tempus
occurrit regi.*

If the king enters without title, or seizes lands by a void or insufficient office, he is no disseisor: but, if the king (b) by letters patent grants lands so seized, and the patentee enters, he is a disseisor; because he has time to enquire into the legality of his title, which the king is supposed to want leisure for.

Poph. 26.

Bro. Prerog. 68.

The king may distrain for his rent-service in any lands of his tenant: so, if he hath a rent-charge issuing out of certain lands, he may distrain in any other lands of the party; but his grantee cannot do so.

6 Mod. 149.

Originally all wrecks were in the crown, and the king has a right to a way over any man's ground for his wreck; and the same privilege goes to the grantee thereof.

PRIVILEGE.

PRIVILEGE is an exemption from some duty, burden, or attendance, with which certain persons are indulged, from a supposition of law, that the stations they fill, or the offices they are engaged in, are such as require all their time and care; and that therefore without this indulgence it would be impracticable to execute such offices to that advantage which the public good requires.

Under this description we shall consider,

- (A) The Duties and Offices from which certain Persons by reason of their Privilege are exempt.
- (B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. *Who*

1. Who are the Officers entitled to Privilege.
2. Of the Privilege and Protection allowed those whose Attendance is necessarily required.
3. In what Cases this Privilege is to be allowed.
4. Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.
5. How privileged Persons are to sue and be sued
6. Whether there can be Privilege against Privilege.

(C) Privilege of Peers and Members of Parliament.

1. Who are the Persons entitled to this Privilege.
2. How far this Privilege extends to their Servants and Attendants.
3. In what Cases this Privilege is to be allowed.
4. Of the Commencement and Continuance of this Privilege.
5. How Privilege is to be claimed and taken Advantage of.
6. What shall be deemed a Breach of Privilege.
7. Of the Proceedings in Courts by and against Persons entitled to Privilege of Parliament.

(A) The Duties and Offices from which certain Persons by reason of their Privilege are exempt.

THE king's servants are privileged in some cases in respect of their necessary attendance. 2 Inst. 531. 704.
Skin. 21. pl. 21.
2 Chan. R. 196.

2 Show. 84. pl. 72. — Privileged from arrests. Raym. 152. [It is an established rule of law, that the king cannot grant an exemption from any duties but those he has a title to impose; and which are *personal* to him, and distinct from the general interest of the realm. 2 Roll. Abr. 198. (K) pl. 1. 202. (T) pl. 2. Therefore where a statute enacted, that the lord-lieutenants of the several counties should "charge any person with horse and arms for the county where his estate should lie," towards the maintenance of the militia, it was holden, that a charter granted to the College of Physicians, exempting the members "from bearing or providing arms to serve in the militia in London and Westminster, or the suburbs or within seven miles thereof," did not exonerate one of the members from the charge, though his estate lay within seven miles of London. Sir Hans Sloane v. Lord William Paulet, 8 Mod. 12. But it should seem, that it is competent to the crown to grant an exemption from being pressed; because in the crown alone lies the power of issuing press-warrants. Cowp. 520, 521.;] *¶ et vide* 16 East, 165.]

One *Swallow* (a), being the king's minter or moneyer, was elected an alderman of London, but refusing to take the oath of an alderman was fined, and committed for the fine by the judgment of the court in London, which appeared on the return to a *habeas corpus*. He alleged in *B. R.* that he was an officer of the mint, and that, by an ancient charter of privilege granted such officers, he ought to be exempt; and offered to plead this matter to the return of the *habeas corpus*, as a matter consistent with him to do: but this the court refused to admit, as he might have pleaded (a) 1 Sid. 287.
2 Keb. 50. 54.
S. C. Swallow's case.

pleaded it in the court below : however, he was directed to set it forth in a suggestion in the crown office, which he did, and obtained a writ of privilege, which at another day he brought into court. The recorder objected to its being allowed against the ancient privilege of the city, confirmed by acts of parliament ; but the court held it a reasonable privilege, the office being ancient, and the attendance necessary elsewhere. They said, that if there were not persons sufficient besides to serve, this might have been shewn, and it would be a good reason to suspend his privilege ; and though aldermen were not mentioned in the charter, yet, as superior and inferior officers were mentioned, as, mayor, sheriff, escheator, collector of tenths, &c., they said the middle were included ; and accordingly he was discharged.

But, where some persons belonging to the custom-house, *London*, were indicted for not keeping watch and ward, though they pleaded a special privilege granted them by the king to exempt them from this duty ; yet, as they did not aver that there were sufficient persons besides, the plea was over ruled.

The king by his charter may exempt some persons from serving on juries if there be enough besides. But such charter of exemption does not extend to the Court of King's Bench, unless particularly named ; nor to any case where the king is concerned, unless it has these words, *licet tangat nos*. And the sheriff must not return such privilege, but the persons who would have the benefit of it must claim it.

A juror surmised at the bar, that he was tenant in ancient demesne, and had his charter in his hand, and prayed to be exempted from serving on the jury ; but the court did not regard it, but caused him to be sworn. It was said he might have his remedy against the sheriff (a) ; or if he had made default and lost issues he might shew his charter in the Exchequer upon the amercement estreated, and there he should be discharged.

Where a peer is party, either plaintiff or defendant, two or more knights (b) must be returned on the jury ; and it was said, that in *Cumberland* there was but one freeholder who was a knight besides Sir *Richard Stote*, a serjeant at law ; and the court were of opinion, that rather than there should be a failure of justice, a serjeant at law ought to be returned a jurymen ; for that his privilege would not extend to a case of necessity.

If a sworn attorney (c), or other officer of any of the courts of *Westminster-hall*, be chosen constable, he may have a writ of privilege for his discharge. And it is held, that such officers shall have this privilege, not only where there is no special custom concerning the election of constables, but also where they are chosen by a particular custom in respect of their estates or otherwise ; for that no such custom shall be supposed to be more ancient than the usage of those courts, and therefore shall give way to them.

So, an attorney, being chosen church-warden of a parish, may have a writ of privilege : so, a writ of privilege was signed by all the

Sid. 272.
Keb. 933.
The King
v. Clark.

Sid. 443.
Lev. 159.
Raym. 115.
Keb. 840.
||See tit. *Jury*.||

Leon. 207.
Mills v.
Snowballs.
Vide title
Ancient Demesne.
(a) *Qu. ; et vide*
Co. Lit 130.
Sid. 243.

2 Mod. 182.
Mod. 226.
Dyer, 107.
pl. 27.
(b) See 24 G.
2. c. 18. § 4.
No challenge
to the array for
want of a knight.

March, 30.
Noy, 112.
Cro. Car. 389.
2 Keb. 477.
(c) This privilege
is thought
to extend to
barristers at
law. 2 Hawk.
P. C. c. 16.
§ 59.

2 Roll. Abr.
272.
Palm. 392.

the Court of C. B. for *G.* a clerk under the *custos brevium*, to free him from being a soldier. And it is therein recited, that it is the privilege of the court, that neither the attornies nor clerks of it should be elected to any office without their consent, but ought to attend the service of the court.

Lev. 265.
Vent. 16. 29.
Raym. 180.
Cro. Car. 11.
389. 585. and
Co. Ent. 436.
like writ of privilege.

Gale, an attorney of *B. R.*, was elected one of the twenty-four burgesses in the town of ———, and because he refused to serve was fined ten pounds: then he procured a writ of privilege, which he shewed; after which debt was brought for the ten pounds in *B. R.*, and it was prayed after imparlance to stay the action against *Gale*, because that after imparlance he could not plead his privilege to the action; and *Stone's* case was cited who was elected reeve to collect the rents of the lord at *Harrow the Hill*, and was discharged by his writ of privilege. The court held, that the privilege of an attorney was a good discharge in this case: they likewise held, that the writ of privilege had a retrospect to the whole, and that being discharged from the office, he was discharged from the fine also.

Trin. 27 Car. 2.
in *B. R.*
Gale's case.
3 Keb. 512.
S. C.

It seems to be the better opinion, that if a captain of the king's guards, a gentleman of quality, or practising physician (*a*), be chosen constable in a parish, where there are persons sufficient to serve, and in which there is no special custom directing such election, that every such person may be relieved or discharged by the Court of King's Bench, which hath a supreme and mandatory power in cases of this nature: but in cases of a special custom in respect of estate or otherwise it hath been holden, that such persons are not to be excused; and the rather, because they may execute the office by deputy.

Sid. 272. 555.
431.
Mod. 22.
Lev. 233.
Keb. 439. 933.
578.
(*a*) Members
of the College
of Physicians
in *London*
exempted by
the statute

52 H. 8. c. 40. [But the equity of this act, it should seem, does not extend to other physicians not mentioned it. 2 Hawk. P. C. c. 10. § 44.]

By the statute 5 H. 8. c. 6. surgeons are exempt from serving parish offices.

2 Keb. 578.

By the 6 W. 3. c. 4. "All persons using the art of an apothecary, who shall be brought up and serve in the said art as apprentices seven years, shall be exempted from the offices of constable, scavenger, overseer of the poor, and all other parish, ward, and leet offices, and from serving on juries."

6 W. 3. c. 4.

If an alderman of *London* has a house in the manor of *R.* in the county of *Essex*, (in which manor the lord has by prescription a leet,) and he as an inhabitant is chosen constable there, yet he is not compellable to serve; for that as an alderman he is bound to be present in the city for the good government thereof. (*b*) — And a writ was awarded to the lord of the manor to discharge him.

Cro. Car. 585.
Jon. 462.
Alderman
Abdy's case
(*b*) At the
assizes at
Croydon, 1777,
Lord Mansfield

refused to fine Mr. Plumbe, returned as a special jurymen in a case before his lordship, because at that time he was one of the sheriffs of *London*.

One *Price*, being high constable for the hundred of *Wanstead*, was elected overseer of the poor in the parish of *St. Peter the Poor* in *London*; and upon producing the certificate of the justices of the peace of the county, and their certifying that his service

2 Jon. 46.
Price's case.

service in the office of constable was of great use and importance to his majesty, he was by the Court of *B. R.* discharged from the office of overseer till such time as his office of constable expired.

Vent. 344.
2 Show. 75.
pl. 59. The
King v. Bet-
tesworth.

But where *A.* was indicted for not taking on him the office of high constable, and the question on a special verdict was, Whether a tenant in ancient demesne may be made constable of an hundred which reaches further than the demesnes? it was adjudged that he might.

Vent. 105.
Lev. 303.
Dr. Lee's
case, and
Mod 282. S.C.
where it is
said, the rea-
son was, be-
cause the land was in lease, and the tenant, if any, ought to do the office. [The like point

Doctor *Lee*, archdeacon of *Rochester*, having lands within the level, was made an expeditor by the commissioners of sewers; whereupon he prayed his writ of privilege, which was granted; for the register is, *vir militans deo non implicetur secularibus negotiis*; and the ancient law is, *quod clerici non ponantur in officia*. — Clergymen are not to serve in the wars.

was determined in the Vicar of Dartford's case, 2 Str. 1107. more fully reported in Andr. 553. under the name of Chambers' case. The court in delivering their judgment in this last case, said, that upon the authority of Dr. Lee's case, and 6 Mod. 140. (*infra*), they were clearly of opinion, Mr. Chambers, the vicar, was not compellable to exercise the office: the first case being directly in point, and standing upon both the reasons given in the books; and the other being contrary to the distinction taken between an office at common law, and under act of parliament. And *Lee C. J.* added, that the usage which had been offered of several clergymen having actually served the office since Dr. Lee's case, had no influence on the present question; for the exemption being claimed as a privilege, any person entitled to it may certainly waive it, if he pleases.]

6 Mod. 140.
[By 1 W. & M.
c. 18. § 11.
*dissenting mi-
nisters*, and by
31 G. 3. c. 32.
*Roman Catho-
lic priests*, are,
under certain
conditions,
exempted

A writ of privilege was moved for to have a clergyman, who appeared to have no cure for souls, privileged from the office of overseer of the poor, which three judges thought reasonable; but *Holt C. J.* seemed against it, who thought that their privilege of exemption was only extendible to their spiritual revenues; and if in any case they were personal, it was only from common law offices, especially if they were without cure, as in the present case; and in deference to his opinion it was directed to be moved for again.

from serving all county, ward, and *parish* offices, and therefore a *clergyman of the church of England* may be supposed to be exempted; for it cannot be imagined, that the legislature meant to confer greater privileges upon *sectaries*, than the *regular clergy* were understood to possess; but there does not appear to be any adjudged case precisely to this point. See note to last edition of 6 Mod. *supra*.]

Mich. 9 G. 2.
in *B. R.* *Evin-
don's* case,
2 Stra. 1145.
[Heaton's case,
Barnes, 1143.
S. P. But
since the

In the case of *Evedon*, an attorney of *B. R.*, it was determined that he was not obliged to serve in the train-bands, or to find a deputy for that purpose, although the array and muster of these is directed by several acts of parliament which contain general words; for his privilege shall exempt him from offices, as well those created by statute as those at common law, if there be not an express clause for taking away his privilege.

§ 42. the militia acts having allowed a commutation of service into a payment of 10*l.*, it hath been holden, that an attorney is not entitled to his writ of privilege to exempt him from serving in the militia, it being no longer deemed to be a *personal* service, upon which ground alone he could be entitled to it. Gerard's case, 2 Bl. R. 1123. — By 26 G. 3. c. 170. § 27. "No peer of the realm, nor any person who shall serve as a commissioned officer in any regiment, troop, or company in his majesty's other forces, or in any one of his majesty's castles or forts, nor any non-commissioned officer or private man, serving in any of his majesty's other forces,"

"forces, nor any commissioned officer serving, or who hath served four years in the militia nor any person being a member of either of the universities, nor any clergyman, nor any teacher of any separate congregation, nor any constable or other peace-officer, nor any article clerk, apprentice, seaman, or seafaring man, nor any person mustered, trained, and doing duty, or employed in any of his majesty's docks or dock-yards for the service thereof, or employed and mustered in his majesty's service in the *Tower of London*, *Woolwich Warren*, the several gun-wharfs at *Portsmouth*, or at the several powder-mills, powder magazines, or other storehouses belonging to his majesty under the direction of the Board of Ordnance, nor any person being free of the Company of Watermen of the river *Thames*, nor any poor man who has more than one child born in wedlock, shall be liable to serve personally, or provide a substitute to serve in the militia: and no person having served personally, or by substitute, according to the directions of this, or any former act, shall be obliged to serve again, until by rotation it shall come to his turn: but no person who has served only as a substitute shall by such service be exempted from serving again, if he shall be chosen by ballot."

[An attorney, it hath been holden, is exempted, by the privilege of the court to which he belongs, from serving the office of sheriff in a corporation; though he be a member of the corporation, and resident in the corporate town, before and when he is admitted an attorney.]

Mayor of
Norwich v.
Berry, 4 Burr.
2115. 1 Bl.
R. 656. S. C.

A. who was a justice of peace, and resided at *Blackheath* in *Kent*, and in *London*, being appointed constable in *London*, moved for a writ of privilege. But the court denied it, saying they had nothing to do with it, but the proper method was under the statute of Car. 2. to apply to the sessions.

Delamott's
case, 2 Stra.
698.

Barristers are considered as exempt from serving the office of sheriff.

Per Lord
Mansfield,
4 Burr. 2114.

It is permitted by 1 W. & M. c. 18. and 13 Geo. 3. c. 20. to dissenters and *Roman Catholics* to serve the office of constable by deputy.

The officers of the excise and customs claim, and have been allowed in several instances, their writ of privilege from the court of Exchequer, as officers of the court, to be discharged from offices. One of these writs of privilege, that are now in use, was settled by Lord Chief Baron *Comyns* himself.

Anstr. 216.

So the foreign apposer was allowed his writ of privilege to exempt him serving the office of constable.

Harrison's
case, Bunb. 24.

One *Martin* who was deputy to the usher of the customs, being chosen head-borough for *Westham* in the county of *Essex*, moved for a writ of privilege to discharge him from that office, which was granted. Upon the authority of this precedent it was moved for a writ of privilege for the chief accountant to the commissioners for victualling the navy, who was chosen churchwarden of the parish of *St. Botolph, Aldgate*, his attendance upon the king's business and the revenue of the crown being, it was urged, equally concerned as in the other case. But the court thought this case not like the other case, for it did not appear here, that there was a clause of exemption in the patent constituting the commissioners of victualling, as in the other case there was for *all* officers, &c.; and the true reason they went upon in the other case was, for that *all* officers in the customs are bound to an attendance in the Court of Exchequer, which, in this case, the party applying for this writ of privilege is not.]

Bishop v.
Lloyd, Bunb.
255.

Rex v.
Warner,
8 Term R. 375.
Ex parte
Jefferies,
6 Bing. 195.

Mosely v.
Stonehouse,
7 East, 174.

|| An officer of the customs is exempted from serving the office of overseer of the poor, though he has not his writ of privilege at the time. So also is the clerk of the treasury of the Court of Common Pleas, since his duties require personal attendance.

A certificate granted upon 10 & 11 W. 3. c. 23., exempting the person prosecuting to conviction any one guilty of burglary from serving parish and ward offices, exempts the party from the office of petty constable for a township within, but not co-extensive with, the parish where the burglary was committed; for the term *parish offices* in the act, is to be taken in a liberal and popular, and not in its strict and technical sense.||

(B) The particular Privileges in Suits allowed Officers and Attendants in the Courts of Justice: And herein,

1. *Who are the Officers thus entitled to Privilege.*

2 Inst. 551.
4 Inst. 71.
Vaugh. 154.
Dyer, 377. a.
pl. 50.

THE officers, ministers, and clerks of the courts in *Westminster-hall* are allowed particular privileges in respect of their necessary attendance on those courts; they are regularly to sue and be sued in the courts they respectively belong to, and cannot, except in certain cases, be empleaded elsewhere; which privilege arises from a supposition of law, that the business of the court or their clients' causes would suffer by their being drawn into any other than that in which their personal attendance is required.

3 Leon. 149.
Lord Anderson's case.

Anderson C. J. of the C. B., brought trespass by bill for breaking his house in the city of *Worcester*, against a citizen of the said city; the mayor and commonalty came and shewed a charter granted by *Edward* the Sixth and demanded conusance of pleas; but it was refused, because the privilege of that court, of which the plaintiff was a chief member, is more ancient than the patent; for the justices, clerks, and attornies of this court ought to be here attending to do their business, and shall not be empleaded or compelled to emplead others elsewhere; and this privilege was given this court upon the original erection of it.

Bro. title Attorney, 67. title Bill, 24.
Vent. 1. Sir John How v. Walley.
(a) That if an attorney absents himself for a year, by the new rules he loses his privilege. 2 Lill. Reg. 371. *per Glyn C. J.* See *acc.* 4 Burr. 2114.

An attorney, so long as he remains on record, shall have his privilege; and therefore where it was moved, that *J. S.* should put in special bail, being an attorney at large, and having (a) discontinued his practice, the court said, that attornies at large have the same privilege with the clerks of the court, and are to appear *de die in diem*; and they were not satisfied that he had discontinued his practice.

2 Roll. R. 115.

But, where *J. S.* was arrested in *B. R.*, and after the arrest he procured himself to be made an attorney of C. B., and prayed his privilege; it was disallowed, because it accrued *pendente lite*.

5 Maule & S. 324.

|| A defendant who is sued by bill as an attorney of the K. B., not being so, may set aside the proceedings as irregular.||

In debt against the warden of the *Fleet*, by bill of privilege, he refused to appear; the court doubted how they could compel him, as they could not forejudge him the court, he having an inheritance in his office; but it being surmised that he made a lease of his office, it was held, that he should not have his privilege, for that the lessee, and not he, was the officer during the lease.

2 Leon. 173.
Gittison v.
Tyrrel.

So, if the marshal of *B. R.* grants his place for life, the grantor has no privilege during that time. (a)

Vent. 65.
(a) *Qu.* if he
can now grant

it? *vide* the stat. 27 Geo. 2. c. 17. whereby the power of appointing the marshal is revested in the Crown.

A clerk of *B. R.* was sued in an inferior court for a debt under five pounds, and had a writ of privilege allowed; for the stat. 21 Jac. 1. c. 23. never intended to take away the privilege of attornies.

Palm. 403.

In the court of Exchequer (b) there are three sorts of privilege; 1st, As debtor. 2dly, As accountant. 3dly, As officer.

Hard. 365.
(b) Where an
officer or mi-

nister of the Exchequer is one of the parties in a personal action, he shall be sued in that court, because his absence might hinder the king's affairs; so, a prisoner of this court, or any accountant that is entered into his account, shall have the like privilege; and a farmer or one indebted to the king, for the king's more speedy satisfaction of his debt or duty, may sue his debtor by a *quo minus* in the Exchequer. 2 Inst. 531. [That officers of the revenue, as such, are privileged to be sued in the Exchequer in all cases, is a doctrine and opinion which has been supposed to obtain in the Exchequer. However, the general privilege to be sued in all personal actions in that court hath been doubted by very great authority: for it seems that the court has always confined the privilege of removing the action to those cases in which the action has been brought for something which hath been done by them in the execution of their office. Lord C. Baron *Eyre's* argument in *Cawthorn v. Campbell*, Anstr. 216. And this doubt of the learned Judge is supported by the case of *Barkley v. Walters*, Bunb. 306. where a custom-house officer had seized two cables, one of which only was forfeited; and an action being commenced against him in the Court of King's Bench, the Court of Exchequer refused to remove it, because it did not appear but that the action was brought in *B. R.* for the other cable only.]

J. S. was sued in an action of battery in *London*, which he removed into *B. R.*, and afterwards prayed his privilege in the Court of Exchequer; and upon the puisne baron's coming into court, and bringing the red-book of the Exchequer, which shewed that he was an escheator, and so an accountant to the king, the privilege was allowed.

Noy, 40.
Walrend v.
Winroll.

If one holds of the queen as of her manor, he shall not have the privilege of the Exchequer for that cause; but (c), if the king grants tithes, and thereupon reserves a rent *nomine decimæ*, and a tenure of him, there he shall have privilege.

2 Leon. 21.
Lightfoot v.
Butler.
(c) In 2 Leon.
146. it is said,

that the tenant of the king in chief, or he who pays first fruits, or he who holds of the queen in fee-farm, shall not have privilege. *Qu. et vide* 5 Leon 258. — That commencing a suit in the Exchequer on a *quo minus* as debtor to the king, is not such a privilege as will oust an inferior jurisdiction; for it is now grown the common method of suing in those courts. Hard. 316. 2 Vent. 362.

On a *latitat's* being sued out against the commissioners of the treasury, the puisne baron of the Exchequer came into the court of *B. R.*, and brought into court the red-book of the Exchequer, which is deemed a record in that court; and thereby it appeared, that the treasurer had privilege of being sued only in that court; and the patent being produced in court which constituted the de-

2 Show. 299.
pl. 301. Lam-
pen v. Sir
Edward Deer-
ing *et al.*

fendants,

(a) Difference between officers that are of record and not. Hard. 164.

Hard. 316.

vide Moor, 765.

2 Inst. 23. 551.

Bro. Privilege,

17. (d) But,

if an account-

ant has finished

his account

and reduces it

to a debt, he shall have no privilege but as a general debtor. Hard. 365.

Raym. 34.

Keb. 137.

Barrington v.

Venables.

Luntley v.

Battine,

2 Barn. & A.

234.; *et vide*

10 East, 578.

5 Term R. 686.

2 Taunt. 167.

Bidgood v.

Davies,

6 Barn. & C.

84.

Hatton v.

Hopkins,

6 Maul. & S. 271.

(c) 2 Lev. 129.

5 Keb. 424.

2 Mod. 296.

S. C. — So of

the servant of

a serjeant at

law. Cro. Car.

84.

Trin. 7 G. 2.

Serjeant Gird-

ler's case.

Barnes, 371.

fendants, &c., and granted them the office of treasurer of *England*, their privilege was allowed them without putting them to bring a writ of privilege, the court grounding themselves on the record before them. (a)

It hath been held, that the treasurer of the navy is *eo ipso* an accountant; and that an accountant's privilege will hold against a special privilege in another court, as officer of the court or otherwise; though it be not alleged that such an accountant is (b) entered upon his account; for that every accountant may be attached by the court to make up his accounts, and must attend for that purpose *de die in diem*.

Hard. 365.

In debt in *B. R.* against *J. S.* he pleaded to the jurisdiction that none of the privy chamber ought to be sued in any other court, without the special licence of the lord chamberlain of the household, and that he was one of the privy chamber; on demurrer to this plea, the court over-ruled it with great resentment, and awarded a *respondeas ouster*.

|| It seems doubtful whether a gentleman of the privy chamber is privileged from arrest, and where the question is doubtful, the court will not discharge the party on motion, but leave him to his writ of privilege.

The king's servants are privileged from arrest; and this although they publicly carry on trade, and the debt be contracted in the course of such trade.

One of the wardens of the *Tower* was arrested, and was informed at the time that the plaintiff would be satisfied if he would enter an appearance. He however claimed his privilege, but afterwards executed a bail-bond. The court refused to order the bail-bond to be delivered up to be cancelled, leaving him to plead his privilege.

The candle and fire lighter to the yeomen of the guard at *St. James's* palace is privileged from arrest on mesne process. ||

It was agreed in Serjeant *Scrogg's* case (c), that the privilege of the court of C. B. which serjeants claimed, extended only to inferior courts, not to the courts in *Westminster-hall*; and that a serjeant may be sued in any of these, because he is not confined to that court alone, but may practise in any other court: but it is otherwise as to attornies or filazers, who cannot practise in their own name in any other court but such as they respectively belong to. A serjeant at law therefore is to be sued by original, and not by bill of privilege.

So, in an action by bill brought in C. B. against a serjeant at law, for work done, he pleaded that he ought to have been sued by original, and not by bill. [Upon arguing the demurrer, a case was quoted, *Baker* against *Swindale*, in the Court of C. P. *Mich.* 10 G. Roll. 360. It was an action brought against a prothonotary's clerk by original, to which he pleaded, that he ought to be sued by bill; whereupon the plaintiff demurred, and the court

court gave judgment that the defendant should answer over. *Per cur.*—This case is in point; serjeants, prothonotaries' clerks, and all others not obliged to attendance in court, are upon the same foot. Judgment *quod billa cassetur*.

The defendant pleaded in abatement, that he was one of the clerks of Sir *J. Cooke*, prothonotary in *C. B.* Upon a rule to shew cause why it should not be set aside, the affidavit annexed to the plea was produced, wherein the defendant swore, that he served his clerkship with a Common Pleas attorney, and that he had for many years acted as an attorney or solicitor; and followed no other employment. After consideration the court set aside the plea, being all of opinion, that such clerks had no privilege at all, they not being sworn as attornies are, nor ever acting as clerks in the prothonotary's office; and that it was not sufficient for the prothonotary to enter their names in his book. As to such clerks as were actually employed under him, for so long as they continued in that employment, they would be privileged, but no longer; as in the case of a judge's clerk; and an old rule 8 Car. was cited, where they were restrained from practising as attornies.]

been required to that effect. *Cooke v. Latimer*; *Reade v. Chambers*, *Fortesc.* 342.; and in the case of one *Worthington*, 1 *Ld. Raym.* 399. *Clift.* 572.

J. S. being arrested by a writ out of *C. B.* brought his writ of privilege as clerk of the crown-office; but it appearing that he was only a clerk to Mr. *Ward* (clerk of that office) and not an immediate clerk of the office, a *supersedeas* to the writ of privilege was granted on motion; the court having agreed, that he had no more privilege than an attorney's clerk. (a)

But the clerk to the clerk of the Pells in the exchequer is entitled to the privileges of that court. *Comb.* 482.

A serjeant at law (b), barrister, attorney, or (c) other privileged person, whose attendance is necessary in *Westminster-hall*, may lay his action in *Middlesex* (d), though the cause of action accrued in another county; and the court on the usual affidavit will not change the *venue*.

And he may continue his practice for some time. 2 *Show.* 176. pl. 172. [*Vide sup. contr.* But he does not lose his privilege by residing in the country. 2 *Black. R.* 1065.] (c) This privilege extends to judges' clerks, and also to the clerk of assize. *Salk.* 670. pl. 9. 671. 2 *Ld. Raym.* 1253. (d) It is the common right of any gentleman at the bar to have a trial at bar; and it has never been denied in the case of an officer of the court. 6 *Mod.* 123. *per cur.*

But it hath been held, that if a privileged person be sued, and the action brought against him in the right county, his privilege will not entitle him to have it tried in *Middlesex*.

court.—But in *Salk.* 668. in *Wilcocks's* case, *Trin.* 2 *Ann.* the *venue* is said to have been changed where an attorney was defendant. [And the like was done in the case of *Wigley v. Morgan*, 2 *Stra.* 1049. *Ca. temp. Hardw.* 285. *Andr.* 384. However, this case has been since overruled, and the law is now settled agreeably to the doctrine in the text. *Pope v. Redfearne*, 4 *Burr.* 2027. *Yeardley v. Rowe*, 3 *Term R.* 573.]

If an attorney lays his action in *London*, the court will change the *venue* on the usual affidavit; for by not laying it in *Middlesex*,

Payne v. Fry, 1 *Stra.* 546. The old way of pleading that a man is a clerk of one of the prothonotaries, was, that he was employed in engrossing records, *assidens in curia*, and the like. *Rast.* 473. b. 34 *H. 6.* 15. And in the court of *K. B.* of late years an affidavit has

2 *Show.* 287. pl. 284. *Ward v. Lawrence.* (a) That an attorney's clerk has no privilege. *Comb.* 12. adjudged.—

Stil. 460. *Mod.* 64.

2 *Show.* 242. pl. 239.

(b) Though he hath discontinued

2 *Show.* 176. pl. 172. [*Vide sup. contr.* But he does not lose his privilege by residing in the country. 2 *Black. R.* 1065.] (c) This privilege extends to judges' clerks, and also to the clerk of assize. *Salk.* 670. pl. 9. 671. 2 *Ld. Raym.* 1253. (d) It is the common right of any gentleman at the bar to have a trial at bar; and it has never been denied in the case of an officer of the court. 6 *Mod.* 123. *per cur.*

Carth. 126.

Ld. Raym. 338.

Show. 148.

Bisse v. Har-

carth. 126. *Ld. Raym.* 338. *Show.* 148. *Bisse v. Har-*

2 *Vent.* 77.

2 *Salk.* 668.

pl. 1. [So, au

attorney suing he seems regardless of his privilege, and is to be considered as a person at large.
by original, waives his privilege. *Hetherington v. Lowth*, 2 Stra. 837.

2 Ld. Raym. 1556. Fitzg. 40. S. C. Burroughs v. Willis. 2 Stra. 822. Barnard. K. B. 14.

1 Price, 384.n.

7 Taunt. 146. S. C. 2 Marsh. 426.; *et vide* 2 Marsh. 152.

On a motion to discharge a rule which had been obtained for changing the *venue*, it appeared, that the plaintiff was a barrister and master in chancery; and the court held, that he had a privilege, by reason of his attendance, to lay his action in *Middlesex*, and therefore discharged the rule.

|| An attorney (not being one of the four attornies of the court of Exchequer) is not in that court entitled to the privilege of laying his *venue* in *Middlesex*.

If the plaintiff, an attorney, by mistake lay his *venue* in another county instead of *Middlesex*, the Court of C. B. will not amend in order to change it.||

2. Of the Privilege and Protection allowed those whose Attendance is necessarily required.

Brownl. 15. Raym. 101. 2 Mod. 181. 2 Roll. Abr. 272. Golds. 33. (a) If he knew that the party was prosecuting or defending any suit; because an affront to the court, as well as an injury to the party arrested. 2 Lil. Reg. 369.

Mich. 26 Car. 2. in C. B.

The law not only allows privileges to the officers of the court, but also protects all those whose attendance is necessary in courts; so that if a suitor is arrested either in the face of the court, or out of the court, as he is coming to attend and follow his suit, or upon his return, it appears upon complaint made thereof, that the fact was so, the court will not only discharge the party from the arrest, but will punish the officers or bailiffs, as also the plaintiff (a) who procured the arrest, as for a contempt to the court.

Serjeant *Scroggs*, entering his coach at the door of *Westminster-hall*, was arrested upon *latitat* out of *B. R.*, and complaint being made thereof in C. B., it was agreed, that not only serjeants at law, but all other persons whatsoever, are freed from arrests so long as they are in view of any of the courts at *Westminster*, or if near the courts, though out of the view, lest any disturbance may be occasioned to the courts or any violence used, which in such cases is very penal. In this case the serjeant was discharged of the arrest by rule of court, and the judges said, that if the plaintiff should bring an action against the sheriff for an escape, they would commit him. The bailiffs who made the arrest were committed to the *Fleet*, but the next day, upon their submission and acknowledgment, were discharged, paying their fees.

2 Mod. 181. Long's case.

So, where one *Long*, an attorney of C. B., was arrested in *Palace-yard*, not far from the Hall gate, sitting the court, he together with the officer was brought into court, and the officer committed to the *Fleet*; and because the plaintiff was an attorney of *B. R.* who informed the Court of C. B. that his cause of action was 200*l.*, the court ordered that another of the sheriff's bailiffs should take charge of the prisoner, and that the prothonotary should go with him to the Court of *B. R.*, and that court, being informed how the case was, discharged the defendant on common bail. The writ upon which he was arrested was an attachment of

of privilege, which the court supposed to be designed to oust him of his privilege; for there was another writ against him at the sheriff's office, at the suit of another person.

If process hath issued against a husband, and in coming to defend it he and his wife are both arrested, the wife shall have privilege as well as the husband; for they are considered as one person in law, and the wife cannot answer without her husband.

If the court give either plaintiff or defendant leave to enquire after evidence in any cause depending in that court, and he be arrested, he shall have privilege; but it is otherwise if he go without the permission of the court. So, if one on the day he has been attending his cause be arrested at ten o'clock at night, by one noway engaged in the cause, he shall not have privilege. (a)

man to go the direct road. Bro. Privilege, 4. allows that the protection is not forfeited by the plea of *extra viam*, because it may be the party went to buy a horse, victuals, or other necessities for his journey. Neither is the law so strict in point of time as to require the party to set out immediately after the trial is over, as in the case of *Hatch v. Blisset*, *infra*, and *Gilb. R. 308*. The defendant, an old woman, had a trial at *Winchester* assizes, which was over on *Friday* at four in the afternoon: she stayed there till after dinner on *Saturday*, and in the evening at seven was arrested going home to *Portsmouth*, which is twenty miles: and the court held, that she ought to be discharged, that her protection was not expired, and a little deviation or loitering would not alter it. And in a later case, where the defendant was attending his cause at the sittings, and though it was put off early in the day, stayed in court till five in the afternoon, and then went with his attorney and witnesses to dine at a tavern, where he was arrested during dinner; the court held, that such a necessary refreshment as this ought not to be looked upon as a deviation, so as to cancel the defendant's privilege *redeundo*. *Lightfoot v. Cameron*, 2 Black. R. 1113.] || But where a party in *London* was required to attend an arbitration at *Exeter* on a given day, and three days before set off, accompanied by his attorney, and went to *Clifton*, where his wife resided, and where were some papers necessary to be produced, and was occupied for a great part of two days in sorting and arranging them; and on the afternoon of the second day was arrested: held, that he had forfeited his privilege by the delay: *Abbott C. J. diss.* *Randall v. Gurney*, 3 Barn. & A. 252. But the majority of the Court of Exchequer held the party privileged under these circumstances. 7 Price, 699. A witness is not privileged from being arrested by his bail: the bail may take him, after he has finished his evidence, for the purpose of surrendering him. *Ex parte Lyne*, 1 Ry. & Moo. Ca. 152.]

A. has a suit against B. in C. B., and afterwards B. is arrested in an inferior court, when he was not coming to or returning from the defence of his suit; he shall not have privilege. Jenk. 173.

A person coming to give security of the peace, it was held he was privileged; if he had come to have sworn the peace, the arrest would have been allowed. Comb. 29. The King v. Fielding.

So, where one came to confess an indictment, the court held he had no privilege *eundo et redeundo*, because there was no process against him. 2 Salk. 544. pl. 6.; *sed vide infra*.

The courts not only protect the parties themselves, but all witnesses are protected *eundo et redeundo*; for since they are obliged to appear by the process of the court, they will not suffer any one to be molested whilst he is paying obedience to their writ. Vent. 11. Mod. 66.

[And it hath lately been laid down by the court of C. P. as a general rule, that all persons who have relation to a suit which calls for their attendance, whether they are compelled to attend by process or not, are entitled to privilege from arrest *eundo et redeundo*, provided they come *bonâ fide*. And in this description bail and barristers upon the circuit are included.] Meekins v. Smith, 1 H. Bl. 636.

20 H. 6. 4.

Bro. Priv. 55.

2 Rol. Abr. 275.

Also, the courts not only protect the persons of their attendants, but likewise all those things that are necessary for their journey or the defence of their suit; but not merchandizes or goods for sale or traffic.

Kinder v. Wil-

liams, 4 Term

R. 377. But see

Ex parte Ker-

ney, 1 Atk. 55.

Ex parte Dick,

[The court of *B. R.* hath refused to discharge a person in custody by process of the sheriff's court in a cause afterwards removed into *B. R.*, because he was arrested whilst attending commissioners of bankrupt to prove a debt.]

and *Ex parte Stow*, 2 Black. R. 1142.

Childerston v.

Barrett,

11 East, 439.

|| A plaintiff, in expectation of his cause coming on, is privileged from arrest while waiting in the vicinity of the court before the day of trial.

Willingham v.

Matthews,

6 Taunt. 356.

So also is a person attending the Insolvent Debtors' Court to oppose the discharge of a debtor.

Rimmer v.

Green, 1 Maule & S. 638.

So also bail attending to justify.

Spence v. Stew-

art, 3 East, 89.

Sed vide 3 Barn. & A. 252.

So also a defendant in a cause attending an arbitrator to be examined under a rule of court.

7 Price, 699.

Arding v.

Flower,

8 Term R. 554.

So also a bankrupt attending a meeting of commissioners to declare a dividend, although several years after his last examination.

Nixon v. Burt,

1 Moo. 413.

S. C. 7 Taunt.

682.

But a capital burgess of a borough attending an election of co-burgesses under a summons from the mayor, issued in obedience to a *mandamus* directing the corporation to proceed to such election, is not privileged during his attendance.

Walters v.

Rees, 4 Moo.

34.

If a plaintiff is arrested while attending the execution of a writ of enquiry at his own suit the under-sheriff cannot discharge him, but the court will do so on motion. ||

3. In what Cases this Privilege is to be allowed.

Sand. 67.

The privilege allowed officers of the court is to be understood as extending only to such cases where the party who sues them has sufficient remedy in their own courts: therefore, if a writ of entry or other real action be brought against an attorney of *B. R.*, he cannot plead his privilege; because, if this should be allowed, the plaintiff would have a right without remedy: for the King's Bench hath not cognizance of real actions.

Ibid.

So, if an attorney of *C. B.* be sued in an appeal, he shall not have his privilege; for his own court hath not cognizance of this action.

Sid. 362.

Sand. 67.

2 Keb. 346.

Turbill's case,

et vide 2 Leon.

156.

So, if money be attached in an attorney's hands by foreign attachment in the sheriff's court in *London*, he shall not have his privilege; because in this case the plaintiff would be remediless; for the foreign attachment is by the particular custom of *London*, and does not lie at common law.

4 Leon. 81.

2 Rol. Abr. 274.

Lit. R. 97.

In indictments, informations, or suits, in which the king alone is concerned, the officer shall not have privilege; for it would be unreasonable that the court should allow protection to those

who

who offend against the public peace of the community and the king's interest.

But it seems the better opinion, that in an action *qui tam*, as on the stat. 23 H. 6. c. 7., against an attorney, for continuing sheriff longer than a year, the defendant ought to have his privilege; for though it be brought in the king's name, and the king is to have part of the money, yet it is to be considered as the mere suit of the party, in which the party may be nonsuit. Besides, the party may have a *tales*, without the warrant of the Attorney-General.

Also, the privilege the courts allow their officers is restrained to those suits only which they bring in their own right, or are brought against them in their own right; for if they sue or are sued as executors or administrators, they then represent common persons, and are not entitled to privilege.

¶ But an attorney who is justice of the peace for a borough is entitled to be sued by bill for an act done in his office of magistrate; and, if sued by original, he may plead his privilege in abatement.¶

Where a clerk of the king's remembrancer in the Exchequer married a woman who was executrix to *J. S.*, and having brought an action of debt by privilege, for a debt due to the testator, it was held, that he was not entitled to privilege.

So in an action against an attorney, who was executor to *J. S.*, who pleaded his privilege, it was over-ruled, though it was urged, that there was a difference where the attorney was plaintiff and where defendant; but the court held it the same in both cases.

Also, if a privileged person brings a joint action, this destroys his privilege; because those with whom he joins are not officers of the court, nor entitled to the attachment which the court grants to its own officers.

So, if an action be brought against a privileged person and others, he shall be ousted of his privilege; for if otherwise, he would destroy the plaintiff's action, as he would be obliged to sue the others by original writ, and him by petition. But some opinions are, that this must be understood where the action is joint in its nature, and cannot be severed; and that if the action can be severed without doing any injury to the plaintiff, the officer shall have his privilege.

But this matter came fully to be considered in a late case, where trespass was brought in *B. R.* against an attorney and another person: the attorney pleaded his privilege as an attorney of *C. B.*, and concluded *quod non intendit quod cur. cognoscere velit*, &c.; and on demurrer, though it was admitted that the nature of the action was several, yet the court, on consideration of the above cited cases, held, that the rule was general, and that the plaintiff was not bound to bring separate actions; and thereupon awarded a *respondeas ouster*.

¶ And an attorney sued jointly with his wife, for her debt incurred *dum sola*, loses his privilege.

- 3 Lev. 598.
- Comb. 319.
- Lutw. 195.
- Skin. 549. pl. 10.
- Salk. 30.
- Ld. Raym. 27.
- 2 Salk. 545.
- pl. 1. 1 Black. R. 375.
- Cowp. 367.
- Hob. 177.
- Dyer, 24.
- pl. 150. 2 Sid. 157.
- Latch. 199.
- Godb. 10.
- Brown and Goldsb. 47.
- Sav. 20.
- 3 Taunt. 166.
- Salk. 2. pl. 4.
- Ld. Raym. 533
- Newton v. Rowland.
- 2 Rol. Abr. 274.
- 14 H. 4. 21.
- 20 H. 6. 32.
- Dyer, 377.
- 2 Rol. Abr. 274, 275.
- Godb. 10.
- Noy, 68.
- 2 Sid. 157.
- Vent. 298.
- 2 Lev. 129.
- 2 Mod. 296.
- Vern. 246.
- Hil. 8 G. 2.
- in *B. R.*
- Pratt v. Salt.
- Roberts v. Mason *et u.r.*
- 1 Taunt. 245.

Ramsbottom
v. Harcourt
and another,
4 Maule & S. 585.

But an attorney sued by bill, jointly with a person having privilege of parliament, is entitled to his privilege.

Brooke v.
Bryant,
7 Term R. 25.
Dyson v.
Birch, 1 Bos. & P. 4.

The privilege only belongs to an attorney who *practises*, and has a certificate according to 25 Geo. 3. c. 80.; and unless an attorney has practised within a year, he is not entitled to it.

Skirrow v.
Tagg, 5 Maule
& S. 281.; *et*
vide 2 Maule &
S. 605.

But he will not lose his privilege by neglecting to renew his certificate on the expiration of the former one, provided he renews it within a year.

Byles v. Wil-
ton, 4 Barn. &
A. 88.

An attorney in custody for debt loses his privilege, and may be detained upon mesne process.

Kaye v.
Denew,
7 Term R.
671.

But he is not precluded from suing by attachment of privilege for a debt due to *himself*, although the statute 12 Geo. 2. c. 13. § 9. prohibits his commencing a suit for another during his custody. ||

4. *Of claiming and allowing Privilege; and therein, that it must be set forth and pleaded.*

Dalst. 16.
Vaugh. 154.
2 Buls. 36.

Privilege is to be claimed and allowed of in courts in such (a) manner as the law directs, and in most cases it is a matter to be taken strictly. (b)

(a) Not to be

allowed on motion. Stil. 373. *Vide* 2 Chan. Ca. 69. — An attorney must plead his privilege, and cannot be discharged on motion. Salk. 554. pl. 3. [1 Wils. 506. 2 Stra. 864. 2 Ld. Raym. 1567. Barnard. B. R. 300. But where an attorney is arrested by *latitat* in his own court, it is a motion of course to discharge him on filing common bail. Wheeler's case, 1 Wils. 298. Imp. K. B. 474. ed. 1791. In the case of Crossley v. Shawe, 2 Black. R. 1085. the Court of C. P. held, that an attorney arrested by *capias* upon a special original out of that court was not entitled to his discharge upon serving the sheriff with a writ of privilege, but must plead his privilege. If, indeed, the arrest were upon process out of an inferior court, his writ ought to be allowed *instantly*. Rawlins v. Parry, Sir Geo. Cooke's notes, p. 2.] (b) 2 Sid. 164.

8 Co. 141.

— 2 Brownl. 101.

— A writ of

privilege dis-

allowed by an inferior court, held error. Cro. Eliz. 152.

Hil. 26 Car. 2.
Barns v.
Fletcher.

If an inferior court will proceed after a writ of privilege is delivered it is a nullity, and the courts at *Westminster* will discharge the party.

One *Fletcher* was sued in the Marshal's Court, and he procured a writ of privilege as attorney of C. B., upon which the plaintiff in the Marshal's Court surmised, that he was forejudged before, and produced the record of his forejudger; upon which the Marshal's Court proceeded; and upon complaint thereof in C. B. the court held, that the writ of privilege ought not to have been questioned there, but ought to have been allowed; and that if it was not duly obtained, it was a matter examinable here; therefore all the proceedings in the Marshal's Court were set aside, and the plaintiff ordered to pay all costs of the proceedings since the writ of privilege, otherwise an attachment to issue.

6 Mod. 305.
Phips v.
Jackson.

A clerk to one of the Barons of the Exchequer being sued in B. R. pleaded, that *tempore quo memoria non extat* all the clerks of the king's Court of Exchequer were privileged from being sued elsewhere than in that court; and that the defendant was clerk to *R. P. un' Baron' de Scaccario nostro praedict'*: upon demurrer, the court said, there were two ways of pleading privilege;

privilege; one was to go to issue, and at the trial, if the party be an officer of record, to shew it by producing the record; if he be not an officer of record, but is attendant on one of the Barons, that must be tried by a jury; because the Court of Exchequer, as a court, cannot take notice of it any more than the Court of King's Bench: the other way is, if he be an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no issue can be joined upon it; and here the custom is ill pleaded, for *tempore quo non extat memoria* is nonsense, it should be *cujus cont' memoria*, &c.; and because that he did not aver to one of the Barons of the king's Exchequer, but *de Scaccario nostro*, a *respondeas ouster* was awarded.

In an action against *A.* he pleaded his privilege thus: And the said *A.* in his proper person says, that he is, and at the time of exhibiting the bill was, one of the clerks of *T. W.*, one of the prothonotaries of the Court of C. B. at *Westm.* in the county of *Middlesex*, and attending his office every day, and concluded with an averment generally, without annexing any writ of privilege to his plea; and this on demurrer was held ill, because the defendant did not say *venit* as well as *dicit*; and for that he did not lay any *venue*, so as the fact of his being a prothonotary's clerk might be tried; for it is a matter issuable, for their clerks are not enrolled. (*a*)

Salk. 30. 2 Salk. 545. pl. 1. Ld. Raym. 27. 2 Sid. 164. 2 Lutw. 1466. Vent. 264. 3 Keb. 552. Skid. 582. pl. 2. [2 Black. R. 1088.]

To an action brought in *B. R.*, the defendant pleaded his privilege of an attorney of C. B., without producing any writ of privilege, and without saying *prout patet per recordum*; and two exceptions were taken: 1st, The want of averment, *prout*, &c. 2dly, That there was no place laid where the defendant was an attorney. And *per Holt* C. J. there are two ways of pleading this matter so as it cannot be denied, *viz.* with a *profert* of a writ of privilege, or of an exemplification of the record of his admission; or it may be pleaded as it is here: and as to the averment by the record, it is never pleaded as a matter of record, which is always pleaded with time, *viz.* of such term, &c.; but never any plea was seen that the defendant of such term was admitted attorney, &c. As to the second exception he said, that it was not necessary to lay a *venue*; for that this being a matter concerning the person of the defendant, it should be tried where the writ was brought.

An attorney of C. B. being sued in *B. R.*, pleaded his privilege; to which it was demurred specially, for not concluding his plea with a *profert* of a writ of privilege testifying his being an attorney, &c. And *per Holt* C. J. the difference is, if privilege of an attorney be pleaded with a writ, the defendant cannot be denied to be an attorney; if without he may; and then a *certiorari* shall be awarded to certify whether he be or not.

¶ An attorney of K. B., in pleading his privilege against being sued by original, improperly stated the custom of that court to be not to compel its attorneys to answer an original writ unless first

Carth. 362.
Skin. 582. pl. 2.
Stephens v.
Squire.
(a) Hard. 164.
7 Mod. 97.
But the privilege of an attorney or officer on record is not traversable, nor triable *per pais*.

2 Salk. 545.
pl. 8.
2 Ld. Raym.
1172.
Scawen v.
Garret.

2 Salk. 545.
pl. 7. Dillon v.
Harper, 2 Ld.
Raym. 898.
S. C.; vide
7 Mod. 106.
Clifton v.
Swezeland,
like case.
Stokes v.
Mason,
9 East, 424.

prejudged from their office (which is the custom in C. P. but not in K. B.); the court, however, held that enough appeared to sustain the plea of privilege, and that they would take notice that an attorney could only be sued by bill, and reject the statement of the custom as surplusage.

Chatland v.
Thornley,
12 East, 544.

And where the plea of an attorney stated his privilege not to be compelled to answer any bill to be exhibited against him *in the custody of the marshal*, and concluded (like a plea to the jurisdiction) that the court could not *take further cognizance*, &c. (instead of praying judgment of the bill, and that it might be quashed), the court refused to consider it as a plea to the jurisdiction, in which case it would have been bad, but only as objecting to the court's taking cognizance of an action against one of its attorneys *in that form*; and the court adjudged the bill to be quashed. ||

6 Mod. 114.

(a) An attorney of C. B. pleaded his privilege in *B. R.* and annexed a writ

of *B. R.* And *per curiam*, he shall not be sworn to his plea (a), nor need the writ of privilege be set forth at large; and if matter of fact be pleaded in abatement, and found against the defendant, judgment (b) final shall be given.

of privilege to his plea, tested after the action brought, but made no affidavit of the truth of his plea; and on a motion of Mr. Parker, the plea was set aside for want of the oath; and because it did not appear by the writ that the defendant was an attorney at the time of bringing the action. Mich. 6 G. 2. Wicks v. Dagley. 2 Barnard. K. B. 216. S. C. [Whether it is necessary to annex an affidavit to the plea seems to be a matter of some doubt. See 2 Black. R. 1088. It must appear by the plea, that the defendant was an attorney at the time of bringing the action. A mere clerical mistake in the statement of this fact was holden to be fatal. 2 Str. 864.] The defendant pleaded his privilege that he was an acting clerk to Sir George Cooke, and annexed an affidavit to his plea, that he solicited causes in the court of C. B., but because he did not swear that he entered causes in that office, or that he did business as an entering clerk, the plea was set aside. Hil. 2 G. 2. in *B. R.* Edmund and Thomas. Barnard. K. B. 141. S. C. may be pleaded without a venue. 2 Ld. Raym. 1173. (b) That it is peremptory. Bro. Perempt. pl. 48.

2 Sid. 104.

Hard. 164.

Forster v. Bar-
rington.

(c) Vide 2 Ld.
Raym. 869.

Lutw. 1466.

(d) The privilege of an officer of the Exchequer may be pleaded, or by shewing the red book of the Exchequer allowed.

1 Keb. 256. 2 Keb. 103. 2 Lutw. 46. — An accountant of the king's Exchequer allowed his privilege in *B. R.* on a Baron's coming into court and shewing his book of accounts, and this without any plea or prayer of the party. 2 Bulstr. 36. — Where one entitled to the privilege of the Court of Exchequer is sued in C. B. the court sends a *supersedeas*; but if it be in *B. R.* no *supersedeas* is sent, for that would be to supersede the king; but the practice is to send up the red book by the Puisne Baron. 2 Salk. 546. *per* Walter Ch. Baron. [The practice here stated is gone into desuetude, and the method now used of asserting the privilege is by an order from the Court of Exchequer to remove the action, whether commenced in the King's Bench, Common Pleas, or any other court, into the office of pleas of the Court of Exchequer, and that it shall be there in the same forwardness as in the court out of which

which the action is removed: but this order does not operate as a *certiorari* to remove the proceedings, but as a personal order on the party to stay his proceedings there, with liberty to commence his action in the office of pleas, and of course calls upon the defendant in that action to appear, to accept a declaration, and to put the plaintiff in the same state of forwardness in the office of pleas as he was in the other court. So that the order is simply an injunction to stay proceedings in the other court, qualified and softened by a liberty given to sue here; and is to be enforced, as all injunctions are, by attachment. Lord C. B. *Eyre's* argument in *Cawthorne v. Campbell*, Anstr. 207, 208.]

In *assumpsit*, the defendant *venit et dicit*, that he is an officer of the Exchequer, and pleads privilege; and on demurrer two exceptions were taken: 1st, Because he pleads his privilege by writ, but not under the seal of the court. 2dly, That it is not said, that the court ought not to have consuance in the beginning of the plea. *Per Holt C. J.* — If a man pleads privilege, and at the time of pleading he produces a writ testifying that he is an officer, the plaintiff cannot deny the privilege: but, if he pleads it without a writ, the plaintiff may deny it, but the plea is good without shewing the writ. As to the second exception he held, that the conclusion made the plea; for if a man begins in bar and concludes in abatement, it is a plea in abatement.

The clerks of the papers and secondary of the King's Bench, when they claim privilege, declare themselves to be clerks to the master. Sid. 74.

Privilege in the Common Pleas must be certified by the prothonotaries, and not by the secondaries. Sid. 65.

It hath been a matter of great doubt how far an attorney of C. B., or other privileged person, being *in custodia marescalli*, shall be ousted of his privilege; for, on the one hand, being in actual custody he is to answer to the plaintiff's demand lodged against him, and not to the process that brought him in; and, on the other hand, it hath been thought hard, that his being there by coercion and on a fictitious trespass should oust him of his real privilege: the determinations herein have been, 1st, That though *A.* be *in custodia marescalli* at the suit of *B.*, yet when *B.* declares against him he may plead his privilege, because he comes there by coercion, and had no opportunity before to take advantage of it. 2dly, If *A.* files bail at the suit of *B.*, and in the same term a declaration is delivered against *A.* at the suit of *C.*, *A.* may plead his privilege against *C.* as well as against *B.*; for it were absurd that *C.*, who tops his suit upon the action of *B.*, should have more liberty or advantage against *A.* than *B.* himself had. 3dly, But if it be in a subsequent term, or if by any thing *A.* waive his privilege in the first action, he then becomes obnoxious to the suits of every one; and as to *C.* he is truly *in custodia marescalli*; for being once ousted of his privilege, he can no longer attend as an officer in the other courts, but is fixed in the King's Bench; and therefore cannot, by the supposition of the necessity of his attendance, oust the party of his action.

So, if an attorney of C. B. is brought into the the Court of *B. R.* at the suit of an attorney there, which is an estoppel to the defendant's privilege, the defendant shall be ousted of his privilege in all other actions commenced against him in *B. R.* in the same term; Carth. 377.

Ld. Raym.
336. Salk.
194. pl. 3.
Thomee v.
Lloyd. Ld.
Raym. 356.
Comb. 482.
12 Mod. 195.
6 Mod. 88.

Sid. 74.

Sid. 65.

2 Bulstr. 207.
2 Roll. Abr.
275. Salk. 1.
pl. 3.
Ld. Raym. 90.
5 Mod. 310.
3 Lev. 343.
Carth. 377.
Ld. Raym. 93.
136.

Carth. 377.

term ; because the jurisdiction of this court was attached upon him by the first action.

22 H. 6. 7.
2 Roll. Abr.
275, 276.
Dyer, 33.
Godb. 286.
Stil. 295.
Lev. 54. Keb.
195. 221. 256.
2 Show. 145.
pl. 124. Hard.
365. Sid. 318.
2 Keb. 103.
121. 163.
Show. 49.
Lutw. 46.
Salk. 1. pl. 3.
Comb. 68.

As to the time of pleading privilege, it has been laid down in a variety of cases as a sure rule, that after imparlance the defendant cannot plead his privilege, because by imparling he affirms the jurisdiction of the court, which by this plea he would oust. But herein these distinctions have been taken, and the law by the modern authorities seems now established, that after a general imparlance the defendant cannot plead privilege, because he must then plead in chief ; so after a special imparlance in this manner, *Salvis omnibus allegationibus et exceptionibus omnimodis tam ad breve quam ad narrationem* ; for by this special imparlance he has confined himself to take advantage of the defects in the writ and count only ; but in case of a general special imparlance obtained from the court, *viz. Salvis sibi omnibus et omnimodis advantagiis et exceptionibus*, he may after plead his privilege ; for this is not to oust the court of its jurisdiction, but is a privilege which each court allows to the officers of the other, to be sued in their own court only.

Trin. 15 Ann.
in *B.R. Hatch*
v. Blisset, Gilb.
Cas. 308.
2 Stra. 986.

A witness was arrested in his return from *Winchester* assizes, and in the term following was discharged by motion on common bail by the court from which the record issued, and that without having the privilege of the court of *nisi prius* certified. Had the arrest been at the assizes, the judges there might have discharged him ; for privileges given by law are to be prosecuted in such a manner as the party may most easily get the benefit of them.

How privileged Persons are to sue and be sued.

4 Inst. 71. 99.
112. (a) In
the Exchequer,
where the
plaintiff is pri-
vileged, the suit

When an attorney or other officer entitled to privilege is plaintiff, he regularly sues by writ of privilege (a), and is sued by bill ; which processes issue out of the court in which the action is commenced, and have no foundation in Chancery.

is *quo minus* ; where the defendant is privileged, the suit is by bill. 2 Salk. 546.

Vent. 199.
28 E. 3. 4.
Cro. Eliz. 731.

But an attorney is not obliged to sue by writ of privilege, but may sue by original ; but if he elects the former, he must name himself attorney, &c. ; for when any particular character or relation gives any person rights and privileges, it must be set forth.

2 Lev. 40.
Vent. 198.
2 Keb. 860.
879. 3 Keb. 15.

And therefore it hath been held, that if an attorney sues by original, he must declare as others do ; and that if he does otherwise, it will be fatal on a special demurrer, though he aided after verdict, and also good on a general demurrer.

Mod. 10.

Attornies are entitled to process of attachment, and are not to be arrested or held to special bail, let the cause of action be what it will ; for being officers of the court they are obliged to a constant attendance, and are presumed to be always amenable.

2 Salk. 544.
pl. 4. Brown's
casé.

A filazer of *B. R.* was arrested by writ, but discharged on common bail ; for he ought to be sued by bill, as being present in court.

Salk. 544.

A bill cannot be filed against a person privileged in vaca-
tion ;

tion (a); for then he is not present in court, and as to the vacation, it begins the last day of the term, as soon as the court rises. [(a) But now it may be filed in vacation as well as in term time, Dougl. 300. || 6 Taunt. 347. ||; though if it be filed in vacation, otherwise than to avoid the statute of limitations, the plaintiff will not be allowed his costs, if the action should be settled before the ensuing term.] || And where the cause of action arises after term, there should be a special memorandum stating the day of bringing the bill into the office of the clerk of the declarations. 5 Term R. 525. Tidd's Prac. (7th ed.) 86. ||

|| And therefore formerly a bill could not be filed for an escape against the warden of the *Fleet* in vacation. Crook v. Eyles, 2 Marsh. 49.

But now by 59 Geo. 3. c. 64. such a bill may be filed in vacation, in the prothonotaries' office of the C. P., or in the office of pleas in the Exchequer. 59 G. 3. c. 64.

The bill must be filed though the attorney agrees to appear and dispense with it; but it may in such case be filed afterwards. 2 Salk. 544. pl. 5.

In an attachment of privilege by the marshal he shall have no attorney, because present in court. 6 Mod. 16.

An information was exhibited against the *custos brevium* of B. R. for abuses and misdemeanors in his office, who refused to appear in person (b), but would have appeared by attorney; and the opinion of the court was, that he could not appear by attorney, being an officer of the court, and presumed to be always present; and therefore it was agreed, that no process should be issued against him; but that upon reading the information, if he did not appear, judgment should be given against him. Sid. 134. The King v. Paget. (b) An attorney may plead his privilege by an attorney without any inconvenience, for he may be sick, or have business. Stil. 413.

ness in another court, and the precedents are both ways. Stil. 413.

In an action brought by an attorney by bill of privilege, the judgment was, *quod nil capiat per breve*, instead of *nil capiat per billam*; which was held manifest error, unless it could be amended as the mistake of the clerk. Cro. Car. 580. Raymond v. Burbedge.

In a bill of privilege by or against an attorney, no *capias* lies, but an attachment of privilege; and consequently on such proceeding there can be no outlawry. Leon. 329. Crew v. Bailie; vide title *Outlawry*, vol. vi.

In an attachment of privilege by or against an attorney, it hath been held, that pledges to prosecute must be entered on the imparlance roll; and that this is not barely form, but matter of substance. (c) Dyer, 288. a. pl. 53. Cro. Car. 91, 92. 3 Lev. 39. (c) Seems now aided by the 4 & 5 Ann. c. 16.

The judges, prothonotaries, attornies, &c. of the Court of C. B. whose attendance is wholly required in court, are not suable by original, but by bill only; but serjeants at law, judges' servants, and other clerks, though they may be entitled to the privilege of being sued in that court, yet must they be sued by original, and not by bill. 2 Mod. 297. 3 Lev. 398. 3 Salk. 283. pl. 8. Ld. Raym. 399.

In *assumpsit* by bill against the defendant as *un' clericorum domini regis coram ipso rege*, the defendant pleaded that he was a filazer, *absque hoc* that he was a clerk; and on demurrer the plea was set aside as frivolous and impertinent, for that filazers are clerks. Trin. 5 G. 2. in B. R. Durett v. Hayward.

6. *Whether there can be Privilege against Privilege.*

Bro. Privilege, pl. 40. Godb. 81. Jenk. 131. 2 Brownl. 267. Moor, 753. 2 Roll. Abr. 274. Jenk. 173. It seems a general rule, that there can be no privilege against privilege; so that if an officer of one court sues an officer of another, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court as the defendant's is in his; and therefore the cause is legally attached in the court where the plaintiff is an officer.

2 Keb. 346. [Barnes, 44. 2 Black. R. 1325. If one attorney sue another attorney by attachment of privilege, and hold him to bail, the defendant may either plead his privilege in abatement, or move the court to stay the proceedings, but in neither case will he be entitled to costs. Barber v. Palmer, 6 Term R. 524.]

Tidd's Prac. (8th ed.) 78. 9 Price, 16. *contrà*. || But though an attorney of the K. B. may sue an attorney of the C. P. in his own court by attachment of privilege, yet he cannot arrest the defendant and hold him to special bail.

4 Barn. & A. 88. Tidd, 78. Where an attorney of C. P. is in actual custody of the marshal, he may be sued in K. B. as a prisoner by third persons.||

2 Leon. 41. Povey's case. As where *J. S.*, attorney of *B. R.*, brought trespass against the warden of the Fleet who came into the Court of C. B., and prayed the advice of the court, whether he being an officer of the court should be obliged to answer; and on consideration of the equality of privilege, the court determined, that he who commences the suit is entitled to privilege; and therefore advised the warden to answer.

4 Leon. 193. Ben Johnson's case. So, where one of the clerks in Chancery was impleaded in C. B. by bill of privilege by an attorney of the said court, and prayed his privilege; it was denied him, because the plaintiff was privileged in that court as well as the defendant in chancery, and was first interested in his privilege by bringing his writ.

Hardr. 117. Baker v. Lenthal. So, where the plaintiff brought his bill in the Exchequer to be relieved against a bond, put in suit against the defendant in the Petty-bag Office, which is a court of common law, to which the defendant pleaded his privilege as an officer of the Court of Chancery; the court agreed, that when both parties are privileged persons, his privilege shall take place who first sues; so that here the suit of equity to be relieved against the penalty of the bond, being first attached here, gained a preference in the plaintiff in his suit, which is a distinct suit from that of the defendant at common law; and therefore the plea was over-ruled, and an injunction awarded till answer. In this case it was said, that if both are privileged, but the attendance of the one is more requisite than that of the other, his privilege shall be allowed who has most cause of privilege.

Wainwright v. Smith, 2 Russ. R. 568. || A sworn clerk in Chancery may arrest a solicitor on an attachment of privilege in the Petty-bag Office; for such solicitor has no privilege in Chancery, the privilege being in the clerks in court.||

Ld. Raym. 27. Where an action is brought by the king, the defendant shall not have privilege.

Ld. Raym. 342. Joliffe v. Langston. An attorney of C. B. sued a member of the University of Oxford, who prayed his privilege, which is, not to be sued in another place;

place; and though it was insisted, that this privilege was given them by act of parliament, yet, in regard the words were general, the court held, that there was no necessity to construe them so as to extend to privileges before *in esse*; and that therefore this special privilege was not taken away by the statute.

(C) Privilege of Peers and Members of Parliament: And herein,

1. *Who are the Persons entitled to this Privilege.*

ALL peers, without any distinction as to degree or rank, are entitled to privilege; for they are equally obliged to (a) attend the service of the public, and (b) are always supposed amenable, and to have sufficient property to answer in suits and actions brought against them, and on these grounds are not to be arrested or molested in their persons. This privilege extended formerly to abbots, as it does to bishops, members of the Convocation, and members of the House of Commons at this day. 4 Inst. 24. Stil. 118. 222. 253. 454. Dyer, 314. Mod. 66. Bro. Exig. 3. Moor, 767. Scobel's Memorials, 88. 103. Sir Simon Dew's Journals, 414. Pick. 59. Finch, 355. 2 Ld. Raym. 1247. 3 Seld. Wilk. edit. p. 1478. (a) Dyer, 60. a. *in margine*. Noy, 102. Moor, 778. pl. 1080. Stamf. P. C. 38. Hawk. P. C. c. 22. § 2. That the king's grant or charter of exemption cannot discharge a nobleman from his attendance in parliament, 4 Inst. 49. (b) The law intends them to be assisting the king with their counsel for the commonwealth, and to keep the realm in safety by their prowess and valour. 9 Rep. 49. a. *id.* 68. Jenk. Cent. 107. pl. 6. Hob. 61. 10 Rep. 76. b. 12 Co. 96.

The privilege of parliament, according to the (c) law of parliament, is of a very extensive nature. But all that is here intended to be treated of is only the taking notice of and pointing out such cases and resolutions relative hereto, as are to be found in the books of law; not to determine concerning this privilege as settled by the rules and orders of each house, of which they themselves are the (d) sole judges, though the king's courts (e) incidentally take notice thereof, and are bound to determine in matters of privilege when so directed by act of parliament. (c) Ld. Coke says of this law, *ab omnibus querenda est, a multis ignorata, a paucis cognita*, 4 Inst. 15. (d) 15 Co. 63. 4 Inst. 23. 50. 363. Prinn's Animad. on

4 Inst. 12. Cro. Car. 181. 604. 2 Ld. Raym. 1111. (e) *Vide* Mod. 66. Have determined in relation to their journals. Hob. 111. See the arguments in the case of *Ashby v. White*, Salk. 19. pl. 10. 6 Mod. 45. 2 Ld. Raym. 938. *Barnardiston v. Soame*, 2 Lev. 114. 3 Keb. 365. 369. *Onslow's case*, 2 Vent. 37. *The Queen v. Paty*, 2 Ld. Raym. 1105.

This privilege extends only to the peers of *Great Britain*; so that a nobleman of any other country, or a lord of *Ireland*, hath not any other privileges in this kingdom than a common person. Also, the son and heir apparent of a nobleman is not entitled to the privilege of being tried by his peers, which is confined to such person as is a lord of parliament at the time. But it seems, that an infant peer is privileged from arrests, his person being held sacred. Co. Lit. 156. 2 Inst. 48. 3 Inst. 50. pl. 19.

The peers of *Scotland* had no privileges in this kingdom (g) before the union; but now, by the twenty-third article of the union, the sixteen elected peers shall have all the privileges of the peers of parliament of *Great Britain*; also, all the rest of the peers (g) 9 Co. 117. stat. 5 Ann. c. 8. P.W. 583. [Since this statute, the peers

son of a *Scotch* peer has been holden to be privileged from arrests, 2 Stra. 999. Fort. 163. 165. But the above article of the statute of union, upon which this privilege is claimed by a peer of *Scotland*, not one of the sixteen, says, that the peers of *Scotland* shall have the privileges of the peers of *Great Britain*, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon. Now, as every privilege claimed by a peer solely depends on, and is in consequence of, his sitting in parliament, that is, being an actual lord of parliament, it seems, that the allowing all the *Scotch* peers the privilege from arrests is not within the words of the act of union, the only act under which the *Scotch* peers to this day can claim any privilege here at all. 2 Cr. Pr. 127

5 Inst. 50.
pl. 19.

39 & 40 G. 3.
c. 67. Art. 4.

¶ And a peer of *Ireland* had formerly no privileges in *Great Britain*, till the union of the two kingdoms. But now, by the fourth article of the act of union, the twenty-eight temporal and four spiritual lords of parliament for *Ireland* in the parliament of the United Kingdom have the same privileges of parliament as the lords of parliament for *Great Britain*. And the peers of *Ireland*, as peers of the United Kingdom, are to be sued and tried as peers, and enjoy all privileges of peers, as fully as those of *Great Britain*; the privilege of sitting in the House of Lords, and those dependent thereon, and that of sitting on the trial of peers, excepted. An *Irish* peer, however, is not entitled to the privileges of a peer during the time that he is a member of the House of Commons. It has been decided, that an *Irish* peer is entitled to the letter missive from the Chancellor on a bill being filed against him.

3 Ves. 601.

Coates v. Lord Hawarden, 7 Barn. & C. 388. And he cannot be arrested for debt.

Russ. & Ry.
Cro. Ca. R.
117.

And he ought not to be on a grand or petit jury, unless he is a member of the House of Commons, in which case he is a commoner to all intents and purposes.¶

2 Inst. 50.
Stil. 222. 234.
252. 2 Chan.
Ca. 224.
Fortesc. R.
162. Vent.

A peeress by birth (*a*) is entitled to privilege: so of a peeress by marriage, and that as well during the coverture as after: but as a peeress by marriage (*b*) loses her dignity by marrying a commoner, after such marriage she is not entitled to any privilege.

298. Styl. 222. Eq. Cas. Ab. 349. (A). Co. Lit. 16. b. 6 Rep. 53. b. Dyer, 79. pl. 51. 2 Hawk. P.C. 44. § 11. Order of House of Peers, 21 Feb. 1692.—(*a*) But doubted whether a peeress by patent only for life is entitled to this privilege. Styl. 254. 252. Held, that she is not entitled. Style, 254.; but adjourned.—(*b*) Co. Lit. 16. 6 Co. 53. Dyer, 79.

(c) Vide this case *infra*.

It was holden by my Lord C. J. *Holt*, in the case of Lord *Banbury* (*c*), that where a person is called by writ to the House of Peers, he is no peer till he sits in parliament, the writ giving him no nobility or honour; but that it was the sitting in the House of Lords, and associating himself with them, that ennobled his blood; and that, therefore, if the king or he dies before a parliament meets, the writ is determined, and the party remains a commoner; but he held it otherwise in a creation by letters patent, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his posterity, according to the limitations in the patent.

2. *How far this Privilege extends to their Servants and Attendants.*

A member of parliament (*a*) shall have privilege of parliament, not only for his servants (*b*), but for his horses, &c. or other goods distrainable.

4 Pryn. Reg. Writs, 624.
D'Ewe's Jour. 123. 4 Inst.

24. (*a*) Noblemen's servants are privileged from arrests in time of parliament. 2 Show. 84. Order of House of Lords, 28 May, 1628. Sir W. Jon. 135. Style, 139, 167. Sir Simon D'Ewe's Journals, 315. 323. 530. 532, 533. 607, 608. 617. (*b*) Said to extend only to servants, and not to their tenants. Mod. 13. And, in *March*, 1792, it is said to have been ordered by the Lords in Parliament, 15 Car. 1. that only menial servants, or those who attended on the person of a knight or burgess of parliament, should be free from arrest. || This privilege is taken away by 10 G. 3. c. 50. 5 Term R. 687. 1 Chitt. R. 85. ||

J. S. brought debt for rent against *H.*, who pleaded that he was tenant and servant to Lord *Moon*, and prayed his writ of privilege might be allowed; the plaintiff demurred: it was argued, that the matter of the plea was against the common and statute law; but *per Rolle C. J.* — You ought not to argue generally against the privilege of parliament; every court hath its privilege; I conceive a writ of privilege belongs to a parliament-man, so far as to protect his lands and estate (*c*); and you have admitted his privilege by your demurrer.

Stile, 139.
Smith v. Hale;
et vide Latch,
150. and the
S. C. Stile,
167. 223.
(*c*) 1 Jon. 155.

The warden of the Fleet insisted upon a writ of privilege, alleging that he was obliged to attend the House of Lords; but it appearing that he was sued upon an escape, and the court considering that great inconvenience would ensue, and being of opinion that it was in their discretion whether they would grant such writ or no upon a motion, they said he might plead it if he would, but they would not award such a writ, or, if his privilege was infringed, he might complain to the House of Lords.

2 Vent. 154.

In debt the defendant pleads he was a servant to a member of parliament, and *ideo capi seu arrestari non debet*; the plaintiff prays judgment; and *quia videtur quod tale habetur privilegium quod magnates, &c. et eorum familiares capi seu arrestari non debent; sed nullum habetur privilegium quod non debent implacitari, ideo respondeat ouster.*

Mod. 146.
cited to have
been adjudged
between Ri-
vers v. Cousin,
Hil. 24. E. 4.
ret. 4. 7. 10.
in Scac.

Defendant, after a general imparlance, pleaded, that he was a servant to a peer, *viz.* the Earl of *Pembroke*; and by *North C. J.* it is not receivable, for it is the privilege of the master and not the servant's; but the defendant ought to sue his writ of privilege, for perhaps his master will not protect him; and if he will not, he is then left to answer: like to the case of a counsellor, where it is the privilege of the client that he shall not be compelled to discover the secrets of the client; but if the client be willing, the court will compel the counsel to discover what he knows; which Serjeant *Maynard* said was his father's case before the Lord *Cecil* in the Court of Wards. *North* said, as it was a matter of great consequence, he would advise with the Lord Chancellor and the rest of the Judges, what used to be done in such cases: afterwards it was moved again, and *North* said, it was moved in the House of Lords, that they had left it to the

Pasch.
30 Car. 2. in
C. B. Lea v.
Wheatley.
|| *Vide* 5 Term
R. 687. 1 Chitt.
R. 83. ||

Judges

Judges to do according to law; and therefore the plea was rejected.

2 Stra. 1065.

By an order 24 Jan. 1606, it the House of Lords, it was resolved, that no common attorney or solicitor, though employed by any peer, should have the privilege of that House.

By an order 24 May 1724, this privilege was restrained to menial servants and others, necessarily employed about estates of peers.

By an order 22 Jan. 1715, it was resolved that every peer should upon his honour certify to the House, that the persons protected were within the privilege of the House; and should by letter acquaint the party arresting such privileged person with the same.

Mich. 10 G. 2.
in *B. R.*
Wickham v.
Hobart.
2 Stra. 1065.
Ca. temp.
Hardw. 348.
S. C.

An attorney was taken in execution upon a *ca. sa.* about two years ago, but upon a letter under the hand and seal of the Lord *Say and Seal*, the sheriff discharged him as steward to his lordship. A rule was obtained at the side-bar for the return of the writ; and now on motion in court to discharge this rule, it was urged in behalf of the sheriff, that this privilege belonged only to the peer, and not to the party, and was not returnable to the process; and that therefore the court ought not to insist upon a return, as the sheriff could not justify the detention of the defendant, but under peril of bringing himself and the plaintiff under the censure of the House of Peers: but on consideration of the above-mentioned orders, and on considering the nature of this case, that the plaintiff was within the ordinary justice of the court entitled to a return of his writ; that without such return he might be debarred from any further execution; but principally from the great inconveniency that might arise by allowing attorneys, who are officers to the courts in which they respectively practise, and therefore amenable to those courts, this kind of privilege; the court gave the plaintiff liberty to proceed against the sheriff, but gave him time till next term to make his return.

On the meeting of the new parliament in November,

[But now the statute of 10 G. 3. c. 50. takes away from servants all privilege whatever, personal, as well as privilege from suits.]

1774, a doubt was conceived, whether, as this act had thus taken away all privilege from the servants of members, some alteration ought not to be made in the form of the prayer of the Speaker of the House of Commons to the throne; and the then Speaker, Sir Fletcher Norton, at first, it seems, intended to make an alteration, by claiming all the usual privileges, "except where the same had been varied or taken away by act of parliament." But upon conferring with the Lord Chancellor, Lord *Apsley*, his lordship said, "that as no alteration had been made formerly, on the passing of the act in King *William's* time, relating to the privilege of parliament; and as, whatever the Commons claimed, neither the allowance of the king, nor the claim itself, could be supposed to include privileges not warranted by law; he was of opinion, that it would be the safer way, in order to prevent any difficulties that might arise from an alteration, to adhere to the usual form; and that he was ready to give the king's answer in the accustomed manner." Sir Fletcher Norton acquiesced in this; and made the claim in the ancient form of words, without any alteration, and received the usual answer, and the same form has been continued ever since.

3. *In what Cases this Privilege is to be allowed.*

Bro. Exigent.

In all causes this privilege is regularly to be allowed; so that a peer

peer of the realm, or a member of the House of Commons, is not to be arrested or molested in his person or estate. (a) *that a capias does not lie against a lord of parliament, nor against an abbot or bishop; but if rescous be returned upon a lord of parliament, a capias lies for the contempt.* Moor, 767. Finch of Law, 355. (a) The goods of a privileged person taken in execution during the privilege of parliament ought to be redelivered and freed as well as the person. Jon. 155.

But privilege of parliament doth not extend to high treason (b), felony, breach of the peace, or surety of the peace. *4 Inst. 25. Prin's Survey of Parliament*

Writs. [On the 4th of June 1614, the Lord Chancellor *Ellesmere*, in a case then before the House of Lords, declares, "That no privilege of parliament doth protect any man, in case of breach of the peace." So, on the 7th of February and 8th of June 1757, on a complaint against Earl Ferrers, the lords resolve, "That no peer or lord of parliament hath privilege of peerage or of parliament against being compelled, by process of the courts in *Westminster-hall*, to pay obedience to a writ of *habeas corpus* directed to him." In the year 1795, the Earl of Abingdon was committed by the Court of King's Bench to the prison of that court as part of the punishment inflicted upon him, being convicted of publishing a libel.] (b) In treason or felony, or misprision of treason or felony, they can only be tried by their peers; but for all other offences, as *præmunire*, riot, seducing a young lady from her parents in order to debauch her, &c. they are to be tried by the country. 2 Hawk. P. C. c. 44. § 15. — That neither *Magna Charta*, nor any other law privileges a peer from being indicted by a grand jury of commoners, either in the King's Bench or before commissioners of oyer or the coroner, &c. 2 Hawk. P. C. c. 44. § 15. — But the Court of *B. R.* cannot receive the plea of not guilty, or the confession of a peer, but only the Lord High Steward; but it may allow a pardon pleaded by a peer to an indictment in that court. 2 Hawk. P. C. c. 44. § 17. — So, if a peer be attainted of treason or felony, he may be brought before the Court of *B. R.* and demanded what he has to say, why execution should not be awarded against him; and if he plead any matter to such demand, his plea shall be discussed, and execution awarded by the said court, upon its being adjudged against him. 3 Hawk. P. C. c. 44. § 18. [In the case of Earl Ferrers it was determined by all the judges, that a peer indicted of felony and murder, and tried and convicted thereof before the lords in parliament, ought to receive judgment for the same according to the provisions of the 25 G. 2. c. 37. And supposing the day appointed by the judgment for execution should lapse before such execution done, that a new time may be appointed for the execution, either by the high court of parliament before which such peer shall have been attainted, although the office of high steward be determined, or by the Court of King's Bench, the parliament not then sitting; and the record of the attainder being properly removed into that court. Fost. Cr. L. 139.]

And therefore in an indictment for treason or felony, trespass *vi et armis*, assault or riot, process of outlawry shall issue against a peer of the realm; for the suit is for the king, and the offence is a contempt against him. But in civil actions between party and party, regularly, a *capias* or *exigent* lies not against a lord of parliament. *2 Hal. Hist. P. C. 199. 2 Hawk. P. C. c. 44. § 16.*

If a peer of parliament be convict of a disseisin with force, a *capias pro fine* and *exigent* shall issue; for the fine is given by statute, in which no person is exempted. (c) *Cro. Eliz. 170. Ld. Stafford v. Thynne; vide Dyer, 314.*

(c) For execution on a statute staple merchant, on the statute of *Acton Burnel*, or on the statute of 23 H. 8. the body of a baron shall be taken in execution; for by these statutes, such persons are not exempted. 2 Leon. 173. — So, a custom to commit persons who shall take an orphan out of the custody of a guardian, is good without exception of peers; for a peer is not privileged in this case, and in a *homine replegiando*, where he detains the body, he shall be committed. Lev. 162, 163.

So, in debt upon an obligation against the Earl of *Lincoln*, he pleaded *non est factum*, which being found against him, the judgment was *ideo capiat*: this on a writ of error brought by him was objected to, in that a *capias* does not lie against a peer of the realm: *sed non allocatur*; for by this plea found against him, *Cro. Eliz. 503. Earl of Lincoln v. Flowes.*

him, a fine is due to the king, against whom none shall have any privilege.

Comb. 49. An information was exhibited in *B. R.* against the Earl of
The King v. *Devonshire*, for striking in the king's palace; which being in time
Earl of Devon- of parliament, he insisted on his privilege of a peer, and refused
shire. to plead in chief, but put in his plea of privilege; to which there
was a demurrer, and the plea over-ruled, and he was fined 30,000*l.*

3 Mod. 215.

In the case of the seven bishops it was insisted, that peers of the realm could not be committed, in the first instance, for a misdemeanor before judgment; and that no precedent could be shewn where a peer had been brought in by a *capias*, which is the first process for a bare misdemeanor, and they put in a plea in writing of their being peers, &c. but the plea was rejected.

2 Hawk. P. C.

c. 22. § 33.

1 Burr. 634.

Also peers of the realm are punishable by attachment for contempts in many instances; as for rescuing a person arrested by due course of law; for proceeding in a cause against the king's writ of prohibition; for disobeying other writs wherein the king's prerogative or the liberty of the subject are nearly concerned; and for other contempts which are of an enormous nature.

7 Term R. 171.

448.

|| But the courts will not grant an attachment against a peer or member of parliament for nonpayment of money according to an award. ||

Dyer, 314. b.

Moor, 767.

9 Co. 49. Co.

Lit. 157. Jon.

153. || Fitz.

N. B. 384., and see Russ. & R. Ca. 117. Peers are exempted from serving on juries by 6 G. 4. c. 50. s. 2. ||

Pasch. 27 C. 2.

in *B. R.*

In the case of Sir *Edward Bainton*, who was returned on a jury, the court would not force him to be sworn against his will, he being a parliament man, and the parliament then sitting.

9 Co. 49. a.

A day of grace shall not be given against a lord of parliament; for he is presumed to be attendant on the service of the public.

Ibid.

So, if a peer be made steward of a base court or ranger of a forest, he may, from the dignity of his person, and the presumption that he is engaged in the more weighty affairs of the commonwealth, exercise these offices by deputy; though there are no words for this purpose in his creation.

9 Co. 49. b.

So, if a licence be granted to a peer to hunt in a chase or forest, he may take such a number of attendants with him as are suitable to his state and dignity.

3 Inst. 129.

A peer or lord of parliament cannot be an approver; for it is against *Magna Charta* for him to pray a coroner.

2 Hawk. P. C.

c. 45. § 5.

(a) In an ap-

peal brought

against him he

If a peer of the realm bring an appeal (a), the defendant shall not be admitted to wage battle, by reason of the dignity of his person.

|| Mag. Char. nec super eum ibimus, &c. are to be intended only of the suit of the king. 3 Inst. 50.

2 Inst. 49. || Appeals and wager of battle are now abolished by 59 G. 3. c. 46. ||

2 Marsh. 232.

4 Taunt. 249.

|| A peer of the realm cannot become bail, nor a member of parliament, on account of the difficulty of proceeding against them. ||

In *Jenkins* the following privileges are laid down as belonging to peers: 1. They are entitled to a letter missive. 2. They (*a*) have a knight to try an issue which concerns them. 3. They are not to be arrested for debt, trespass, or any personal action. 4. They are exempted from serving on juries. 5. To have no day of grace against them. 6. Upon the trial of a peer for treason or felony, they try him upon their honour only, and not upon oath. 7. When they pass through any of the king's forests to attend upon the king, upon blowing a horn they may have a buck or doe, as the season of the year is. 8. They have a power in their House to reverse judgments given in the King's Bench. 9. They have the benefit of clergy though they cannot read. 10. They are not liable to find carriages for the king when he removes from one place to another.

¶ To these privileges should be added that of franking enjoyed by peers of parliament, and all its other members. On the original settlement of the Post-office, in 1660, the duty of postage was imposed generally on all his majesty's subjects. A clause was proposed exempting the knights, citizens, and burgesses of the Lower House from the duty. The clause was treated as below the honour of the House, and the Speaker was reluctant to put the question upon it; nevertheless it was carried, but was afterwards omitted in the Lords. This omission occasioned some difficulty in the Commons in passing the bill, to obviate which the ministers gave an assurance to the members that the privilege should be granted, and accordingly a warrant was constantly issued to the postmaster-general, directing the allowance thereof to the extent and under the regulations expressed. At length the privilege was expressly confirmed by the stat. 4 G. 3. c. 24., which adds many new regulations to prevent abuses, which have been subsequently altered by the 24 G. 3. c. 37. and 35 G. 3. c. 53.; and by the 42 G. 3. c. 63. these acts are extended to the members of the United Kingdom. The privilege is entirely a privilege of *parliament*, and founded on the parliamentary duties of its members. Therefore a Roman Catholic peer is held not entitled to it.

The answer of a peer on his protestation of honour may be read on the question of costs.¶

4. *Of the Commencement and Continuance of this Privilege.*

The privilege of the Lords commences from the teste of the writ of summons, and the privilege of a burgess at his (*b*) election: but if he be arrested or in execution before his election he shall not have privilege.

(*b*) *Vide* 1 Sid. 42. [Sir Richard Temple's case, Pasch. 13 Car. 2. A trial at bar, wherein Sir Richard Temple was defendant, being appointed for this term, he moved the court by his counsel to put off the trial, upon the ground of his being elected a burgess to serve in the next parliament, which was to meet in eight days, and therefore prayed his privilege. But the court doubted whether they could allow the privilege, because it did not appear to them whether it were actually so as he suggested or not, but by affidavit, which they would not admit to prove this suggestion. And it was said by the court, that if he were arrested upon mesne process, or taken in execution, it was proper for the parliament (when they should meet)

Jenk. 107.
(*a*) This privilege is taken away by
24 G. 2. c. 18.
§ 4.

Parl. Hist.
v. 23. p. 56.
3 Hats. 82.
1 Black. C.
322.

Lord Petre
v. Lord Anch-
land, 2 Bos.
& P. 159.

Dawson v.
Ellis, 1 Jac.
& W. 524.

Moor, 57.540.
Jenk. 118.
Dals. 58.
Dyer, 59, 60.
Latch, 46.150.

to discharge him, for the court doubted whether they had the power to do so. The defendant said, that the clerk of the parliament would not make him out a certificate of his election before the meeting of parliament. Upon which *Twisden J.* asked, why he could not sue his writ of privilege out of Chancery upon the return of his election? *Quare bien.* But the court refused to grant the motion, because the trial was to come on before the day on which the parliament were to meet.—On the 9th of *February* 1625, a motion was made, that Mr. Giffard, returned a member of the House, and then in execution, might be sent for. On this motion being examined into, it appears from a report of the committee of privileges on the 15th, “that one of the burgesses for *Bury* was elected on the 6th of *January*; that Mr. Giffard was “elected on the 11th of *January*, but that the indenture was not dated till the 30th of *January*, “the town-clerk conceiving it was to bear date the day of the next county-court; and that “Mr. Giffard was arrested on the 23d of *January*, after his election, but before the return.” After much debate and consideration of this difficulty, on the 17th of *February*, the clerk of the crown, the sheriff of *Suffolk*, and the town-clerk of *Bury*, were all called up to the table, and there, by order of the House, amended the return from the 30th of *January* to the 11th; and then it was ordered that Mr. Giffard should have privilege, and be delivered out of execution; and a warrant was issued to the clerk of the crown to bring him up the next day. On the 18th he was accordingly brought in, with the keeper of the gate-house, the bar down; the writ of *habeas corpus* was handed up to the clerk, and the writ and return being read by him, the Speaker discharged Mr. Giffard, and wished him to take the oath, and then his seat in the House. 1 Hats. Prec. 164.—On the 1st of *March* 1592, Mr. Serjeant Yelverton, from the committee of privileges and elections, reported the following case:—Thomas Fitz-herbert of *Staffordshire*, being outlawed upon a *capias ullagatum* after judgment, is elected “burgess of this parliament: two hours after his election, before the indenture returned, the “sheriff arrested him upon this *capias ullagatum*: the party is in execution: now he sendeth “his supplication to this House to have a writ from the same to be enlarged, to have the “privilege in this case to be grantable.” On the 5th of *April* the House came to the following resolution: “That Thomas Fitzherbert was, by his election, a member thereof; yet that “he ought not to have privilege in three respects: 1st, Because he was taken in execution “before the return of the indenture of his election; 2d, Because he had been outlawed at “the queen’s suit, and was now taken in execution for her majesty’s debt; 3d, and lastly, “In regard that he was so taken by the sheriff, neither *sedente parlamento*, nor *eundo*, nor “*redeundo*.” *Dewes’s Journ.* 479. 1 Hats. Prec. 107.—On the 4th of *July* 1625, the case of Mr. Basset was referred to the committee of privileges, who reported, “that he was imprisoned “upon mesne process, and afterwards chosen a burgess.” There is a debate in the Journal, whether under these circumstances he were eligible, or to be allowed privilege? Great distinction was made between a person arrested on mesne process, or in execution; and it was at last resolved, upon the question, “That Mr. Basset should have the privilege of the House;” and a warrant was ordered to the marshal to bring him up the next morning, which was done accordingly. 1 Hats. Prec. 163.]

And. 293.

So persons outlawed ought not to be knights or burgesses of parliament; and such persons outlawed may be arrested by *cap. ullag.* privilege of parliament notwithstanding.

Atkin’s Power

of Parl. 38.

4 Inst. 44.

Brownl. 91.

Memorials,

88. 103. 180.

Sir Simon

Dewes’s Journals, 414. [The writ of privilege in the case of Trewynnard, in the 36th and 37th H. 8. is to persons “*venientes seu venire intendentes*.” *Pryn’s Fourth Register*, 780.] (a) By the 35 H. 8. c. 11. members of parliament have their wages so many days after the parliament as they may reasonably spend in their return home. *Vide Rast.* 664. Appendix to Reg. 1.

2 Lev. 72.

Chan. Ca. 221.

Sid. 29. pl. 2.

Kebl. R. 5. pl. 7.

By two orders of the House of Lords, one dated the 28th of *May* 1624, the other the 27th *January* 1628, it is declared, that their privilege commences from the teste of their writ of summons to parliament; and that upon every session and prorogation, their privilege is for twenty days before and twenty days after each session,

session, which one of the orders says is time enough for them to come from all parts of the realm, and to return; but the Commons never assented to this, for they claim (a) forty days before and after each session.

[On the 27th of *February* 1586, the House was informed, that one *William White* had arrested *Mr. Martin*, a member of the House of Commons; therefore it was ordered, "That the serjeant should warn *White* to be here to-morrow, sitting the court." On the 6th of *March*, *William White* was brought into the House, to answer his contempt for arresting *Mr. Martin*; who answered, "that he caused him to be arrested the 22d day of *January*, which was above fourteen days before the beginning of the parliament." The House upon this appoint a committee to search precedents, who, on the 11th of *March*, make report of *Mr. Martin* arrested upon mesne process by *White*, above twenty days before the beginning of this parliament, holden by prorogation (mistaken for adjournment), and in respect that the House was divided in opinion, *Mr. Speaker*, with the consent of the House, moved these questions to the House: 1st, Whether they would limit a time certain, or a reasonable time, to any member of the House for his privilege? The House answered, A convenient time. 2d, Whether *Mr. Martin* was arrested within this reasonable time? The House answered, Yea. 3d, If *White* should be punished for arresting *Martin*? The House answered, No; because the arrest was twenty days before the beginning of the parliament, and unknown to him, that would be taken for reasonable time. But the principal cause why *Martin* had his privilege, was, for that *White*, the last session (mistaken for meeting) of parliament arrested *Mr. Martin*, and then knowing him to be a burgess for this House, discharged his arrest; and then afterwards *Mr. Martin*, again returning to *London* to serve in the House, *Mr. White* did again arrest him; and therefore the House took in evil part against him his second arrest, and thereupon judged, that *Martin* should be discharged of his second arrest out of the Fleet by the said *Mr. White*."

It is observed upon the above case, that this parliament met on the 29th of *October* 1586; on the 22d of *December* they were adjourned by commissioners from the queen to the 15th of *February* following; so that this arrest was not either before the beginning of the parliament, or during a prorogation, but on the 22d of *January*, during an adjournment, and consequently clearly within privilege. For an adjournment, even for a very long period, would not affect privilege, as we may collect from the Journals of the House of Commons of the 1st of *June* 1621, and the printed debates of that session, when it was ordered, agreeably to the opinion and advice of *Sir Edward Coke*, *Mr. Noy*, *Mr. Hakewill*, and others, "that during that adjournment," (which was for above five months, from the 4th of *June* to the 14th of *November*,) "no suits against members, or their servants, should be proceeded in, in any court of law; and if they were,

(a) In Cotton Record. 704. they claim forty days. So, by Jenk. 118.

Dewes's Journ. p. 410.

1 Hats. Prec. 100.

This restriction as to suits was afterwards limited by stat. 12 & 1

13 W. 3. c. 3.
to an adjourn-
ment of 14
days.

“ that a letter should issue, under the Speaker’s hand, for the
“ party’s relief therein, as if the parliament was sitting; and the
“ party refusing to obey it to be censured at the next access.”
And a similar resolution was about the same time come to by the
Lords. For upon the 2d of *June* 1621, the Lords consulted the
Judges upon this question; and they having answered, on the
4th of *June*, that they could not satisfy their lordships of any
precedents of the continuance of their privileges, during all the
time of the long cessation, the Lords notwithstanding resolve,
“ That they do know, that the privileges of themselves, their
“ servants and followers, do continue, notwithstanding the ad-
“ journment of the parliament; and they order and adjudge the
“ same to be observed in all points accordingly.”

(a) The House
had been pro-
rogued from
the 20th of
June to the
20th of *Octo-
ber*, and then
further pro-
rogued to the
20th of *Janu-
ary*. When
King *Charles*
the Second in-
tended to pro-
rogate the par-
liament from
the 27th of
July 1663 to
the 16th of
March follow-
ing, a space of
eight months, he said in his speech to both Houses of parliament upon that occasion, “ I think
“ it necessary to make this a session, that so the current of justice may run the two next terms
“ without any obstruction by privilege of parliament, and therefore I shall prorogue you to the
“ 16th day of *March*.” Lords’ Journ. 417.

On the 22d of *January* 1628, Mr. *Rolle* complained of goods
being seized by an officer of the customs for dues; and this
complaint was immediately referred to the consideration of a
select committee. The substance of the case was, that these
goods were seized by the customs, or those who had a lease of the
customs, for refusing to pay the duties of tonnage and poundage,
which the Commons had not yet granted to the king; but which
the king, as appears from his warrant in the eighth volume of the
Parliamentary History, p. 311. had directed to be levied by his
own authority. The House, on the report from the grand com-
mittee upon this violation of their privileges, resolve, 1st, That
every member of this House is, during the time of privilege of
parliament, to have privilege for his goods and estate; 2d, That
the 30th of *October* last was within the privilege of parliament(a);
and 3d, That Mr. *Rolle* ought to have privilege for his goods
seized the 30th of *October* last, the 5th of *January* last, or at any
time since.]

Trin. 8 G. 2.
in *B. R.* Col.
Pit’s case.
2 *Stra.* 985.
Fortesc. R.
159. 542.
Barnard. K. B.
442. *Com. R.*
44.

In the case of Colonel *Pit*, the parliament was prorogued
16th *April* 1734, dissolved the 17th, and the new writs bore teste
the 18th following, and the defendant *Pit*, who was a member of
that parliament, was arrested on the 20th. One of the questions
in this case was, Whether the arrest was within time of privilege?
And it was determined that it was, although the defendant had
lived for two years before no farther distant from *London* than
Hammersmith; but the court did not think it necessary, in the
determination of this cause, to ascertain the exact time of privilege
members of the House of Commons were entitled to after a dis-
solution of parliament.

This point,
though left
undefined by
the *British*
parliament,
is in *Ireland*

[The only statutory declarations of the duration of privilege
in any instances, are the above statute of 12 & 13 W. 3. c. 3.
and the 4 G. 3. c. 24. & 24 G. 3. c. 37.; by which two last statutes
the right of members to send their letters free from postage is
ascertained to continue during the sitting of parliament, and
within

within forty days before, and forty days after, any summons or prorogation of the same.] ascertained by a statute of the legislature

of that country, viz. 3 E. 4. c. 1. and limited to forty days before and forty days after the conclusion of the parliament. the legislature

5. *How Privilege is to be claimed and taken Advantage of.*

It seems that formerly the usual, and indeed necessary, way of taking advantage of privilege was to plead the same, or to bring a writ of privilege; and that applications in other manner, or even by motion in court, were held insufficient. Dals. 16. Stil. 177. 186. 214. 222. [But so early as the 44th of

H. 8. Ferrers, a member in execution, was delivered by the sergeant without any other warrant than his mace, even though the Lord Chancellor ordered a writ of privilege. Holling. Chron. 1 Hats. Prec. 55. Dyer, 61. a. But *qu.* of this case, *et vide infra.*]

As where the defendant, being a burghess of parliament, brought a (a) letter from the Speaker to the King's Bench, to stay, &c. it was disallowed by the court; for, as the book says, it ought to have been a writ of privilege: and in this case it was said, that when *Thorpe* was Speaker, he had a general *supersedeas* for all actions against him; and this was held ill, for he ought to have had a particular *supersedeas* for each action. Noy, 83. Latch, 48. 150. Hodges v. Moor. (a) See ord. House of Commons, 1st June 1621, *supra*.

A person chosen to serve in parliament shall not have privilege before the day of session: for there is no clerk of parliament to certify, and the court will not admit affidavits in that case; he ought to sue his writ of privilege in Chancery, on the return of his election. Sid. 42. pl. 9. Kel. R. 3. pl. 7. T. Raym. 12. See Fortesc. R. 162. and the cases *supra*.

Lord *Banbury* was indicted of murder by the name of *Charles Knollys*, Esq., and he pleaded in abatement, that by letters patent K. Car. I. created his grandfather Earl of *Banbury*, and so shewed the descent to him, and prayed judgment of the indictment, because he was not named Earl. The Attorney-General replied, that upon his petition to the House of Lords to be tried by his peers, the Lords dismissed his petition, and disallowed his peerage, &c. and upon demurrer, the replication was held to be naught, and the plea good, and the indictment abated. In this case the following points were determined: 1st, That it was not necessary for the defendant in his plea to aver that *Banbury* was within any county in *England*; for that in reality there is not any necessity that he should be created of any place. 2dly, That it was not necessary for the defendant to aver that he was *unus parium regni Angliæ*; for whatever is done under the great seal of *England*, ought to bear relation to *England*; and to suppose him a peer of *Ireland* is a foreign intendment, and ought to be rejected. 3dly, That the conclusion of his plea, *et hoc paratus est verificare unde ex quo*, without *prout patet per recordum*, or producing a writ to certify that he was an Earl, was sufficient (b); though baron or not baron is regularly to be tried by the record of his having sat in parliament: but herein the court took a difference between a creation by writ, and that by patent; and held, that in the latter case his sitting or not sitting in parliament was not material, as his creation was by patent, which gave him 2 Stra. 989. 2 Salk. 509. pl. 1. Skin. 336. pl. 2. Carth. 297. Comb. 275. Ld. Raym. 10. S. C. The King and Queen v. Knollys *al.* Lord Banbury. Trin. 6. W. & M. in *B. R.*

(b) 22 Ass. 24. Bro. Ass. 240 55 H. 5. 46. 6 Co. 55. 9 Co. 31. F. N. B. 247. Regist. 287. Cro. Car. 205

(a) A trial of peerage in some cases shall be by the country, as where a duchess is ennobled by marriage. 6 Co. 55.

Vent. 298.
Countess of Huntingdon's case. [Vide *infr.*]

2 Ld. Raym.
1247. 2 Salk.
512. pl. 2. S. C.

Salk. 3. pl. 7.
Smith v. Villars. Stil. 454.
[(b) But now it is decided that a defendant is estopped by the recognition of bail from pleading a misnomer, though he himself be no party to the recognizance. 2 New R. 453.]]

4 Inst. 15.
Skin 521.

all the privileges of a peer, though he had never sat in parliament: besides, his plea does not barely consist of matter of record, but the descents are matters of fact (a) which might be traversed, and tried by a jury. 4thly, It was held, that the replication did not avoid the defendant's plea, nor was he concluded from his peerage by the order of the House of Lords: 1st, Because in an original cause the Lords have no jurisdiction, nor is there any precedent of their having ever determined a right of peerage without a previous petition to the king, who is the fountain of honour, and the king's reference to them. 2dly, That this dismissal can amount to no more than an ordinance of one part of the legislature, and such ordinance cannot divest the party of that in which he hath a freehold and inheritance, and in whose advice and services the king and commonwealth are interested. 3dly, That this dismissal does not amount to a judgment of parliament, and therefore cannot be pleaded in bar to the defendant.

A bill of *Middlesex* was issued out of *B. R.* by an attorney of the court, against the Countess of *H.*, which was discharged by *supersedeas* without pleading; because it appeared by the record that she was a peeress, and the attorney committed for suing out the process.

A motion was made in the behalf of the Lord *Banbury* for a *supersedeas* to a *latitat* which was issued out of the court of *B. R.* against him, and on which he had been taken; and to induce the court to grant it, they offered to produce an exemplification of the judgment in the indictment in this court against my Lord, and the letters patent of creation, and an affidavit that my Lord was the same person in the record of the judgment; and it was also pretended, that if my Lord should put in bail he would be estopped to plead his peerage. But the court denied the motion, and the Ch. J. said, that they could not take notice that this *Charles Knollys* is Earl of *Banbury*; that there was a difference between this case and the case of a peer that had sat in the House of Lords. If my Lord had been ever summoned to parliament and had a writ to shew, and there were no dispute about the identity of the person, it would have been reasonable to have granted a *supersedeas*; but in this case of a lord who has never sat, they could not do it; for they could not try peerage on a motion, but his Lordship might plead it, and pray a *supersedeas*.

Villars was arrested as *J. Villars, Armiger*, and pretended himself to be Earl of *Buckingham*; and upon a motion, the question was, How he should put in bail so as not to estop himself? *Et per cur.* he need not join in the recognizance, and then there is nothing to estop him; for the act of others cannot conclude him. (b)

Recognition of bail from pleading a misnomer, though he himself be no party to the recognizance. 2 New R. 453.]]

If a bishop has occasion to plead to the jurisdiction of a court, he must plead that he is *unus de paribus hujus regni Angliæ*; for he has no patent to produce in testimony of his peerage, but is only

only a peer *ratione baroniae*, which he holds in *jure ecclesiae*: otherwise, of a temporal peer.

In the case of Colonel *Pit*, who was arrested two days after the dissolution of that parliament of which he was a member, and which was held to be within time of privilege, the question of the greatest difficulty was, How he should be relieved, and whether he could not be discharged on motion without bringing his writ of privilege? And it was held by ten judges, that though a writ of privilege was heretofore held a sure and legal remedy, that notwithstanding, and especially since the statute 12 & 13 W. 3. c. 3., which expressly provides that no person entitled, &c. shall be arrested during time of privilege, that he might be discharged on motion; for the judges are to take notice of every act of parliament, and to take care that they be duly executed; and this method was since the making of the above-mentioned statute thought more advisable by the judges than a plea or writ of privilege, as the act does not make the process void, but only avoidable; and as there could be no plea to a process for irregularity which is aided by the appearance of the party. And this case was compared to an arrest of an ambassador's servant contrary to the 7 Ann. c. 12. § 3., and to an arrest on a *Sunday* against the statute 29 Car. c. 7., and to other cases of privilege, as when a juror or witness, or the plaintiff himself, is arrested in going to or returning from the court; who are all discharged upon motion.

Mich. 7 G. 2.
Col. Pit's case,
at Serjeants'
Inn. 2 Barn-
ard. K. B. 423.
435. 448.
Com. R.
444. pl. 208.
2 Str. 905.
Fortesc. R.
159. 342.
[Col. Pit was
first brought
up by *habeas
corpus* into the
Court of Com-
mon Pleas; but
as he had been
taken by pro-
cess out of the
King's Bench,
the Court of
Common Pleas
refused to in-
terfere, and re-
manded him.
Dutton v. Pit,
Barnes, 199.]

6. *What shall be deemed a Breach of Privilege.*

The privilege, order, or custom of parliament, either of the Upper House or House of Commons, belongs to the determination or decision only of the court of parliament; so that they are the proper judges of all breaches of privilege, of which the courts of *Westminster* only take notice incidently.

And accordingly in the case of *Patty* and others, who were committed to *Newgate* for a breach of privilege in commencing and prosecuting actions at common law against the late constable of *Ailesbury* (a), the Court of K. B., by the opinions of three judges against *Holt* C. J., refused to relieve or discharge them on a *habeas corpus*, this being a parliamentary matter in which the House of Commons are the sole judges.

13 Co. 63, 64.
Prinn's 4 Inst.
16. Cro. Car.
181. 604.

2 Ld. Raym.
1105. The
Queen v. Paty.
(a) See the
case of Ashby
v. White,
6 Mod. 45.
2 Ld. Raym.
938. 1 Salk. 19.

So, in the case of one *Ferrers*, the sheriff was committed for detaining a member in execution.

Dyer, 61.
[Before this
case of Fer-

rers, the House, if in truth the privilege of parliament extended to persons in execution, had been very tender in their mode of exerting it. It had, indeed, been the practice to release members in confinement in execution, but this had not been done by any immediate authority of the House itself, or even by writ of privilege, but by petition by the Commons to the king, and a special act of parliament for that purpose, an act being supposed to be necessary as well to protect the gaoler from an action for the escape, as to secure the debt of the creditor, who would otherwise have lost his right to a new execution. See the cases of *Lark*, Rot. Parl. 8 H. 6. No. 57.; of *Clark*, Rot. Parl. 39 H. 6. No. 9.; and of *Hyde*, Rot. Parl. 18 E. 4. No. 55. There can be no doubt, however, of the existence of such privilege at present, as the stat. Jac. 1. c. 15., which is a general law passed for the purpose of obviating in all cases the difficulties which were the objects of the above-mentioned special acts, expressly provides, "That nothing therein contained shall extend to the diminishing of any punishment, to be there-
" after

“ after by censure in parliament inflicted upon any person which thereafter should make, or “ procure to be made, any such arrest as is aforesaid,” that is, any arrest in execution ; and is therefore a parliamentary declaration, that, during the privilege of parliament, it is not lawful to arrest, even in execution, any member of either house of parliament. We cannot help remarking with what a high hand the privilege was asserted in Ferrer’s case ; for though, as we have before mentioned, it had not been the practice in any preceding time to release members in execution without a special act of parliament, yet it appears that Ferrers was delivered by the serjeant, without any other warrant than his mace, even though a writ of privilege was offered by the Lord Chancellor ; that the persons who opposed the delivery were imprisoned by the House of Commons, some in the Tower, and some in Newgate ; and the creditor himself, who procured the arrest, was also committed for the contempt of the privilege of parliament. And these powers, according to Hollinghead, were admitted by all the judges of *England* to be legal. Hollingh. Chron. and 1 Hats. Prec. 53. Dyer too, in his argument as counsel in Trewynnard’s case (Dy. 61. a.), cites the case of Ferrers, to shew what the law was in this respect ; but when, in a subsequent case, he was delivering his opinion as judge, he said, “ If a man be condemned “ in debt or trespass, and be elected a member of parliament, and then be taken in execution, “ he cannot have the privilege of parliament ; and so it was holden by the sages of the law, “ in the case of Ferrers, in the time of Henry the Eighth. And though privilege was at that “ time allowed, *ceo fuit minus just.*” Moor, 57. pl. 153. We may add, that even since the statute of 1 Jac. 1. c. 13. no instance occurs where any person entitled to privilege, if in custody in execution, hath been delivered by any other mode than by virtue of a writ of privilege, or by a writ of *habeas corpus*, issued in obedience to a warrant under the Speaker’s hand, some formal process being deemed necessary to give the act its full operation. See Sir Thomas Shirley’s case, 5 Parl. Hist. 113. and 1 Hats. Prec. 155.]

Sir George
Binion v.
Evelin. Lev.
111. Mod.
145. 2 Salk.
512. pl. 2.
Show. 99.
Carth. 157.
2 Ld. Raym.
1113. S. C.

2 Ld. Raym.
1113. *per Holt*
C. J.

Ibid.

But where in *assumpsit* the defendant pleaded the statute of limitations, and the plaintiff replied that the defendant was a parliament man, &c., the plea was over-ruled ; because one may file an original against a parliament man, and continue it down without any breach of privilege, here being no actual molestation of his person or estate ; and that this should be so is of absolute necessity in order to save the bar of the statute, for such case not being provided by an exception the plaintiff would be barred of his action, though he could not file an original.

So a man whilst member of parliament may alien his estate by fine with proclamations ; and a person who has a right may be necessitated to commence an action to save the bar that would incur against him by the statute of 4 H. 7. c. 24.

So one may commence an action against a member of parliament that is executor.

7. *Of the Proceedings in Courts by and against Persons entitled to Privilege of Parliament.*

12 & 13 W. 3.
c. 3. § 1.

[[For the history of this statute, and the alterations it underwent in the Lords, vide 2 H. Bl. 273, 274. 300 &c.]]

By the statute 12 & 13 W. 3. c. 3. § 1. it is enacted, “ That “ any person may prosecute any suit in any of his majesty’s “ courts at *Westminster*, or Chancery, or Exchequer, or the “ Duchy Court, or in the Court of Admiralty ; and in all causes “ matrimonial and testamentary in the Court of Arches, the “ Prerogative Courts of *Canterbury* and *York*, and the Delegates, “ and all courts of appeal, against any lord of parliament, or any “ of the knights, citizens, and burgesses of the House of Commons, or their servants, or any other person entitled to privilege of parliament, at any time immediately after the dissolution or prorogation of parliament, until a new parliament shall “ meet, or the same be re-assembled, and immediately after any “ adjournment of both Houses for above fourteen days, until both “ Houses

“ Houses shall meet ; and the said courts may, after such dissolution, prorogation, or adjournment, proceed to give judgment, and to make final decrees and sentences thereupon ; any privilege of parliament notwithstanding.”

§ 2. “ Provided that this act shall not subject the person of any of the knights, citizens, and burgesses, or any other person entitled to privilege of parliament, to be arrested during the time of privilege ; nevertheless if any person have cause of action or complaint against any peer, such person, after such dissolution, prorogation, or adjournment as aforesaid, or before any sessions of parliament, may have such process out of his majesty’s courts of King’s Bench, Common Pleas, and Exchequer, against such peer as he might have had out of time of privilege ; and if any person have cause of action against any of the knights, citizens, or burgesses, or any other person entitled to privilege of parliament, after any dissolution, prorogation, or such adjournment, &c. such person may prosecute such knight, citizen, or burgess, or other person entitled to privilege, in his majesty’s courts of King’s Bench, Common Pleas, and Exchequer, by summons and distress infinite, or by original bill and summons, attachment and distress infinite, which the said respective courts are empowered to issue, until they enter a common appearance, or file common bail ; and any person having cause of suit or complaint may, in the times aforesaid, exhibit any bill or complaint against any peer, or against any of the said knights, citizens, or burgesses, or other person entitled to privilege, in the Chancery, Exchequer, or Duchy Court, and proceed thereupon by letter or *subpoena* as usual ; and upon leaving a copy of the bill with the defendant, or at his last place of abode, may proceed thereon, and for want of an appearance or answer, or for nonperformance of any order or decree, may sequester the estate of the party, as is used where the defendant is a peer, but shall not arrest the body of any of the said knights, citizens, and burgesses, or other privileged person, during the continuance of privilege of parliament.”

And § 3. “ Where any plaintiff shall by reason of privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall upon the rising of the parliament be at liberty to proceed.”

And § 4. “ No suit or proceeding in law or equity against the king’s original and immediate debtor, for the recovery of any debt originally and immediately due to his majesty, or against any person liable to render an account to his majesty, for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of parliament ; yet so that the person of such debtor or accountant, being a peer, shall not be liable to be arrested, or being a member of the House of Commons, “ shall

§ 3.

§ 4.

“shall not, during the continuance of privilege, be arrested by
“any such proceedings.”

§ 5.

2 & 3 Anne,
c. 18.

§ 5. “This act shall not give any jurisdiction to any court to
“hold plea of any real or mixed action in other manner than
“such court might have done before.”

[By the 2 & 3 Anne, c. 18., an act for the further explanation and regulation of privilege of parliament, in relation to persons in public offices, it is enacted, “That any action or suit
“may be commenced or prosecuted against any officer or person
“entrusted or employed in the revenue, &c. for any forfeiture,
“misdemeanor, or breach of trust, &c. and shall not be stayed
“or delayed by or under colour or pretence of any privilege of
“parliament, although such officer or person be a peer of the
“realm, or lord of parliament, or one of the knights,” &c.

Provided, “That nothing therein shall extend to subject the
“person of such officer, being a peer of the realm, or lord of
“parliament, to be arrested or imprisoned; but that all process
“shall issue against such officer or person, being a peer of the
“realm, or lord of parliament, as should have issued against him
“out of the time of privilege; nor shall extend to the person of
“such officer, being a knight, citizen, or burgess of the House
“of Commons, to be arrested or imprisoned, during the time of
“privilege of parliament; and that against such officer or other
“person, being a knight, citizen, or burgess of the House of
“Commons, entitled to privilege, shall be issued summons and
“distresses infinite; which the said respective courts are hereby
“empowered to issue in such case, until the party shall appear
“upon such process, according to the course of such respective
“courts.”

12 & 13 W. 3.
c. 3.

The act of 12 & 13 W. 3. c. 3. restraining only the privilege of parliament in actions or suits commenced in the courts therein specified, by the 11 G. 2. c. 24., in amendment of the act of King *William*, it is enacted, “That any person and persons shall
“and may commence and prosecute, in *Great Britain* or *Ireland*,
“any action or suit in any court of record, or court of equity,
“or court of admiralty; and in all causes matrimonial and
“testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of parliament
“of *Great Britain*, or against any of the knights, citizens, and
“burgesses of the House of Commons of *Great Britain*, for the
“time being, or against them and any of their menial and other
“servants, or any other person entitled to the privilege of the
“parliament of *Great Britain*, at any time from and immediately
“after the dissolution or prorogation of any parliament, until a
“new parliament shall meet, or the same be re-assembled; and
“from and immediately after any adjournment of both houses
“of parliament, for above the space of *fourteen days*, until both
“Houses shall meet or re-assemble; and the said respective
“courts may proceed,” &c.

Provided, “That the said act shall not extend to subject the
“person of any knight, &c. to be arrested during the time of
“privilege.

“ privilege. And § 2. authorizes proceeding as above in any
 “ of the courts of *great sessions in Wales, courts of session in the*
 “ *counties palatine of Chester, Lancaster, and Durham; the courts*
 “ *of King’s Bench, Common Pleas, and Exchequer, in Ireland,*
 “ after any such dissolution, &c. And the court of Chancery in
 “ Ireland, and equity of Exchequer, are authorized to proceed in
 “ like manner as the court of Chancery and equity court of Ex-
 “ chequer in England may, against any peer, knight, &c. after
 “ such dissolution,” &c.

§ 3. saves the statute of *limitations* in like manner as the act § 3.
 of King William.

And by § 4. No action or suit commenced against the king’s § 4.
 debtor, &c. to be stayed in any court in England or Ireland [as by
 § 4. in the act of King William.

And lastly, by the stat. 10 G. 3. c. 50. The preamble of which 10 G. 3. c. 50.
 states, that the acts already in being are insufficient to obviate
 the inconveniences arising from delay of suits, by reason of the
 privilege of parliament, it is enacted, “ That any person or per-
 sons shall and may, at any time, commence and prosecute any
 “ action or suit, in any court of record, or court of equity, or of
 “ admiralty; and in all causes matrimonial and testamentary,
 “ in any court having cognizance of causes matrimonial and
 “ testamentary, against any peer or lord of parliament of *Great*
 “ *Britain*; or against any of the knights, citizens, or burgesses,
 “ and the commissioners for shires and burghs of the House of
 “ Commons of *Great Britain*, for the time being; or against their
 “ or any of their menial or any other servants, or any other
 “ person entitled to the privilege of parliament of *Great Britain*;
 “ and no such action, suit, or any other process or proceeding
 “ thereupon shall, at any time, be impeached, stayed, or delayed,
 “ by or under colour or pretence of any privilege of parliament.”

2. Provided, that “ Nothing in this act shall extend to subject
 “ the person of any of the knights, citizens, and burgesses, or the
 “ commissioners, &c. for the time being, to be arrested or im-
 “ prisoned upon any such suit or proceedings.”

3. And whereas the process by *distringas* is dilatory and ex-
 pensive: for remedy thereof, be it enacted, “ That the court out
 “ of which the writ proceeds may order the issues levied from
 “ time to time to be sold; and the money arising thereby to be
 “ applied to pay such costs to the plaintiff as the said court shall
 “ think just, under all the circumstances, to order; and the sur-
 “ plus to be retained until the defendant shall have appeared, or
 “ other purpose of the writ be answered.”

4. Provided always, when the purpose of the writ is answered,
 that then the said issues shall be returned; or if sold, what
 shall remain of the money arising by such sale shall be repaid
 to the party distrained upon.

5. And it is further enacted, “ That obedience may be en-
 “ forced to any rule of his majesty’s courts of King’s Bench,
 “ Common Pleas, or Exchequer, against any person entitled to
 “ privilege of parliament, by distress infinite, in case any person
 “ or

“ or persons, entitled to the benefit of such rule, shall choose
 “ to proceed in that way: and the last clause extends them to
 “ *Scotland*.”]

45 Geo. 3.
 c. 124. § 3.;
 and see Tidd,
 118. (8th ed.)

¶ The mode of proceeding by *distringas* against persons having privilege of parliament being found extremely dilatory and expensive, it was enacted by 45 Geo. 3. c. 124. § 3., that “ when
 “ any summons, or original bill and summons, shall be sued out
 “ against any person having privilege of parliament, and no
 “ such affidavit shall be made and filed as therein mentioned,
 “ if the defendant shall not appear at the return of the summons,
 “ or within eight days after such return, the plaintiff, on affidavit
 “ being made and filed in the proper court of the service of
 “ such summons, which shall be filed *gratis*, may enter an ap-
 “ pearance for defendant, and proceed thereon as if such de-
 “ fendant had entered his appearance.”]

(a) The
 6th May 1628,
 it was resolved
 by the House

of Lords, that the nobility of this kingdom are of ancient right to answer in all courts as defendants upon protestation of honour only, and not upon the common oath. W. Jon. 155. Fortesc. R. 395. (b) Dyer, 314. Jon. 153. 2 Mod. 99. 3 Keb. 631.

2 Salk. 513.
 and Freem.

422. pl. 566. *Vide* Prec. Chan. 92.

Also, if a peer is by order of court to be examined on inter-
 rogatories, or to make an affidavit, the same must be on oath.

1 P. Wms. 146.
 pl. 39. 2 Salk.
 51. S. C.
 Sir Thomas
 Meers v. Lord
 Stourton.

As where the Lord *Stourton* brought a bill against Sir *Thomas Meers* to compel him to a specific performance of articles for the purchasing of Lord *Stourton's* estate, Sir *Thomas* in his defence insisted that there were defects in Lord *Stourton's* title to the estate; and it being ordered that Lord *Stourton* should be examined on interrogatories touching his said title, it was objected, that Lord *Stourton*, being a peer of the realm, ought to answer upon honour only; but it was ruled by Lord *Harcourt*, that though privilege of peerage did allow a peer to put in his answer upon honour only, yet this was restrained to an answer; and that as to all affidavits, or where a peer is examined as a witness, he must be upon his oath; and that this examination upon interrogatories being in a cause wherein his lordship was plaintiff, to enforce the execution of an agreement, as his lordship would have equity, so he should do equity, and allow the other side the benefit of a discovery, and that in a legal manner; and accordingly ordered Lord *Stourton* to put in his examination on oath.

Dawson v.
 Ellis, 1 Jac. &
 W. 524.

Vern. 329.

¶ Lord *Eldon* allowed the answer of a peer on his protestation of honour to be read on the question of costs.¶

It hath been held, that though a court of equity will not proceed against a member that has privilege of parliament, yet if a parliament man sues at law, and a bill is brought here to be relieved against that action, the court will make an order to stay proceedings at law till answer or further order.

Raym. 12.
 Sid. 42 S. C.

R. T. being chosen a burgess for *Buckingham*, and having a trial at bar to be had on *Tuesday* before the sitting of the parliament,

liament, moved to have his privilege allowed him; but was denied, in regard the parliament was not sitting nor to sit till after the trial had.

It hath been held, that in an action founded on the above-mentioned statute 12 & 13 W. 3. c. 13. the defendant shall have an imparlance; and it was said in this case, that the practice is to file a bill in nature of a special *capias* against the defendant, and then to summon him; and if he appears upon such summons, the plaintiff may declare against him, as *in custodiâ marescalli*.

Hil. 10 G. 1.
in *B. R.*
Wadsworth v.
Handiside.

Peers are entitled to a letter missive, which method was introduced upon a presumption that peers would pay obedience to the Chancellor's letter; and is founded on that respect that is due to the peerage.

Jenk. 107.

If the lord doth not appear upon the letter, a *subpœna* on motion is awarded against him; because no subsequent process can be awarded but upon a contempt to the great seal; and the Chancellor's letter is only *ex gratiâ*.

If, on the service of the *subpœna*, the peer doth not appear, or if he appears and does not put in his answer, no attachment can be awarded against him, because his person cannot be imprisoned; but the proceedings must be by sequestration, unless cause, &c. and this is regularly made out, upon affidavit made of the service of the letter and the *subpœna*, though sometimes it is moved for without, since the peer may shew want of service at the day assigned to shew cause why the sequestration should not issue; and this order for a sequestration is never made absolute without an affidavit of the service of the order to shew cause, and a certificate of no cause shewn.

2 Vent. 342.
Har. Chanc.
Pract. 50.
Gilb. Chanc.
65, 66.
3 Seld. 1543.

A bill being filed against a peer or peeress, the first application is for my Lord Chancellor's letter returnable in term time; or it may be *immediate*, if the peer or peeress lives in town; but in this case there must be an affidavit, that the original letter is left with the peer at his house, with a copy of the petition as answered; and therewith also is left an office-copy of the bill signed by the six clerk; for if the bill is not signed, the service is irregular.

This letter is only a compliment, and no process to found proceedings on; so that a peer may appear or not, as he pleases; if he fails, a *subpœna* issues against him, and his time for appearing and answering being out, an attachment must be actually sealed and entered against him, though never executed, to ground a sequestration upon. It is a motion of course for a sequestration upon an attachment for want of an answer.

The peer must be personally served with this order, and he hath eight days to shew cause after personal service of the order; if no cause, the order is absolute; but if the sequestration is for want of an appearance, and he appears, the plaintiff must run the same race over again for want of an answer, and the peer must pray time to answer, as suitors do.

The proceeding is the same against a member of the House of Commons: there, the party proceeds by way of sequestration, only with this difference, that instead of a letter there is always a *subpœna*

(a) This was before 10 G. 3. c. 50. which enacts, that privilege shall not delay proceedings in law, equity, or ecclesiastical courts.

2 P. Wms.
385. pl. 117.
Ld. Clifford's case.

Butler v.
Rathfield,
3 Atk. 740.

47 Geo. 3.
sess. 2. c. 40.

1 P. Wms.
555. pl. 155.

subpcena sued out; and when a cause either against a peer or a commoner stands in the paper, and is called, and cannot proceed (privilege (a) being in) the court never strikes it out, as they do in other cases where the party is not ready, but they let it stand over from one term to another, till privilege is out, and never put the party to sue out a new *subpcena* to hear judgment. And the direction of the court to the registrar is to put all privileged causes (which have been put off on that account) the very first causes in the paper when the court sits after privilege is out.

A sequestration was granted, unless cause, against the Lord Clifford for want of an answer; he afterwards put in an answer, which being reported insufficient, it was moved for a sequestration absolutely, an insufficient answer being as no answer. But the court thought it a hardship, in the case of a peer or member of the House of Commons, that a sequestration, which in some respects is in nature of an execution, should be the first process against them, and therefore allowed, that in case of an answer which is reported insufficient, the plaintiff is to move again *de novo*, for a sequestration *nisi*.

[The cause shewn against an order *nisi* for a sequestration for want of an answer from a member of the House of Commons, was, an answer come in; to which it was replied on the part of the plaintiff, that as exceptions were taken, it was no answer, and therefore the order ought to be made absolute. On the other hand was cited the above case of Lord Clifford. But by Lord Chancellor — If there is a sequestration *nisi* for want of an answer against a member of parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to his answer, the court *will enlarge the time for shewing cause*, till it shall appear whether the answer is sufficient or no. Mr. Goldsborough, who said, when Lord Clifford's case was before the court, that it was the standing rule of the court there should be a new sequestration *nisi* in this case, was a good officer, but yet I should think what I have mentioned is the proper medium. But his Lordship at present allowed the cause, as it was the course of the court.]

|| By 47 Geo. 3. sess. 2. c. 40., when any bill or information shall be exhibited in any court of equity against any knight, citizen, or burgess of the House of Commons, it shall not be necessary to leave a copy of the bill or information with the defendant, or at his house or last place of abode, as is now used, but it shall be lawful for the person exhibiting such bill, &c. to proceed, for want of appearance or answer, to sequester the real and personal estate of such knight, &c. although no copy of the bill, &c. shall have been left with him, or at his last place of abode, in the same manner as he might before the passing of the act have proceeded after such defendant had a copy of the bill, &c. delivered to him, or left at his house or last place of abode.||

It was moved for a sequestration *nisi*, for want of an answer, against a menial servant of a peer of the realm, as the first process for contempt, in the same manner as in the case of the peer himself;

self; and though the motion was granted by the Master of the Rolls, yet the registrar refused to draw it up, as thinking it against the course of the court; which being moved again before the Lord Chancellor, his Lordship, upon reading the statute 12 & 13 W. 3. c. 13. likewise granted the motion, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them, and they would have a greater privilege than their lord, if the process against such menial servant were to be a *subpoena*.

The plaintiff, in an action against a member of parliament, had proceeded agreeably to the act of 10 G. 3. c. 50., and had obtained rules for selling the issues levied upon a *distringas*, *alias*, and *pluries*; and also a rule for an attachment against the sheriff: but no issues had been actually levied, and at length defendant appeared; whereupon it was moved that these rules should all be discharged. For as no issues had been levied, they could not be sold; [*vide* § 3. of the statute 10 G. 3. c. 50.] and as the defendant in the action had now appeared, the end and purpose of the writs were answered. On the other side, the plaintiff insisted on the costs of issuing the writs, before the rules should be discharged. And the court thought that reasonable; and directed that on payment of costs the rules should be discharged. They were of opinion, that these costs were not to attend the event of the suit, but were to be paid to the plaintiff at all events, whether he should finally succeed in his suit or not.

Martin v.
Townshend,
5 Burr. 2725.

In *Trinity* term 18 Geo. 3., in the King's Bench, in the case of *Gosling* and wife against Lord Viscount *Weymouth*, the question was, whether a *peer* could be sued there by *bill of privilege*? And adjudged that he might. The case was this:—

Cowp. 844.

The plaintiffs commenced an action against the Lord *Weymouth* by *bill of privilege*, to which he pleaded in abatement, that he ought to have been sued by *original writ*, and not by *bill of privilege*, and thereupon there was a *demurrer and joinder*. On the argument of which the court relied on the case of *Say* against Lord *Byron* in that court, a few years before, and awarded a *respondeas ouster*.

In the case of *Say* v. Lord *Byron*, Mr. *L. Robinson* moved (upon an affidavit, that the plaintiff had sued out two writs of *distringas*, whereupon the sheriff had levied forty shillings and four-pence, and that no bill was filed,) for a rule to shew cause why the said two writs should not be quashed, and the money levied thereon be restored. He objected that a peer ought not to be sued by bill, but by original writ; and that the stat. of 12 & 13 W. 3. does not make any variation in the proceedings against peers, but respects, in this particular, *commoners* only. Mr. *Stow* shewed cause, and the rule was enlarged. Upon shewing cause at a farther day, the court declared, that there were many precedents of actions against peers of parliament for many years before the statute of W. 3. as certified by the Master, and the clerk of the rules; and said, why could not the court support its ancient

jurisdiction, as well as the Court of Exchequer, as *debitor domini regis*? The court therefore discharged the rule.

It is however very remarkable, that when the act of King William went to the Lords for their concurrence to the proceedings therein, against the members of both Houses, *by bill and summons thereon*, the Lords expunged that part of the clause relating to themselves being sued by *original bill and summons*, and sent back the amended bill to the Commons; which afterwards passed accordingly. Which clearly proves, that the Lords, at that time, did not think themselves included therein.

Earl of Lonsdale v. Little-
dale, 2 H. Bl.
267. 299.; ||*et*
vide 5 Bos. &
Pull. 7.||

Nor is it clear even at this day, notwithstanding the above cases, that they are included in the act. For upon a writ of error by the Earl of Lonsdale, to reverse judgment because he had been sued by bill, the two following questions were proposed to the judges by the House of Lords. 1st, Whether the Court of King's Bench hath any jurisdiction to hold plea in a personal action against a peer, or lord of parliament, who is neither in the custody of the marshal, nor is an officer or minister of that court, without the king's original writ issuing out of his chancery, to warrant such action? 2d, If the court has no such jurisdiction, can it derive such jurisdiction from the acquiescence of the defendant, by pleading to issue in an action commenced without the king's original writ? In answer to which the Lord Chief Justice Eyre stated the unanimous opinion of the judges to be, that the first question would have admitted of considerable doubt, if the objection had been made in an earlier stage of the cause, and that the cases of *Say v. Lord Byron*, and *Gosling v. Lord Weymouth*, were not to be considered as decisive authorities upon the subject. But that after pleading in chief it was too late for the defendant to object to the jurisdiction of the court.]

Briscoe v. Lord
Egremont,
3 Maul. & S. 88.

Davies v. Lord
Rendlesham,
1 Moo. 410.
7 Taunt. 679.
Fortnam v.
Lord Rokeby,
4 Taunt. 662.

Hunter v. De-
loraine,
2 Chitt. R. 638.

2 Stra. 734.
Say. R. 634.

|| And if a peer be sued jointly with others by bill of *Middlesex*, the Court of K. B. will set aside proceedings as against the peer.

But the Court of C. P. refused to set aside proceedings against an *Irish* peer sued by bill, and left him to plead his privilege in abatement. But where an *Irish* peer was sued by common *capias*, the Court of C. P. set aside the proceedings, although it appeared that the defendant had often waived his privilege, and had sued and been arrested as a commoner.

A declaration in case against an earl, stating him to have been *summoned* to answer, instead of *attached*, is bad. ||

[A member of the House of Commons may be sued either in *B. R.* or *C. B.* by bill; but he cannot be declared against in *B. R.* as *in the custody of the marshal*.

All the subsequent proceedings to the declaration against a *peer or privileged person* are the same as in other cases, except that their bodies cannot be taken *in execution*, unless the judgment is obtained upon a *statute-staple* or *statute-merchant*, or upon the *statute of Acton Burnell*, 11 Edw. 1., and then a *capias ad satisfaciendum* lies even against peers of the realm.]

|| And for preventing inconvenience, from merchants and other persons

persons within the description of the statutes relating to bankrupts being entitled to privilege of parliament and becoming insolvent, it is enacted, by 4 Geo. 3. c. 33., that any single creditor, or two or more creditors being partners, whose debt or debts amount to 100*l.* or upwards, and any two creditors whose debts amount to 150*l.* or upwards, or any three or more creditors whose debts amount to 200*l.* or upwards, of any person deemed a merchant, banker, broker, factor, scrivener, or trader within the description of the acts of parliament relating to bankrupts, having privilege of parliament, may, upon affidavit made and filed of record in any of his majesty's courts at *Westminster* by such creditor or creditors that such debt is justly due, and that such debtor is a merchant, &c. within the description of the statutes concerning bankrupts, sue out of the same court a summons, or an original bill and summons, against such merchant, &c. and serve him with a copy thereof; and if such merchant, &c. shall not within two months after personal service of such summons (affidavits of the debt or debts having been duly made and filed as aforesaid) pay, secure, or compound for such debt to the satisfaction of such creditor, or enter into a bond in such sum, and with two sufficient sureties, as any judge of the court shall approve, to pay such sum as shall be recovered in such action, with such costs as shall be given in the same, he shall be accounted and adjudged a bankrupt from the service of such summons; and any creditor may sue out a commission against such person, and proceed thereon as against other bankrupts.

4 G. 3. c. 33.

A bond given under the above statute is analogous to a recognizance of bail in error; and therefore, where a member had given such a bond with two sureties, conditioned for payment of the sum to be recovered in the action, and before trial became bankrupt, the court refused to order the bond to be delivered up to be cancelled.

Hunter v. Campbell,
5 Barn. & A.
273. 1 Chit.
R. 731.; and
see Jameson v.
Campbell, 5 Barn. & A. 250.

And in order to give effect to the above provisions, it is enacted by statute 45 Geo. 3. c. 124. that when any summons, or any original bill and summons, shall be sued out against any person deemed a merchant within the description of the acts relating to bankrupts, having privilege of parliament, and such affidavit of the debt duly made as in the said recited act mentioned, and such merchant shall enter into such bond as in the act mentioned, to pay such sum as shall be recovered in the action, together with such costs as shall be given in the same, every such merchant shall, within two months after personal service of such summons, cause an appearance to be entered to such action, and on default thereof shall be adjudged a bankrupt from the service of such summons, and any creditor may sue out a commission against such person, and proceed as against other bankrupts. ||

45 G. 3. c. 124.;
and see Tidd,
115. (8th ed.)

PROHIBITION.

2 Inst. 601.
F. N. B. 40.

12 Co. 65.

And. 279.

2 Jones, 213.

Skin. 628.

(a) And is of great antiquity, 3 E. 1. An attachment granted against the bishop and official, for holding plea after a prohibition. 2 Roll. Abr. 281.

(b) Ecclesiastical courts holding plea by fraud of matters of which they had not cognizance, were punishable in the Star-Chamber. Dav. 52.

Show. Par.
Ca. 63.

2 Inst. 602.
Roll. R. 252.
3 Bulst. 120.
Palm. 297.

AS all external jurisdiction, whether ecclesiastical or civil, is derived from the crown, and the administration of justice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of their several jurisdictions prescribed them by the laws and statutes of the realm. And for this purpose the writ of prohibition was (a) framed; which issues out of the superior courts of common law to restrain inferior courts, whether such courts be temporal, ecclesiastical, maritime, military, &c. upon a suggestion that the cognizance of the matter belongs not to such courts; and in case they exceed their jurisdiction, the officer who executes the sentence, and in some cases the judges that give it, are in such superior courts (b) punishable, sometimes at the suit of the king, sometimes at the suit of the party, sometimes at the suit of both, according to the nature of the case.

The object of prohibitions in general is, the preservation of the right of the king's crown and courts, and the ease and quiet of the subject. For it is the wisdom and policy of the law, to suppose both best preserved when every thing runs in its right channel, according to the original jurisdiction of every court; for by the same reason that one court might be allowed to encroach, another might; which could produce nothing but confusion and disorder in the administration of justice.

So that prohibitions do not import that the ecclesiastical or other inferior temporal courts are *alia* than the king's courts, but signify that the cause is drawn *ad aliud examen* than it ought to be; and therefore it is always said in all prohibitions (be the court ecclesiastical or temporal to which they are awarded) that the cause is drawn *ad aliud examen contra coronam et dignitatem regiam*.

Under this Head we shall consider :

- (A) What Courts may grant a Prohibition.
- (B) Whether the granting of a Prohibition be discretionary, or *ex debito iustitiæ*.
- (C) Who have a Right to such Writ, and may demand it.
- (D) Who may join in such Writ.

(E) Of

- (E) Of the Suggestion and Manner of obtaining a Prohibition; ||and herein, of Costs.||
- (F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.
- (G) Whether more than one such Writ is to be awarded.
- (H) At what Time to be granted; and therein, in what Cases it may be granted after Sentence.
- (I) To what Courts a Prohibition may be awarded; and therein, that the superior Courts are to determine the Boundaries of all inferior Jurisdictions.
- (K) Prohibitions to inferior Temporal Courts in what Instances to be granted.
- (L) Prohibitions to the Spiritual Court in what Instances: And herein,
1. *Where they meddle with a Matter purely Temporal.*
 2. *Where they determine on a Matter of Freehold.*
 3. *In what Cases a Prohibition lies when they determine on Criminal Offences.*
 4. *Where the Ecclesiastical Courts determine on Acts of Parliament.*
 5. *In what Cases they have a concurrent Jurisdiction, and may determine Incidents.*
- (M) The Offence of disobeying a Prohibition.

(A) *What Courts may grant a Prohibition.*

THE superior courts of *Westminster*, having a superintendency over all inferior courts, may in all cases of innovation, &c. award a prohibition. In this the power of the Court of *B. R.* has never been doubted, being the superior common law court in the kingdom. F. N. B. 53.
4 Inst. 71.

Also, the Court of Chancery may award a prohibition, which may issue (a) as well in vacation as in term time; but such writ is returnable into *B. R.* or *C. B.* (b) Bro. Prohibition, pl. 6.
4 Inst. 81.
1 P. Wms. 45.

(a) If one be sued in an inferior court for a matter out of its jurisdiction, the defendant may either have a prohibition from one of the common law courts of *Westminster-hall*; or, in regard this may happen in a vacation, when only the Chancery is open, he may move that court for a prohibition; but then it must appear by oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused. And if a prohibition has been granted out of Chancery *improvidè*, and without these circumstances attend-

ing it, the court will grant a *supersedeas* thereto. 1 P. Wms. 476. pl. 135. ||(b) The writ of prohibition from the Court of Chancery appears not to be returnable; but if it be not obeyed, then that court grants an attachment returnable in *B. R.* or *C. B.* 4 Inst. 81.||

(a) Bro. Prohibition, pl. 6.
Noy, 153.

(b) 12 Co. 58.
108. Bro. Consultation, pl. 3.
4 Inst. 99.

2 Brownl. 17.
—Prohibitions for encroaching jurisdictions issue as well out of the

C. B. as *B. R.* Vaugh. 157. *per Vaughan C. J.* [The author of the Commentaries says, that the writ of prohibition is issuing properly only out of the Court of King's Bench, being the king's prerogative writ, but that for the furtherance of justice it may now also be had in *some* cases out of the Court of Chancery, Common Pleas, and Exchequer. 3 Black. Comm. 112. And Lord *Hardwicke* is reported to have said, that where the ecclesiastical court proceeds to try a custom by a different evidence from that which the common law courts would have done, *no other court* has the cognizance of it, but the Court of King's Bench. 3 Atk. 628. *Rotheram v. Fanshaw*. In the case of the Company of Horners in *London*, it is said that it is the *proper* power and honour of the Court of King's Bench to limit the jurisdictions of all other courts. 2 Roll. R. 471.]

Moor, 861.
2 Roll. Abr. 317.
Hutton's case.
Hob. 15. S. C.
and there said by Hob. that the party might likewise have a prohibition out of the Duchy Court.

Noy, 77.

Dixy v. Brown.
Palm. 422.

Latch. 114. S. C.
(c) That if it be insisted on, a

prohibition cannot be moved for till the suggestion be entered on the roll. Salk. 136. *per Holt C. J.* [For want of a suggestion on record the Court of *B. R.* discharged the rule to shew cause why a prohibition should not be granted. *Hawkins, Assignee of Wooldridge, v. Blaquiére and others, Assignees of Sampson*, Hil. 20 G. 3: 2 Crompt. Pr. 259.] (d) But, if an attachment issues upon such prohibition, or the party puts in bail, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuited, though not before. Palm. 423. Latch. 114. *per Dodderidge and Jones*.

Palm. 525.

Lane, 39.

Rol. Abr. 539.

As the jurisdiction of the Court of C. B. is founded on original writs issuing out of Chancery, it hath been heretofore (a) doubted, whether this court could without writ or plea depending award a prohibition; but this point has been (b) determined by the unanimous sense of all the judges, *viz.* That this court may upon a suggestion grant prohibitions, to keep as well temporal as ecclesiastical courts within their bounds and jurisdictions, and that without any original writ or plea depending; the common law being, in these cases, a prohibition of itself, and standing instead of an original.

Accordingly it hath been adjudged, that a prohibition ought to be granted by the Court of C. B. to the Court of Delegates, for suing there to avoid an institution of a clerk to a church in *Lancashire*, after induction made of him thereto, though the *quare impedit* for this church could not be brought in C. B. but only in the county of *Lancaster*; because the title of the advowson was not questioned by this prohibition, but the intrusion upon the common law, of which this court has special care.

But as to the Courts of *B. R.* and C. B. this difference hath been made, that in the first of those courts a prohibition may be awarded upon a bare surmise (c), without any suggestion on record; and such writ is only in nature of a commission prohibitory, which is discontinued (d) by the demise of the king; but that as to a prohibition issuing out of C. B. the suggestion must be on record, and therefore is considered as the suit of the party, in which he may be nonsuited, and is not discontinued by the demise of the king.

[For want of a suggestion on record the Court of *B. R.* discharged the rule to shew cause why a prohibition should not be granted. *Hawkins, Assignee of Wooldridge, v. Blaquiére and others, Assignees of Sampson*, Hil. 20 G. 3: 2 Crompt. Pr. 259.] (d) But, if an attachment issues upon such prohibition, or the party puts in bail, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuited, though not before. Palm. 423. Latch. 114. *per Dodderidge and Jones*.

If the king's farmer, or a copyholder of the king's manor, be sued in the ecclesiastical court for tithes, upon a suggestion in the Court of Exchequer that he prescribes to pay a certain *modus* in lieu of tithes, he shall have a prohibition out of the said court, and such *modus* shall be tried there.

The grand sessions of *North Wales* may send a prohibition and write to the spiritual courts there, as well as the courts here may.

Sid. 92.; but for this *vide* Cro. Car. 341. Jon. 350. Vaugh. 411.

¶ The Court of C. B. have no power to issue an original writ of prohibition to restrain a bishop from committing waste in the possessions of his see, at least at the instance of an uninterested stranger; and it is doubtful whether any of the courts can grant such a writ.¶

Jefferson v. Bishop of Durham, 1 Bos. & P. 105.

(B) *Whether the granting of a Prohibition be discretionary, or ex debito justitiæ.*

IT is laid down in *Hob.* that though a surmise be a matter of fact, and triable by a jury, yet it is in the discretion of the court to deny a prohibition, when it appears to them that the surmise is not true.

Hob. 67. in the case of Aston Parish v. Castle Birmidg Chapel.

This authority has been often quoted in questions of this kind, and in some cases denied to be law. But yet it seems the better opinion, and to have been so holden by the greater number of our judges, that the awarding of a prohibition is a matter discretionary, that is, that from the circumstances of the case the superior courts are at liberty to exercise a legal discretion herein, but not an arbitrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm they ought to be granted.

Winch, 78. it is said to be a matter discretionary. — But in Raym. 3, 4. Sid. 55. prohibitions are said by the judges to be *ex debito justitiæ*, and

de gratiâ. In Raym. 92. *Hide* C. J. affirms, that a prohibition is *ex gratiâ*, but *Keling* and *Twisden* positively denied it. — Salk. 33. pl. 6. Comb. 148. they are held to be discretionary. — Ld. Raym. 220. 578. it is said by *Holt* C. J. that *Hale* and *Windham* held prohibitions to be discretionary in all cases. — And of this opinion is *Holt*; and so in Ld. Raym. 586.

It hath been determined in the House of Lords, that no writ of error will lie upon the refusal of a prohibition; but when a consultation is awarded, it is with an *ideo consideratum est*, and then a writ of error will lie. (a)

Ld. Raym. 545. in the Bishop of St. David's case.

does not lie from the K. B. to the Exchequer Chamber; for prohibitions are 27 Eliz. c. 28. 5 Barn. & C. 765.¶

¶(a) But error not within the

If a master of a ship sues in the Admiralty for his wages, and a prohibition is moved for, upon a suggestion that the contract was made on land, and the court is of opinion that a prohibition ought by law to be granted; in this case they will not compel the party to find (b) special bail to the action in the court above.

Salk. 33. pl. 4. Carth. 518. Com. 74. Ld. Raym. 576. S. C. [Clay v. Snelgrave.

3 Term R. K. B. 315.] (b) But *Holt* C. J. confessed that the court had sometimes interposed and procured bail to be given, but that was by consent. Ld. Raym. 578. [For without consent it cannot be done, and the case of *Wharton v. Pitts*, Salk. 548. where such terms were imposed, was over-ruled in *Velthasen v. Ormsley*, 3 Term R. K. B. 315.]

[For without consent it cannot be done, and the case of *Wharton v. Pitts*, Salk. 548. where such terms were imposed, was over-ruled in *Velthasen v. Ormsley*, 3 Term R. K. B. 315.]

If there is judgment against a simonist, who by the assent of parties is to continue for a certain time on the benefice, and who at the expiration of the time refuses to remove, but commits waste on the house or glebe, a prohibition to stay his doing waste may be had by the patron, incumbent, or any other person,

Comp. Incumb. 43. Sid. 65.

because that is the king's writ; and any one may pray a prohibition for the king, and it is grantable *ex debito justitiæ*, and not in the discretion of the court.

(C) Who have a Right to such Writ, and may demand it.

F. N. B. 40.

THE king may sue for a prohibition, though the plea in the spiritual court be between two common persons, because the suit is in derogation of his crown and dignity.

2 Inst. 607.

So, if the ecclesiastical court will hold plea of any matter which belongs not to their jurisdiction, upon information thereof to the king's courts, either by the plaintiff, defendant, or by a mere stranger, a prohibition will issue.

2 Roll. Abr.

312.

Leon. 150.

Gouls. 149.

As, if a man libels in the spiritual court for a matter which does not appertain to that court, but to the common law, as a matter of frank-tenement; yet he himself, against his own suit, may pray a prohibition, and shall have it.

Cro. Jac. 351.

2 Bulst. 283.

Lit. R. 20.

Wort v.

Cliston.

So, where the plaintiff in the spiritual court brought a prohibition to stay his own suit there, for that he suing for tithes by virtue of a lease made by the vicar of *A.* for three years, the defendant claimed to be discharged of the tithes by a former lease and composition by deed; it was held, that the plaintiff himself may have a prohibition to stay the suit; for the ecclesiastical judges are not to meddle with the trial of leases or real contracts, though they have jurisdiction of the original cause (*viz.* the tithes); for the lease is in the realty, and is not merely accidental. And it makes no difference, that the plaintiff bring this prohibition to stay his own suit; for if the temporal court has knowledge by any means that the spiritual court meddles with temporal trials, a prohibition ought to be awarded.

2 Roll. Abr.

312. Robert's case.

(a) Cro. Eliz.

251. Keilw. 110.

Moor, 915.

Cro. Eliz. 55.

March, 22. 45.

— A prohibition *quia timet* does not lie. Allen, 56.

1 Bos. & P.

105.

If a vicar sues a parishioner for tithes in the spiritual court, and the parson appropriate appears there (a) *pro interesse suo*, and prays a prohibition, it shall be granted.

If lessee for years is sued in the spiritual court for tithes, he in reversion may have a prohibition.

But no man is entitled to a prohibition, unless he is in danger of being injured by some suit actually depending; and therefore upon a petition to the archbishop, or other ecclesiastical judge, no prohibition lies.

|| A stranger cannot have an original writ of prohibition against a bishop to restrain him from committing waste in the possession of his see.||

[If the wife libel in the spiritual court to recover her fame, a prohibition shall not be granted upon the motion of her husband.]

Tarrant v.

Mawr,

1 Stra. 576.

(D) Who may join in such Writ.

IF several libels are exhibited against *A.* and *B.* in a matter in which the court hath not consensance, *A.* and *B.* cannot join in a prohibition. So, if the griefs be several, as some books say.

But, where the vicar of *A.* libelled several persons severally for tithes, who joined in a prohibition, suggesting a *modus*; though the court held in this case, that the prohibition was not regularly brought, being in all their names, when there were several libels; yet inasmuch as this was on a custom, and matter triable at common law, in which the ecclesiastical court was properly prohibited, though not in exact form, they refused to award a consultation, but directed that the parties should put in several declarations, as if there had been several prohibitions.

So, if *A.* libels against *B.* and *C.* for defamation, and they sue a prohibition, they shall join in attachment upon it; and it is no objection to say that the defamation was several.

Raym. 425. Comb. 448.

Where two or more are allowed to join in a prohibition, and one of them dies, the writ shall not abate; because nothing is by them to be recovered, but they are only to be discharged.

(E) Of the Suggestion and Manner of obtaining a Prohibition; ||and herein, of Costs.||

WHERE the matter suggested for a prohibition appears upon the face of the libel, an affidavit is never insisted upon; but if it does not appear upon the face of the libel, or, if a prohibition is moved for as to more than appears upon the face of the libel to be out of their jurisdiction, there ought to be an affidavit of the truth of the suggestion.

The suggestion in the temporal courts may be traversed.
2 Co. 44. Prohibition not to be granted upon process before libel or appearance. Salk. 35. pl. 8. — Where it is in nature of a *supersedeas*. Lev. 253. — That a person may alter his suggestion. Show. 179. — Where a variance between the libel and suggestion is not material. Yelv. 79.

On a rule to shew cause why a prohibition should not be granted to stay a suit against the plaintiff in the court of the archdeacon of *Litchfield*, for not going to his parish-church, nor any other church, on *Sundays* or holidays, nor receiving the sacrament thrice a year, upon suggestion of the statute *Eliz.* and toleration act, and then qualifying himself within the act, and alleging that he pleaded it below, and they refused to receive his plea; cause was shewn, that this fact, that such a plea had been put in and refused, was false, and that the plaintiff was not a dissenter, nor had qualified himself *ut supra*, and therefore hoped the court would not suffer the rule to stand, unless there was an affidavit of the above fact; for by that means any person might come and suggest a false fact, and oust the spiritual court of their jurisdiction,

Noy, 131.
Leon. 286.
Cro. Car. 162.
Yelv. 128, 129.
Burgess and
Dixon v. Ash-
ton. Owen, 13.
Bartue's case,
L.P. adjudged.

Ld. Raym. 127.
per Treby C.J.
et vide for this,
Vent. 266.

Owen, 13. per
cur.

2 Salk. 549.
pl. 8. per Holt
C. J. 1 P.
Wms. 677.
[4 Burr. 2037.
Cowp. 330.]

2 Inst. 611.

2 Ld. Raym.
1211. Burdett
v. Newell.

tion; which the court admitted; and therefore for want of such affidavit the rule was discharged.

Skin. 20. pl. 20.
Hard. 406.
3 Keb. 217.

If a plea to an inferior jurisdiction be properly tendered, and they refuse it, though this be a good cause for a prohibition, yet an affidavit must be made of the refusal.

Roberts v.
Williams,
12 East, 33.

¶ The matter of the plea tendered to the inferior court must not appear bad on the face of it. Where to a suit for tithe of turkeys a *modus* was pleaded in the spiritual court, that the vicar was only entitled to one penny for every turkey laying eggs, or to every tenth egg laid by such turkey, and this plea was rejected, and a prohibition was applied for on the ground of such rejection, the Court of *B. R.* refused the prohibition on the ground of the uncertainty of the *modus* in not ascertaining any time for the money payment, in case the option were made to take the tithe in money.¶

4 Mod. 367.
[1 Stra. 187.
4 Burr. 2032.
2039. See
Dougl. 380. as
to this custom
of London.]

A motion was made for a prohibition to the ecclesiastical court of *London*, for calling a woman a *whore*, upon a suggestion that the words were actionable there by custom of the place; but the court would not grant a prohibition without oath made, that if any such words were spoken, they were spoken in *London*, and not elsewhere.

Vent. 10. Day
v. Pitts.

On a libel for calling the plaintiff *old thief and old whore*; the defendant suggested for a prohibition, that if any such words were spoken, they were spoken at the same time; but this suggestion was held ill, because the words ought to have been fully confessed.

(a) Rehearsed
in the statutes,
27 H. 8. c. 20.
and 32 H. 8.
c. 7. to which
this act refers.

By 2 & 3 Edw. 6. c. 13. § 14. it is enacted, "That if any party at any time hereafter, for any matter or cause before (a) rehearsed, limited, or appointed by this act, to be sued or determined in the king's ecclesiastical court, or before the ecclesiastical judge, do sue for any prohibition to any of the king's courts where prohibitions before this time have been used to be granted, that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court, where such party demanded prohibition, the *very true copy of the libel, depending in the ecclesiastical court* concerning the matter wherefore the party demandeth prohibition, subscribed or marked with the hand of the same party, and under the copy of the said libel shall be written the suggestion wherefore the party so demandeth the said prohibition; and in case the said suggestion, by two honest and sufficient witnesses at the least, be not proved true in the court where the said prohibition shall be so granted, within six months (a) next following after the said prohibition shall be so granted and awarded, that then the party, that is letted or hindered of his or their suit in the ecclesiastical court by such prohibition, shall, upon his or their request and suit, without delay, have a consultation granted in the same cause in the court where the said prohibition was granted, and shall recover double costs and

¶ (a) 1 Turn. &
Russ. R. 314.¶

"damages

“ damages against the party that so pursued the said prohibition ;
 “ the said costs and damages to be assigned or assessed by the
 “ court where the said consultation shall be so granted ; for which
 “ costs and damages the party to whom they shall be awarded
 “ may have an action of debt by bill, plaint, or information, in
 “ any of the king’s courts of record.”

In the construction of the above-mentioned statute the following opinions have been holden.

That this statute referring to the statutes 27 H. 8. c. 20. and 32 H. 8. c. 7. which extend to tithes and offerings generally, all such tithes and church-duties as are mentioned in those statutes are as much within this act as if particularly enumerated.

And therefore it extends to prohibitions to suits for small tithes as well as great.

So it hath been adjudged, that the suggestion of a *modus decimandi* ought to be proved within six months, being within the act.

So, where one that was sued for tithe of hay in the spiritual court, suggested for a prohibition, that he was to pay so much upon an arbitrament ; it was held, that this suggestion ought to be proved, as well as one made of a *modus decimandi*. So, on a suggestion upon the statute 31 H. 8. c. 13. that lands are tithe-free, because the clause requiring the proof of a suggestion is general, and not limited to real composition.

So, upon a suggestion, that the suit in the spiritual court was for tithes of heath and barren ground improved, within seven years after the improvement, contrary to the statute ; in this case, proof of the suggestion within six months was held necessary.

But it hath been held, that there needs no proof of the suggestion, where the suit is for tithes contrary to common right, or where the contract (a) of the party is suggested.

It hath been held, that the suggestion need not be proved (b) strictly, nor with precise certainty as to all its circumstances ; but that if it be proved in substance, or in such manner as to shew (c) that the ecclesiastical court has not jurisdiction, it is sufficient.

sufficient. Palm. 377. — Or that it is so by common fame. Noy, 28. *modus* was alleged to be, that one should pay 20s. in satisfaction of tithes, and the proof was, that he should pay 40s., this was held sufficient proof ; because thereby the court above had sufficient jurisdiction. Hetl. 100. So, where the suggestion was to pay 2s. 6d. for tithes, and the witnesses proved the *modus* to be to pay 3s., this was held good by two judges against one ; because it ousted the ecclesiastical court of jurisdiction. Noy, 44. Hetl. 110. ; *et vide* Yelv. 55. 2 Keb. 57. 407. — So, if one surmise that the inhabitants of *B.* (of which he himself is one) have paid a *modus*, and the proof be that he himself had paid it, this is sufficient ; because it ousts the ecclesiastical court of its jurisdiction. Noy, 28.

The suggestion must be proved by honest and sufficient witnesses, which is required by the express words of the statute ; and therefore the testimony of one attainted of felony, excommunicated or convicted of recusancy, is, as in other cases, to be rejected.

But it hath been held, that persons, such as parishioners of the parish, &c. who may not be sufficient and able witnesses at a trial

2 Inst. 662.
Comp. Incumb. 600.
Dyer, 170. b.

Yelv. 102.
2 Ld. Raym. 1172.

Noy, 148.
Yelv. 102. L.P.
Roll. R. 55.
Reynolds v. Hay.

Jon. 231.
Strande v. Hoskins.
Cro. Car. 208.

(a) For this *vide* Yelv. 102.
119. 2 Leon.
29. Brown. and
Gouls. 99. Hetl. 145. 2 Keb. 134. Lit. R. 297.

Cro. Eliz. 736.
819. Ca. temp. Hardw. 292.
Moor, 911.

(b) That proof by hearsay is

(c) As, where a

2 Bulst. 154.

Mich. 27. Car. 2
in C. B. Sharp.
at v. Hobart.

at law, may notwithstanding be sufficient witnesses to prove the suggestion; the chief intent of the statute being to prevent frivolous and vexatious suggestions. Also it hath been held, that after admitting and recording the proof of the suggestion, nothing is to be objected against the persons of the witnesses or their evidence.

Vent. 107.

If a suggestion consists of two parts, it is said to be sufficient to produce one witness to the one, and another to the other.

Hob. 179.

Lit. R. 19.

2 Mod. 58.

[2 Roll. Abr.

521. Foy v.

Lister, 2 Salk. ecclesiastical law.

554. 2 Ld. Raym. 1172. S. C. *semb.* [Vide contra, and that this computation is confined only to the case of a lapse in *quare impedit*, Co. Lit. 135. b. Cro. Jac. 166, 167. 4 Mod. 186. 3 Burr. 1455. Skin. 514. And that depends on the words in the act of 13 E. 1. st. 1. c. 5. "*tempus semestre*." But in all acts where "months" are spoken of, without the word "calendar," and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months. Lacon v. Hooper, 6 Term R. 226.]

(a) Moor, 573.

(b) Noy, 30.

2 Ld. Raym.

1172. 2 Salk.

354. pl. 20.

It is said in *Moor* (a), that the time of six months given by the statute to prove the suggestion, ought to be intended six months in term-time, and that the vacation should be no part of the time; but this hath been since adjudged otherwise (b), and that the time shall commence from the *teste* of the writ of prohibition, and not from the time of the rule made for awarding it.

Maltom v.

Acklom,

Barnes, 428.

Noy, 30.

(c) That it

must be entered in the

office. 2 Show. 308. pl. 316.

[When the declaration is ordered to be amended, the time for proving the suggestion is to be computed from the amendment.]

If the surmise (c) be proved before one of the judges within the six months, although it be not recorded till after the six months by the court, it is well enough.

Lit. R. 155.

It hath been held, that proof which is not sufficient may be supplied by better proof within the six months, but not after.

Arg. Creake v.

Pitcairn,

Trin. 13 G. 2.

Cas. Pr. C. B.

[It is said, if the party who has obtained a writ of prohibition, be ordered to declare in prohibition, that he is not obliged to make proof of his suggestion within six months, pursuant to the 2 & 3 Ed. 6. because the proof is, in such case, to be made at the trial of the cause.]

Bendl. 143.

(d) Vide stat.

8 & 9 W. 3.

c. 11.

Brownl.

Gouls. 99.

Yelv. 119.

The party, on failure of proof of the suggestion, shall not only have double costs and damages, but also his costs and damages (d) in the action he brings for the recovery of them.

But, if the prohibition be grounded partly on a *modus*, which needs proof, and partly on the contract of the parties, which needs no proof, there ought not to be double costs; for the mixing of the contract with the manner of tithing privileges the whole.

Yelv. 79, 80.

So where, for a variance between the libel and suggestion, a consultation was awarded, and double costs adjudged to the defendant; this was held to be error by the very letter of the statute, which gives double costs (e) only for want of proving the suggestion, and for no other cause.

(e) Carth. 463.

So, where a prohibition was obtained upon a suggestion which was not proved within the six months, in which the defendant took issue with the plaintiff, which was found for the plaintiff; in this case it was resolved, that the defendant should not have double costs for want of the suggestion's being proved; for the statute is, that he shall have a consultation and double costs; but in this case he could not have a consultation, the matter and issue being found against him; but ought to have prayed a consultation upon the suggestion's not being proved, and then should have had his double costs.

[Where a consultation is granted, because the suggestion has not been proved within six months, the court will not make the payment of the double costs and damages given in such case to the defendant, in prohibition of the 2 & 3 Edw. 6. c. 13., a part of the rule; — that would be unnecessary, for if a consultation be awarded for want of such proof, double costs and damages follow of course.

A suit was instituted in an ecclesiastical court against an *administrator* for tithes *due from the intestate in his lifetime*, to which suit the administrator, alleging a *modus*, obtained a prohibition, but did not prove his suggestion within the time limited for that purpose by the 2 & 3 Edw. 6. c. 13. and it was doubted, whether or not he was liable to double costs according to that statute.

According to these books, the court resolved, that the plaintiff in prohibition was *not* liable to pay any costs.

If a defendant in prohibition bring an action of debt for the recovery of the double costs and damages, given by the 2 & 3 Edw. 6. where a consultation is granted for want of the suggestion's being proved within six months, he shall also have costs in such action.

The 2 & 3 Edw. 6. c. 13. § 14. gives costs where the party applying for a prohibition fails in proving the truth of his suggestion within six months; and this continued to be the only case where either a plaintiff or defendant in prohibition was entitled to recover any costs until the 8 & 9 W. 3. c. 11. By the third section of that statute it is enacted, "That in all suits upon prohibitions, the plaintiff obtaining judgment, or any award of execution after plea pleaded, or demurrer joined therein, shall likewise recover his costs of suit; and if the plaintiff shall become nonsuit, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs, and have execution for the same by *capias ad satisfaciendum, fieri facias, or elegit.*"

Where judgment is given for the plaintiff, in a suit in prohibition, upon demurrer, or after plea pleaded, he shall have costs taxed from the suggestion, and so as to include the costs incurred by the motion.

Thus in prohibition, a motion being made that the prothonotary should not allow costs, except from the time of the delivery of the declaration, the court unanimously declared, that the plaintiff ought to have his costs from the time of the suggestion, and

Latch, 140.
Watkinson v.
Sir G. Pacy.

Foy v. Lister,
2 Ld. Raym.
1172.

Creak v.
Pitcairne, Trin.
13 & 14 G. 2.
Barnes, 129;
sed vide S. C.
Cas. Pr. C. B.
157. Pract.
Reg. 118.

1 Rol. Abr. 516.
l. 37.

Comb. 20.
The 5th sect.
of 8 & 9 W. 3.
c. 11. provides,
that nothing
in that act con-
tained shall be
construed to
alter the laws
then in being,
relative to the
payment of
costs by ex-
ecutors or ad-
ministrators.

2 Stra. 1062.
Ca. temp.
Hardw. 396.
Andr. 62.
Barnes, 130.

Wills v. Tur-
ner, Hil. 2 G. 1.
Cas. Pr. C. P.
11. S. C.
B. N. P. 351.

and of the suggestion itself, and all costs incident and subsequent thereto.

Sir Harry
Houghton v.
Starkey. In
Scacc. Hil.
4 G. 1. 4 Stra.
82. S. C. Fort.
348. S. C.
cited Ca.
temp. Hardw.
396.

So where, after judgment for the plaintiff in prohibition, the question was, Whether the costs payable by the defendant should be computed from the first motion, or only from the declaration? upon search, it was found to be the course of all the courts, to tax only from the time of declaring, except in two instances, viz. *Eads v. Jackson*, B. R. 2 G., and *Brown v. Turner* and others, in C. B., where costs were allowed from the time of the original motion for the prohibition. And Mr. Baron *Fortesque* said, that this question had been put to all the judges, whose opinions were conformable to these two decisions. Therefore, in the principal case, the Court of Exchequer ordered costs to be taxed from the first application to the court inclusively; and directed the officers to pursue that mode of taxation in all such cases for the future.

1 *Stra. ubi sup.*;
sed vide Ca.
temp. Hardw.
396. where this
case is cited
differently, and

Afterwards, in *Swetnam v. Archer*, the same question occurred, and received the same determination; and, in this case, it was agreed that the practice had been uniformly such, since the resolution in *Houghton v. Starkey*.

said to have been never determined.

Bury v. Cross,
1 *Stra.* 83. S. C.
1 *Barnard*.
K. B. 47. S. C.
cited Ca.
temp. Hardw.
396.

And this point was again agitated in a subsequent case, on account of a doubt entertained on the subject by a new Master of the King's Bench; when the court resolved, that the plaintiff in prohibition should have costs from the very first application for the prohibition, because the whole is but one suit, and the words of the 8 & 9 W. 3. c. 11. are, that the plaintiff shall recover his costs of suit.

But it hath been holden, that a defendant in prohibition, in case of the nonsuit of the plaintiff, is not entitled to the costs occasioned by opposing the rule for the prohibition, but merely to the costs of the nonsuit.

Carlisle v.
Meyrick, C. B.
Hil. 17 G 3.
Say. on Costs,
157.

Thus, upon a rule to shew cause why the prothonotary should not review his taxation of costs, it appeared, that the plaintiff in a suit in prohibition had been nonsuited; upon which the question was, Whether the defendant ought to have the costs incurred by opposing the rule to shew cause why the writ of prohibition should not be granted, as well as the costs of the nonsuit? It was determined, that he ought to have no more than the costs of the nonsuit. If the defendant had succeeded in his opposition to the rule to shew cause why the prohibition should not be granted, it would even then have been for the consideration of the court, whether, upon all the circumstances of the case, that rule should be discharged with costs; but as he did not succeed in that opposition, it must now be intended that it was groundless, and, consequently, there is no pretence for his being allowed the costs thereof.

If, upon argument of a demurrer to a declaration in prohibition, a writ of prohibition be awarded as to some of the points contained in the libel in the court below, and a consultation as to others, the plaintiff in prohibition shall have costs.

Thus,

Thus, where *John Middleton* and his wife were libelled against in the spiritual court, for being married out of canonical hours, without licence or banns, and in a private house; a prohibition was applied for, upon a suggestion that the power of the ecclesiastical court was taken away by the statute of 7 & 8 W. 3. c. 35. by which penalties were laid on the clergyman marrying, and the parties married, without banns or licence, which penalties were to be recovered in the temporal court. In order to bring the matter fully before the court, the plaintiffs were ordered to declare in prohibition; the defendant by his plea denied (in common form) that he had proceeded in the spiritual court contrary to the writ of prohibition; and for a consultation demurred generally. After joinder in demurrer by the plaintiffs, *John Middleton*, the husband, died; however, notwithstanding his death, the court, at the instance of the parties, and because the ecclesiastical court might still proceed against the wife, gave judgment that the prohibition should stand as to that part of the libel which was for marrying at an uncanonical hour, *i. e.* not between the hours of eight and twelve in the forenoon, and that a consultation should be awarded *quoad* the residue of the cause.

Middleton v. Croft, Ca. temp. Hardw. 395. S. C. Andr. 57. 2 Stra. 1062.

In consequence of this judgment, application was made to the court that the Master might be directed to tax *Anne Middleton*, the wife, her costs, upon the 8 & 9 W. 3.; but no suggestion being then made upon the roll, of the husband's death, the court refused, at that time, to grant any rule.

This suggestion being afterwards made, the matter was moved again, and a rule to shew cause was granted.

For the plaintiff, the case of *Dr. Bentley* and the Bishop of *Ely* was cited; where, in a suit in prohibition in this court, judgment was given that the prohibition should stand as to all the articles, concerning which the Doctor was libelled below; but, upon a writ of error in the House of Lords, that judgment was reversed, and a new judgment given, — That the prohibition should stand as to part of the articles, and a consultation go as to the rest; and there it came to be debated, whether the plaintiff in prohibition was entitled to costs, he having judgment only for part? and this was solemnly argued, upon a day appointed for that purpose, by all the judges then present; and finally the plaintiff had judgment thereupon for his costs.

Vide 4 Bro. Parl. Cas. 66.

Upon the first argument of the principal case, the whole court were clearly of opinion, that where a prohibition goes to part, and a consultation to other part, the plaintiff in prohibition is entitled to costs. And Lord *Hardwick*, then Chief Justice of this court, observed, that this case was within the very words of the statute of 8 & 9 W. 3. c. 11. § 3. which are, *if the plaintiff obtain judgment, or any award of execution after plea pleaded, or demurrer joined*; and the statute only provided for the defendant's recovering his costs in such suits where the plaintiff should become nonsuit, suffer a discontinuance, or a verdict should pass against him; neither of which was the case here. And as to the *quantum* of the costs, he said, that though it was an equitable construction

Hil. Term, 10 G. 2.

construction of the statute, to give costs from the first motion ; yet where a consultation was awarded as to part, it was in the discretion of the court, upon the circumstances of the case, whether they would allow costs for that time or not.

However, it being objected, that the death of the husband before judgment had abated the suit, no rule was then made for costs, but the court ordered this point to stand over for further argument.

Accordingly, this question was argued in a subsequent term, when the court were unanimously of opinion, that in this case the circumstance of the husband's death, previous to the judgment, was not an abatement of the suit, even at the common law ; or, if it was, that it was clearly aided by the 8 & 9 W. 3. c. 11. § 7. And thereupon they made the rule for the allowance of costs to the wife absolute ; and added, that such costs must be allowed from the time of the original motion for the prohibition.

So it hath been determined, that a defendant in a suit in prohibition is entitled to costs, where a verdict is found for him, though it be for part only of the matter in issue, and a consultation be awarded for the residue.

¶ But in a very recent case, where the judgment on demurrer to a declaration in prohibition was, that a writ of prohibition issue as to proceeding on part of the matters in the libel, with a view to deprivation, and a writ of consultation as to proceeding on them for any other purpose, and as to all other matters in the libel, it was held, that this was not a case within the statute as to costs.¶

If, in a suit in prohibition, the plaintiff be obliged to declare as administrator, (as if the prohibition be granted to a suit in the spiritual court against the plaintiff as administrator, for tithes due in the intestate's lifetime,) and become nonsuit at the trial, he is not liable to the payment of costs.

A plaintiff in prohibition is entitled to costs, by the statute of 8 & 9 W. 3. c. 11. only where he obtains judgment after plea pleaded, or demurrer joined ; but, if there be judgment by default in a suit in prohibition, and the plaintiff have damages upon a writ of enquiry for the contempt in proceeding after the writ of prohibition delivered, he will be entitled to costs, by virtue of the statute of *Gloucester*, c. 1. : this was determined in the following case.

Upon a motion to set aside a writ of enquiry of damages in prohibition, after judgment by default, upon which the jury had found damages for the plaintiff, it was alleged on the part of the plaintiff, that the citing him to appear in the spiritual court in a plea of which that court has no cognizance, and whereby the plaintiff may sustain great damage, is a contempt of the laws of the land, and therefore the defendant ought to make the plaintiff satisfaction for the damages sustained by the proceedings in the court below ; and this the defendant tacitly admits, by suffering judgment to go against him by default. And if the plaintiff be entitled to damages, he is also to costs, under the statute of *Gloucester*.

Andr. 62.

Malton v.
Acklam,
Barnes, 138.

Free v. Bur-
goyne, 5 Barn.
& C. 538.

Creek v. Pit-
cairne, Cas.
Pr. C. P. 157.
Pract. Reg.
118.

Sir E. Bettin-
son v. Dr.
Hinchman,
Cas. Pr. C. P.
20. S. C.
B. N. P. 331.
Lill. Ent. 320.
Acc. Raym.
387. 2 Jon.
128. 1 Vent.
337. 348. 350.
3 Lev. 360.

The court inclined to be of this opinion, but took further time to consider of the matter. On a subsequent day, the question was solemnly argued; after which the court gave the plaintiff leave to proceed on his enquiry, and directed the prothonotary to tax his costs. But because, in this case, the defendant was prosecuted for a contempt at common law, as judge of the spiritual court, and he could not possibly be in contempt until the rule was made absolute to stay his proceedings, the costs were allowed only from the time that the rule for the prohibition was made absolute.

It should seem that the case reported by the name of Sir *Edward Bettison v. Savage*, in Com. 335. is the same with that above stated; though it must be confessed the reports differ very widely in several material points.

Hull. on
Costs, 522.

According to *Comyns*, the plaintiff having declared in prohibition, the defendant, *quoad* any proceedings since the writ of prohibition delivered, pleaded not guilty, and for a consultation demurred: there was judgment for the plaintiff upon the demurrer, and upon a writ of enquiry of damages in that issue, the jury found 2*d.* damages. And the court were of opinion, the plaintiff should have costs; and, upon error in the King's Bench, this judgment was affirmed. And afterwards, the reporter adds, a writ of error was brought in parliament, which was dropped upon his persuasion that it was reasonable, and agreeable to the authorities in law, that the plaintiff should have costs.

If one of the issues joined upon a declaration in prohibition be, whether the defendant hath proceeded in the spiritual court subsequent to the granting of a writ of prohibition, and, at the trial, it be found against the defendant; or if, in an attachment upon a prohibition, it be found that the party proceeded after the writ of prohibition awarded; the plaintiff, in both cases, is entitled to recover damages and costs for the contempt.

Facy v. Lange,
Cro. Car. 559.
S. C. 1 Roll.
Abr. 516. 575.
Jon. 447.
Vide 1 Stra.
485. 8 Mod. 1.

If defendant in prohibition compels the plaintiff to declare, and then pleads a nugatory plea, the court will, on motion, order him to pay costs to the plaintiff.

Thus, at the defendant's instance, it was made part of the rule for a writ of prohibition, that the plaintiff should declare in prohibition. The defendant afterwards demanded a declaration, and threatened a *nonpros* for want thereof. Whereupon the plaintiff's agent prepared a declaration; but when it was ready, he was told by the defendant's agent that he need not deliver it; however, having been at the trouble and expense of preparing it, he delivered the same, and demanded a plea. Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Upon which the plaintiff obtained a rule for the defendant to shew cause why he should not pay the plaintiff the costs of the proceedings in prohibition. The rule was now made absolute. The court looked upon the plea to be a sham nugatory plea, not being to the merits of the cause; the allegation that the defendant has proceeded contrary

Seed v. Wolfenden,
Barnes, 148.

to the prohibition, is, and must be put into every declaration of this kind; but whether he has so proceeded or not is totally immaterial. The statute 8 & 9 W. 3. c. 11. gives costs after plea pleaded, or demurrer, but this is not a plea within that statute.

But though a plaintiff in prohibition may have prepared, and actually tendered a declaration to defendant, proceedings shall be stayed without costs, where the defendant is desirous of submitting without further litigation.

Gegge v. Jones,
2 Stra. 1149.

Thus, upon shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay proceedings, as being willing to submit. The plaintiff insisted he had a right to go on, in order to get at the costs of the motion, which he could not otherwise have. But the court stayed the proceedings *without* costs; saying, the direction to declare was in favour of the defendant, who might waive it.]

Leon, 286.

The surmise or suggestion may be brought in by attorney, and need not be in proper person.

Latch, 7.

2 Roll. R. 456.

[Rolle adds,
"or on the

"last day but one." Gibs. 1029. 3 Burn's Eccl. Law, 213.]

A prohibition is not to be granted the last day of term, but on motion on that day a rule may be obtained to stay proceedings till the ensuing term.

(F) When to be granted absolutely, or *quousque* only; and therein, of directing the Party to declare on his Prohibition.

6 Mod. 308.

PROHIBITIONS are granted either absolutely, or *hoc usque* only till such an act be done. The first of these is peremptory, and ties up the inferior jurisdiction till a consultation is awarded: the second is *ipso facto* discharged upon performing the act, and that, without any writ of consultation.

Vent. 252.

2 Salk. 553.

pl. 19.

When a prohibition is moved for, because a copy of the libel is denied to be delivered, the court requires that oath should be made of the denial, and the prohibition is only *quousque* the copy is delivered.

6 Mod. 308.

A prohibition *quousque* they give copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel, and after they shall not proceed till they give a copy of it.

Ld. Raym. 442.

(a) 2 H. 5. c. 3.

A prohibition was denied to be granted to the Admiralty court, upon a suggestion that they refused to give the party sued there a copy of the libel, because the statute (a) extends only to the ecclesiastical courts.

2 Ld. Raym. 991.

per Holt C. J.,
and so ruled by
him in a like
case, Salk. 553.

It was formerly held by all the judges of *England*, that when there was a proceeding *ex officio* in the ecclesiastical court, they were not bound to give the party a copy of the articles. But the law is otherwise; for in such cases, if they refuse to give a copy of the articles, a prohibition shall go *quousque* they deliver it.

On

On motions for prohibitions (a) it is frequent in doubtful cases to grant them *nisi*, or that the adverse party should shew cause why they should not be granted. Also in nice and difficult cases (b) it is usual to direct the plaintiff to declare on his prohibition (c), and so proceed to issue (d), that the merits of the cause may be brought before the court with the greater exactness, and they thereby be the better enabled to judge of the reasonableness of granting or refusing the prohibition. [(e) But if the court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expense, and delaying in the mean time the exercise of what appears to them a lawful jurisdiction. For this denial is not conclusive to the plaintiff. If there is no jurisdiction the sentence will be a nullity, and upon any attempt to excuse or enforce it, the whole may be tried in an action. (g) The plaintiff may also apply to any other court in *Westminster-hall* for a prohibition, and take their opinions. *Per Lord Mansfield*.

he ought not to sue for tithes in specie, there being a *modus* found. Vent. 52. *vide suprâ*. (e) *Saint John's College v. Todington*, 1 Burr. 198, 199. (g) *Lindo v. Rodney*, Dougl. 620.

If, however, the court incline in favour of the prohibition, the defendant has, it seems, a right to put the plaintiff to declare: and having such right, he may of course waive it, and, after a rule given to declare, submit and stay proceedings.]

The court is not obliged to give direction for such declaration, but are absolute judges of the sufficiency or insufficiency of the suggestion.

[Where the party is ordered to declare in prohibition, he ought not to take out the writ, for serving the other side with a rule is sufficient; and if in that suit he obtain judgment, the judgment is *stet prohibitio*, otherwise it is *eat consultatio*; therefore, if the party be excommunicated, the mandatory part of the writ to assail the party is not to be obeyed till after trial had.]

The declaration in prohibition is a *qui tam* declaration, for it supposes a contempt to the king in proceeding after the writ delivered. But the contempt is merely form, not traversable, and no verdict need be given about it.]

If the declaration varies from the suggestion this is naught, and a consultation will be awarded.

[Where an issue is joined in a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than 1s. damages; for it is in nature of an issue to inform the conscience of the court: but, after he has had judgment, *quod stet prohibitio*, he may bring his action upon the case, and recover the damages he has sustained.]

In tithe cases, and matters of such sort, where many things are in controversy, it is frequent to order the prohibition to stand as to part, and a consultation to go as to the other part.]

(a) Ld. Raym. 256. (b) Cro. Eliz. 736. 4 Mod. 151, 152. Lev. 123. Raym. 88. (c) Stile's Pract. Leg. 473. (d) If the jury, upon an issue joined in a prohibition *de modo decimandi*, find a different *modus*, yet the defendant shall not have a consultation; for it appears that

1 Burr. 198.
2 Str. 1149.
Gegge v. Jones.

Leon. 181.

Dean and Bishop of Wells, Mich. 25 Geo. 2.

12 Co. 61.
Stratford v. Neale, Stra. 482. Seed v. Wolene Barn. 148.

7 Mod. 115,
114. Leon.

128. for the surmise is as the writ.

Carter v. Leeds, Mich. 2 G. 2.

1 Ld. Raym. 59.

(G) Whether more than one such Writ is to be awarded.

(a) Intended spiritual judge, and therefore this statute extends not to the Court of Admiralty.

2 Brownl. 55. (b) Ecclesiastical judge in general, or person competent, and not the same individual person. Poph. 159.

Palm. 418. Latch, 6. 75. (c) But if the first prohibition was unduly obtained, as on proceedings by *English* bill in Chancery, &c. a second prohibition may be awarded notwithstanding this statute. Cro. Eliz. 736. p. 5. (d) Whether proceeding out of the same court or another, if for the same cause. Cro. Eliz. 277. (e) 2 Roll. R. 207.

2 Brownl. 26.

247. Leon.

150. 3 Bulst.

182. Moor,

917.

Jones, 231.

Yelv. 102.

Cro. Car. 208.

2 Keb. 719.

(g) But must

pay double

costs. Carth.

463. (h) It is

said by Justice *Holloway*, that after a consultation awarded for not proving his suggestion, &c. the party shall be for ever barred from having another prohibition on the same libel. Comb. 63. — [Sed. qu.]

2 Vent. 47.

A motion was made for a prohibition to a suit for tithe-lamb, upon suggestion of a *modus* to pay 2*d.* a lamb for lambs falling in the plaintiff's farm in the parish. It was objected, that a prohibition was granted before to stop this suit, upon a suggestion, which was tried and found for the plaintiff, and a consultation granted. But it was answered, that that suggestion was for every lamb which fell in the parish, whereas this only is for lambs falling in a particular farm, and so not within this statute. However the court inclined against the prohibition, thinking it within the statute.

Keb. 286.

[See Com. Dig.

tit. Prohibition

(K.) 4. Contr.]

If upon the trial of a suggestion the plaintiff be nonsuit, no new prohibition shall be granted, although the nonsuit was occasioned for want of some of the plaintiff's witnesses, who were to prove the truth of the suggestion, and who were necessarily obliged to be absent.

Moor, 917.

If the ecclesiastical court refuse to grant a copy of the libel, for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cause, the matter not being within their jurisdiction, another prohibition lies.

Owen v. —,

2 Show. 195.

[A prohibition was granted in a suit for tithes, upon a suggestion that the lands were barren and newly improved, and a trial had

had on the declaration in prohibition, and a verdict for the plaintiff that the lands were not barren, on which a consultation was granted, and he obtained sentence. From the inferior court there was an appeal to the Arches, and an allegation entered that the land was barren; and the court there were proceeding to reverse the sentence, because barren land, though contrary to the verdict at law; upon which a prohibition was granted *quoad* the allegation of barren land.]

If the defendant in a prohibition die, his executors may proceed in the ecclesiastical court, and the judges of the court, out of which the prohibition was granted, will also in such case make a rule to the spiritual court to proceed; but the plaintiff may, if he please, have a new prohibition against the executors. Lit. R. 155.

(H) At what Time to be granted; and herein, in what Cases it may be granted after Sentence.

IT is clearly agreed, that in all cases where it appears upon the face of the libel, that the Admiralty, Spiritual Court, &c. have not a jurisdiction (*a*), a prohibition may be awarded, and is grantable as well after as before sentence; for the king's superior courts have a superintendency over all inferior jurisdictions, and are to take care that they keep within their due bounds.

299. pl. 2. Carth. 465. March, 155. 2 Roll. R. 24. Comb. 356. [Ca. temp. Hardw. 317. 1 Burr. 314. 2 Burr. 815. 3 Burr. 1922. 2 Stra. 1153. 4 Burr. 2037. Cowp. 424. (*a*) Either never had any at all, or have exceeded that which they had. 5 Term R. 37. Prohibition will be granted to a court of appeal where it appears that they have no jurisdiction over the subject matter, even after they have remitted the suit to the court below, and awarded costs against the appellant, if they are proceeding to enforce the payment of these costs. Darby v. Cosens, 1 Term R. 552. On a libel to charge a man to repair a church in respect of a light-house, a prohibition was granted after sentence, and an appeal to the Delegates. Sir Isaac Rebow v. Bickerton, Bunb. 81.]

But where the court has a natural jurisdiction of the thing (*b*), but is restrained by some statute; as by 23 H. 8. c. 9. for citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. *Vide* the authorities *supra* and Cro. Car. 97. 2 Show. 145. pl. 123. 155. pl. 141. Vent. 61. 6 Mod. 252. 7 Mod. 137. Godb. 163. 245. 5 Mod. 541. Hetl. 19. 12 Co. 76. (*b*) 2 Salk. 549. Like point; because the cause belongs to the spiritual court, and though not to that spiritual court, yet it belongs to some other, and not to the king's temporal courts; *et vide* Carth. 33, 34. where it appeared on the face of the libel, that the party was cited out of his proper diocese. — Cro. Jac. 429. Cro. Car. 97. Comb. 448. where the party obtained a prohibition before sentence, but did not serve it till two terms after, which was after sentence definitive, it was held to be too late.

¶ However, it is now decided that where a spiritual court incidentally misconstrues an act of parliament contrary to the rules of the common law, a prohibition lies even after sentence; for until sentence the courts of common law have no reason to suppose that the ecclesiastical court will determine wrong, and the misconstruction is matter of prohibition rather than of appeal. Gould v. Gapper, 5 East, 345. 5 *Ibid.* 472.; *sed vide* Stainbank v. Bradshaw, 10 East, 349.

Leman v.
Goulty,
5 Term R. 3.

And where it appears on the face of the proceedings that the spiritual court have exceeded their jurisdiction, a prohibition will be granted, though after sentence.

Ibid.

Therefore, though they may compel churchwardens to deliver in their accounts, yet as they cannot decide on the propriety of the charges, a prohibition will be granted if they do.

2 Term R. 475.

But after sentence it is incumbent on the party making the application, to shew clearly that the spiritual court had no jurisdiction.||

Offley v.
Whitehall,
Bunb. 17.
||(a) See
4 Barn. & C.
514. 5 Term
R. 3.||

[If a man libels in the spiritual court for tithes in kind, and the defendant below suggests and insists upon a *modus*, *there*, the spiritual court have no jurisdiction to try the *modus*, their method of trial of prescription being different from ours: but, if a man libels for a *modus*, and the defendant admits the *modus*, the spiritual court may proceed in the cause. But even in the first case, if the party permit the spiritual court to proceed to sentence, he comes, *then*, too late for a prohibition, it being *pro defectu triationis* only: but a party can never be too late, where it is *pro defectu jurisdictionis*.] (a)

French v.
Trask, 10 East,
548. S. C.
15 East, 574.

|| Where a defendant in a tithe suit applied for a prohibition on affidavit, that he had *answered on oath*, or *pleaded* to the libel a *modus*, &c. it was objected that the defendant had only put in an answer of a *modus*, and that his application was too soon, until he had regularly pleaded it; but the court said the prohibition must be granted, as it appeared there was nothing to try but the *modus* insisted upon in the answer.

Per Bayley J.
5 Barn. & C.
22.

And when once it appears by the proceedings in the spiritual court, that the prescription instead of being admitted is disputed, and that the parties are in progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred the expense of putting it in issue, but the prohibition is grantable at once.||

2 Ld. Raym.
855. Dike v.
Brown.

Upon a motion for a prohibition the case was, the defendant libelled in the spiritual court for tithes [of faggots made of loppings of trees; and the suggestion for a prohibition was, that these loppings were cut from the stumps of timber-trees above the growth of twenty years; and it was alleged, that sentence was given in the spiritual court, and therefore the plaintiff comes here too late to have a prohibition: but *per Holt C. J.* the sentence will not hinder the having a prohibition in any case, but in case of prohibitions grounded upon 23 H. 8. c. 9. for not citing out of the diocese; but because the plaintiff had not pleaded this matter in the spiritual court, they denied the prohibition, because the spiritual court has a general jurisdiction of tithes; and if any special matter deprives them of their jurisdiction, it must be pleaded there; and if it had been pleaded there, and issue joined upon it, and upon the trial it had been found not to be *silva cædua*, it had been well; but if they had refused to admit the plea, a prohibition should have been granted.

- (1) To what Courts a Prohibition may be awarded:
And herein, that the superior Courts are to determine the Boundaries of all inferior Jurisdictions.

THE king's superior courts of *Westminster* have a superintendency over all inferior courts of what nature soever, and are by law intrusted with the exposition of such laws and acts of parliament as prescribe the extent and boundaries of their jurisdiction; so that if such courts assume a greater or other power than is allowed them by law, or if they refuse to allow acts of parliament, or expound them otherwise than according to the true and proper exposition of them, the superior courts (a) will prohibit and controul them.

Hence prohibitions are grantable to almost all sorts of courts which differ from the common law in their proceedings, to the courts Christian (b), to the Admiralty, nay to the Delegates (c), and even to the steward and marshal, upon the statute of *articuli supra chartas*.
derived from the king. Dav. 97. (c) Where they exceed their authority, or proceed in matters not properly within their cognizance, may be prohibited. Moor, 460. 463. Latch, 85, 86. [So they are grantable to naval and military courts martial. 2 H. Bl. 100.]

A prohibition lies to the convocation, *si concilium teneant de aliquibus quæ ad coronam regis pertinent, vel quæ personam regis, vel statum suum, vel statum concilii sui contingunt*.

Prohibitions have been granted to the marches of *Wales*, of which there are many instances;
317. Roll. R. 309. 311. Winch, 78. 103. Raym. 191. Vent. 300. Jon. 248.

As where a bill of foreclosure was brought against one in the grand sessions for the county of *Montgomery*, upon a mortgage of lands that lay there, but the party himself was not an inhabitant; it was held in this case, that a prohibition ought to go; for that the party living out of the jurisdiction could not be served with process, and, consequently, could not be guilty of a contempt, on which a sequestration on his lands could be grounded.

So prohibitions have been granted to the county palatine of *Chester* in many instances where they have exceeded their jurisdiction.

So prohibitions have been granted to the duchy court of *Lancaster* (d), for holding plea of land, not parcel of the duchy (e), for determining on the validity of letters patent granted of a manor.

So where a suit was commenced in the duchy chancery court, to discover matters whereby the defendant there would forfeit his freehold; a prohibition was granted.

F.N.B. 45. 45
4 Inst. 231.
249. 3 Bulst.
120. 2 Roll.
Abr. 317, 318.
(a) The honour of *B. R.* to keep inferior courts in order. 2 Roll. R. 471.
Show. P.C. 63.
(b) That the spiritual jurisdiction exercised within this realm is
4 Inst. 322.
— Lay to the high commission court.
4 Inst. 333. Lit. R. 152. 189. 274.
4 Inst. 243.
2 Roll. Abr.
300. Jon. 248.
2 Ld. Raym. 1408.
Vaughan v. Evans, 1 Stra. 650. S. C.
8 Mod. 374. S. C.
Hutt. 59.
2 Roll. Abr. 318. Stile,
331. Sid. 180.
(d) 2 Roll. Abr. 317, 318.
Hob. 77.
(e) 3 Bulst. 119. Roll. R. 252. Skin. 43. pl. 14.
2 Salk. 550. pl. 11.

Comb. 261.

A prohibition was moved for to the chancery court of the Cinque Ports, in which a bill was filed, setting forth a custom, that every ship that used the pier of *Ramsgate* should pay 4*d.* for all their gettings in the year, for the maintenance of the pier, and for a discovery of the defendant's gettings; and such prohibition was held to lie, as to the custom, which is only triable by law; but the court held, that such bill might be proper as to the discovery.

Vent. 212.
Mekins v.
Minshaw.

A prohibition was prayed to the court of the chamberlain of *Chester*, where an *English* bill was preferred, setting forth that *J. S.* being indebted to the plaintiff, the defendant upon good consideration promised that if *J. S.* did not pay it he would, and that he wanted such precise proof as the law required, and so prayed to be relieved by the equity of the court: the defendant confessed the promise in his answer, and said that he had paid the money: and a prohibition was granted; for the plaintiff had now obtained the end of his suit, and might have remedy at law upon the evidence of the defendant's answer.

2 Salk. 555.
5 Mod. 272.
278. S. C.
Bredon v. Gill.
Ld. Raym. 219.
Comb. 414.

The plaintiff in prohibition suggests, that by the laws of *England*, when issue is joined between the parties, it ought to be tried by the evidence *vivâ voce*, and not by notes or minutes of their testimony: That an information was exhibited against him before the commissioners of excise pursuant to 12 Car. 2. c. 23. and 15 Car. 2. c. 11. setting forth that he was a common brewer, and did keep a common store-house without acquainting the said commissioners therewith; that he was found guilty; and that he appealed from their sentence to the commissioners of appeals, before whom the informer did produce as evidence the minutes taken before the commissioners of excise, and that the witnesses who gave evidence there were still alive; which minutes were allowed as evidence by the commissioners of appeals. &c. and after great consideration a prohibition was granted *quoad* the admitting this evidence.

Vide 396.
Show.

If the commissioners for determining policies of insurance grasp at more power, or proceed otherwise than as they are enabled by the acts of parliament which create their jurisdiction, they will be prohibited by the king's superior courts.

Lit. R. 10.

A prohibition lies to the vice-chancellor's court in *Oxford* and *Cambridge*, where they exceed their jurisdiction.

Mich.
26 Car. 2.
in *B. R.*
Richardson's
case.

On a motion for a prohibition to the court of the vice-chancellor of *Cambridge*, it was suggested that one *Richardson* had a libel preferred there against him, because he had preferred an information in this court against divers persons for a riot committed within the jurisdiction of their court, and the libel was read in this court; and upon that the court declared, that their jurisdiction was concurrent but not exempt from this court, and that they ought to plead their privilege here, if they had any such privilege, but they ought not to proceed against the informer as a criminal; and so the court granted a prohibition, *nisi*, upon the motion of Sergeant *Scroggs*.

Lit. R. 163.

If justices of peace take upon them more jurisdiction than they are

are allowed by law, as where they determined on the statutes of usury, a prohibition lies.

¶ The Court of *B. R.* refused a prohibition on application of the inhabitants of *Dorsetshire* to restrain the justices of the county from pulling down an old bridge before the new one was passable; the application being a novel one, and the parties having a remedy by indictment if the act were a nuisance. ||

Rex v. Justices of Dorset,
15 East, 494.

So a prohibition lies to the court of stannaries, which is confined to tin matters only, and where the parties who sue, or one of them, is a tinner, if they exceed their jurisdiction.

4 Inst. 229.
Cro. Car. 335.

A prohibition was granted to the council of *York* for holding pleas in replevin and avowries; the court being clearly of opinion that these are matters determinable at common law.

Bulst. 110.

So a prohibition hath been granted to the court of requests, for enjoining a creditor to give time to his debtor to pay his debt upon security given.

Bulst. 20.

It hath been resolved, that a prohibition lies to the court of the Earl Marshal for proceeding against a person for painting arms and marshalling funerals.

Show. P.C.
58. in the case
of Dr. Oldis
and Donmille,
Mod. 128. S. C.

where there is good learning on this subject. 4 Mod. 128. S. C.

So a prohibition was holden to lie to the court of honour, to prohibit a suit there for these words, *you a knight! you are a pitiful fellow*; and in this case *Holt C. J.* at first doubted whether there was or could be any such court; but said a prohibition would lie to a pretended court.

2 Salk. 555.
pl. 18.
7 Mod. 125.
Chambers v.
Sir John
Jennings.

[A prohibition will go where visitatorial authority is usurped. Reg. 40. b.]

¶ A prohibition was granted to the Bishop of *Chichester* to prohibit him from proceeding to present by lapse, under pretence of visitatorial authority, to the office of canon residentiary of the cathedral, it being a freehold office, and the right of election being in the dean and chapter. ||

Bishop of
Chichester v.
Harward,
1 Term R. 650.

It is said by my Lord *Coke* in 3 Bulst. that the Court of King's Bench may prohibit (a) any court in *Westminster-hall*, if they exceed their jurisdiction. But this notion of Lord *Coke*, of which he was very fond, especially as to proceedings in courts of equity, hath been so shaken and contradicted of late years, that his authority herein seems to be but of very little weight; but for this we must refer to title *Courts and their Jurisdiction*.

3 Bulst. 120.
(a) If the
judges of C.B.
hold plea of
an appeal, a
prohibition is
to be granted
by *B. R.*

—So if the Court of Exchequer hold common pleas without a writ of privilege. *et vide* 2 Salk. 550. pl. 12. — So an *English* court, or court of equity, holding whereof judgment was given at common law hath been prohibited. Moor, 836. — But for this *vide Jurisdiction of the Court of Chancery*, and *Ld. Raym.* 531. || In prohibition a writ of error does not lie from the K. B. to the Exchequer Chamber. 5 Barn. & C. 765. ||

3 Bulst. 120.
3 Bulst. 120.;
plea of a thing
Cro. Jac. 335.

¶ It appears doubtful whether the Court of *B. R.* has authority to direct a prohibition to the Lord Chancellor sitting in bankruptcy. The following case was determined without deciding that question: — A motion was made for a prohibition to restrain the Lord Chancellor from proceeding on an order made by him on the assignee of a bankrupt. It appeared that the assignees

Ex parte
Cowan,
5 Barn. & A.
123.

had

had seized as the property of the bankrupt, a farm belonging to *A. B.*, and had kept it a long time and mismanaged it. The commission was afterwards superseded. *A. B.*'s title to the farm was established by a verdict at law, and the Lord Chancellor referred it to the Master to take an account between *A. B.* and the assignees in respect of such property and the mismanagement; and afterwards, on the Master's report, ordered a certain sum to be paid by *A. B.* to the assignees. In support of the motion it was contended, that the Lord Chancellor sitting in bankruptcy had no jurisdiction to make this order: 1st, Because the commission had been superseded before the order was made. 2d, Because the sum directed to be paid was composed in part of damages for the mismanagement of the farm, which could only be ascertained by a jury in an action at law. 3d, Because the order was not confined to a payment out of funds in the hands of the assignee, but operated personally on the parties by whom the payment was to be made. But the court overruled all these objections, and held that no want of jurisdiction appeared; that where the Lord Chancellor had jurisdiction generally the Court of *B. R.* could not revise his orders; and that the *final order* of the Lord Chancellor was analogous to a final judgment or decree, after which a prohibition could not be granted, unless an original want of jurisdiction was apparent on the face of the proceedings. ||

Lit. R. 42.

2 Roll. R. 471.

The superior courts of *Westminster* not only grant prohibitions where inferior courts assume a jurisdiction, which properly belongs to such superior courts, but also in cases where one inferior court encroaches upon another, and that even in matters in which such superior courts have not a jurisdiction.

5 Co. 75.

Show. P.C. 63.

As if the ecclesiastical court grant the probate of a will made within a manor, when by custom or of right such probate belongs to the lord of the manor.

2 Roll. Abr.

313. Winch.

78

So where the marches of *Wales* held a plea of a matter that belonged to the court Christian, it was holden that a prohibition lay.

4 Inst. 249.

So in *London*, where the lord mayor and court of aldermen have the government of city orphans, if any orphan sue in the ecclesiastical court or elsewhere, for a legacy or duty due to them by custom, a prohibition lies.

Hob. 178.

If a bishopric be void, and the jurisdiction devolve on the metropolitan, he must hold the courts within the inferior dioceses, otherwise he will be prohibited.

Jefferson v.

Bishop of Dur-

ham, 1 Bos. &

Pul. 105.; sed

vide 3 Swanst.

493. 499.

|| A prohibition does not lie from the court of *C. B.* nor (*come semble*) from any of the courts to a bishop to restrain him from committing waste in the possessions of his see, — at least at the suit of an uninterested stranger. ||

Mod. 211. per

North C. J.

If there be a controversy, whether such a will ought to be proved before a peculiar or before the ordinary; whether by the archbishop of one province or another, or both; and what shall be

be *bona notabilia* (a): In these and the like cases the common law retains the jurisdiction of determining.

(a) But in 10 Mod. 272. this point is

taken notice of and denied to be law, for that the spiritual and common law are the same as to *bona notabilia*; and there said, that if a prohibition lay, there must be frequent instances of it.

(K) Prohibitions to inferior Temporal Courts, in what Instances to be granted.

IT is clearly agreed that a prohibition doth lie as well to a temporal court as to the spiritual, Court of Admiralty, or other court, whose proceedings are different from the common law, if such temporal court exceeds the bounds of its jurisdiction, or take cognizance of (b) matters not arising within its jurisdiction.

F. N. B. 45.
2 Inst. 229.
243. 601.
2 Roll. R.
379. Roll.
R. 252.

(b) Or if but part only, cannot have jurisdiction. *Ld. Raym.* 698.

As if trespass *vi et armis* be brought in the county court, a prohibition lies to the plaintiff or sheriff.

F. N. B. 47.

So if one sue another in a court-baron or other court, which is not a court of record, for charters concerning inheritance or freehold, there shall be a prohibition.

F. N. B. 47.

A person having obtained judgment in *B. R.* for his debt and damages, brought his action for the recovery of them against the bail in the court of the Tower of London, in which action the party was taken on a *capias*, and was rescued (c); after which the plaintiff brought his action on the case in the same court for the rescue; and all this appearing to the court of *B. R.* they granted a prohibition.

Roll. R. 54.

(c) If an officer let a man at liberty who is in execution upon a bond sued in an inferior court, the bond not

being made within the jurisdiction thereof, this is no escape. 2 Mod. 29. *Squibb, v. Hole*.—So where the plaintiff in an action brought against an officer, declared in *Hull* upon a bond made at *Halifax*, and had judgment and execution, and the defendant escaped, in an action brought for this escape the declaration was held ill, because it did not allege the bond to be made *infra jurisdictionem curiæ*. Roll. Abr. 809. *Richardson v. Bernard*.

So, where an action of debt was brought in the *Marshalsea*, on a judgment in *B. R.* a prohibition was granted.

2 Salk. 439.
pl. 2.

A suit was surmised to be before the Lord President of the Marches, for an office, between the grantee of the Lord President and a stranger, wherein the only question would be, Whether the grant of that office belonged to the Lord President? and because in this case he would be as it were both judge and party, (d) a prohibition was granted.

Keb. 648.

(d) Salk. 396.
pl. 1. That where a judge has an interest, neither he nor his deputy can determine a

cause or sit in court, and in so doing a prohibition lies. *Hard.* 503.

If there be one entire contract above 40s. and a man sue for it in a court-baron, severing it into divers small sums under 40s., a prohibition shall be granted, because this is done to defraud the court of the king.

19 H. 6. 5.
2 Roll. Abr.
280. F. N. B.
46.

An action was brought in the hundred court for 40s. in which action the plaintiff confessed that he was satisfied one shilling, which being done with an intent to give that court jurisdiction, and to defraud the superior courts, a prohibition was granted.

Palm. 564.
Clarke v. Corke.

If there be several contracts between *A.* and *B.* at several times for divers sums, each under 40s. but amounting in the whole to a sum

Vent. 65. said to have been adjudged in

the case of the Savoy court and Standford.

Vent. 75.
Girling v.
Alders. 2 Keb.
617. S. C.
Show. 11.
S. C. cited.

a sum sufficient to entitle the superior court to a jurisdiction, they shall be sued for in such superior court, and not in an inferior one, which is not of record.

So, in a prohibition to the court of the honour of *Eye*, where the case was: One contracted with another for divers parcels of malt, the money to be paid for each parcel being, under 40s., and he levied divers complaints thereupon in the said court; wherefore the court here granted a prohibition; because, though there be several contracts, yet, inasmuch as the plaintiff might have joined them all in one action, he ought to have so done, and sued here, and not put the defendant to unnecessary vexation, any more than he can split an entire debt into divers, to give the inferior court jurisdiction *in fraudem legis*.

2 Inst. 251.
Sand. 74.
2 Jon. 250.
Show. 10.; *et*
vide tit. Courts
and their
Jurisdiction.

It is laid down by my Lord *Coke*, and admitted in a great variety of cases, that no inferior court can hold plea of an obligation, contract, battery, or other transitory action, if not made within the jurisdiction, and that the cause of action must be alleged to arise within such jurisdiction.

Roll. Abr. 545.
809.

And therefore, in an action on a promise in an inferior court, not only the promise, but the consideration must be alleged to arise within the inferior jurisdiction, and must be so proved on the trial.

Ld. Raym.
211.; but see
contra Ld.
Raym. 1042.

But, if the plaintiff had shewn that the money had been lent *infra jurisdictionem curiæ*, or if it had been for goods there sold, the plaintiff would have had no need to say that the defendant assumed to pay *infra jurisdictionem curiæ*; because the law creates the promise upon the creation of the debt, which debt being within the jurisdiction, the promise shall be intended there also.

6 Mod. 146.
Carth. 402.
Salk. 201.
pl. 3. 1 P.
Wms. 476. pl.
135.

In all cases where inferior courts assume a jurisdiction, or hold plea of a matter not arising within their limits, the party hath his remedy, and may stay their proceedings by prohibition. But such prohibition can only regularly be obtained by its appearing, on oath made, that the fact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was refused.

(a) 2 Mod. 271,
272.
(b) *Vide* Im-
parlance, un-
der tit. *Plead-*
ings.

In the case of *Mendyke v. Stint* (a) it was greatly insisted upon, that, though the party neglected to plead to the jurisdiction, yet the matter arising out of the inferior jurisdiction, the superior courts ought to grant a prohibition; for that otherwise the parties, their counsel and attornies, would give a jurisdiction to inferior courts which they were not entitled to by law. But it was otherwise adjudged in this case; and it seems to be now agreed, that after admitting the jurisdiction, or after imparlance (b), the party cannot apply for a prohibition.

2 Mod. 275.
[See *acc. Cro.*
Jac. 96. 1 Term
R. 552. 3 Term
R. 3. 315.]

But in the above-mentioned case these things were agreed by the court, 1. That if any matter appears in the declaration, which sheweth that the cause of action did not arise *infra jurisdictionem*, there, a prohibition may be granted at any time. 2. If the subject-matter in the declaration be not proper for the judgment and determination of such court, there also, a prohibition may be

be granted at any time. 3. If the defendant, who intended to plead to the jurisdiction, is prevented by any artifice, as by giving a short day, or by the attorney's refusing to plead it, &c. or, if his plea be not accepted, or is overruled; in all these cases, a prohibition likewise will lie at any time.

A motion was made for a prohibition to be directed to the sheriff's court in *Bristol*, upon suggestion that causes of action arising out of the jurisdiction of the sheriff's court ought not to be sued there; and this motion was made in behalf of the defendant in the action, before he had appeared, to stay the proceedings of the court, who proceeded to attach his goods in the hands of a garnishee. Sir *B. Shower* opposed the motion; because the defendant could not pray a prohibition upon suggestion of a matter which he could not plead; and as here he could not plead this before appearance, so he ought not to make such a motion before appearance. And *per Holt C. J.* — A man shall not plead to the jurisdiction until he appear; but if the original cause of action arose out of the jurisdiction of the court, the garnishee may plead it; and of that opinion, he said, was *Hale C. J.*; but, if it was debt upon a simple contract, it is attachable where the person of the debtor is.

So, in the case of *Clerk v. Andrews*, where *Shower* moved for a prohibition to the court of the sheriffs of *London* to stay proceedings, where they attached the debt of the garnishee, because it arose out of the jurisdiction; it was denied, because the debt was upon simple contract, which follows the person of the debtor.

[The misinterpretation of a statute by an inferior court, the consideration of which ariseth incidentally in the course of a proceeding, which is confessed to be within its jurisdiction, should seem to be rather a matter of appeal than a ground for a prohibition. But clearly in such a case a prohibition will not lie, unless it be made appear to the superior court, that the party applying for the prohibition has, in the course of the proceedings in the inferior court, alleged the grounds for a contrary interpretation of the statute on which he applies for a prohibition, and that the inferior court has proceeded notwithstanding such allegation.]

As no right is vested by any of the prize acts in the captors of an enemy's ship and cargo in war, before the ultimate adjudication of the courts of prize; it follows, that the issuing of a monition to the prize agents by the court of commissioners of appeals in prize causes, to bring in the proceeds of a ship and cargo, which have been sold, after a sentence of condemnation as lawful prize, but from which sentence there is an appeal, (on a subject distinct from the question, whether prize or not, which is not disputed,) cannot be a ground for a prohibition to that court, for the monition neither interferes with nor defeats any vested rights.]

|| Naval courts-martial, military courts-martial, courts of admiralty, courts of prize, are all liable to the controlling authority which the courts of *Westminster-hall* have from time to time exercised

Ld. Raym. 546.
Coke v. Licence.

Show. R. 9.
cited *Ld. Raym.* 547.

Home v. Earl of Camden,
1 *H. Bl.* 487.
4 *Term R.* 582.
2 *H. Bl.* 533.;
|| *sed vide*
5 *East*, 345.
3 *East*, 472. ||

1 *H. Bl.* 487.
4 *Term R.* 582.

Grant v. Gould, 2 *H. Black.* 100.

exercised for the purpose of preventing them from exceeding the jurisdiction given them, the general ground of prohibition being an excess of jurisdiction, when they assume a power to act in matters not within their cognizance. But where the matter is clearly within the jurisdiction of the inferior court, a mere error in the proceedings may be a ground of appeal or review, but not of prohibition.

1 Madd. 15.

And the courts will not grant a prohibition to the admiralty prize-court against proceeding in a suit which involves a question of prize; for the court is within its jurisdiction.||

(L) Prohibitions to the Spiritual Court in what Instances : And herein,

1. *Where they meddle with a Matter purely Temporal.*

F. N. B. 40.

IF one sues another in the spiritual court for a chattel or debt, the defendant shall have a prohibition. So, if he sues for a trespass.

4 Term R. 351.

|| Therefore a prohibition was granted to stay a suit in the spiritual court, for breaking open a chest in the church, and taking away the title-deeds to the advowson; for trespass or trover was the proper remedy.||

2 Rol. Abr. 291.

7 Co. 44.

Roll. R. 332.

Cro. Eliz. 228.

3 Leon. 129.

3 Keb. 286.

S. P. per Hale C. J.

because the prescription is

the ground thereof.

If the spiritual courts take upon them to try the boundaries of parishes, a prohibition lies.

2 Rol. Abr. 282.

Show. 10. cited

Noy, 147. S. P.

but that it

must so appear

by the plead-

ings in the spiritual

court. Vent. 335.

S. P. and that a plea thereof must be tendered in the

ecclesiastical court. (a) So, where the defendant pleaded that he resorted to and received

the sacrament in a different parish from that in which he inhabited. R. Bulst. 159. C. Hard.

406. D. Salk. 166. pl. 6. 6 Mod. 188.

As, if a suit be by a parson for tithes, and the defendant plead, that the place for which the tithes are sued is in another parish, a prohibition lies; because they meddle with that which is out of their jurisdiction, though the original thing be of their cognizance, and this come in obliquely. (a)

2 Rol. Abr. 291.

[The bounds

of parishes,

though coming

in question in

a spiritual

matter, shall

be tried in the

temporal courts. This is a maxim in which all the books of common law are unanimous;

though our provincial constitutions expressly mention *Limites parochiarum* among the matters

quæ merè ad forum ecclesiasticum pertinere noscuntur, and *quæ non possunt ad forum seculare*

aliquatenus pertinere, complaining of this as one encroachment, among others, which the tempo-

ral courts were making upon the spiritual at that time. Gibs. Cod. 239.]

So if a vicar of a parish libel against another to avoid his institution to the church of *D.* which he supposes to be a chapel of ease appertaining to his vicarage, and the defendant suggest, that *D.* is a parish of itself, and not a chapel of ease; a prohibition will be granted, for they shall not try the bounds of the parish.

2 Rol. Abr. 291.

several cases to

this purpose.

So if the question be in the court Christian, Whether a church be a parochial church, or but a *chapel of ease*; a prohibition lies.

But

But if the bounds of two vills lying in the same parish come in question in the spiritual court, no prohibition lies; for that such bounds are triable in the ecclesiastical court, though those of parishes are not.

2 Roll. Abr. 312. pl. 7. S. P. But see *Gibs. Cod.* 239.]

The ecclesiastical courts have cognizance of a way to a church, and for not repairing such way the parties may be proceeded against in the spiritual court.

So, if a parson is prevented from carrying away his tithe by the stopping up the usual way, he may have his remedy in the ecclesiastical court, grounded on the statute 2 & 3 E. 6. c. 13.

But if the question be, Whether he is to have one way or another, or whether such a way be a highway or not? (a) this cannot be tried in the spiritual court.

So, if the churchwardens of a church sue for a way to the church, which they claim to appertain to all the parishioners by prescription, a prohibition shall be granted; for this right being grounded on the prescription, is to be tried in the temporal courts.

If a man be admitted, instituted, and inducted, and a suit be commenced in the ecclesiastical court to avoid the institution, supposing it not valid; though the thing be of their cognizance, yet, because the induction, which is temporal, and gives a lay right, may depend upon it, a prohibition lies.

If there be a suit for tithes in the ecclesiastical court, and the tenant plead, that the party who sues is not incumbent, but that *J. S.* is, and this plea, because it goes to the right of the incumbency, be rejected, a prohibition lies; for by denying the tenant this liberty he might be twice charged for his tithes.

There are frequent instances of prohibitions being granted to the ecclesiastical courts to stay suits for fees by chancellors, registrars, and proctors in those courts, on this foundation, that demands *pro opere et labore* are properly determinable at common law, and that fees cannot be settled by the canon law; and that the spiritual court can only give costs and expenses of suit, but that no action of debt will lie for such costs at common law; and that the profits of an office being temporal, the remedy for them ought to be by *quantum meruit*; or in case it be an office of freehold, by assize; the denial of just fees being a disseisin. It therefore seems to be now settled, that neither a proctor nor registrar can sue for fees in the spiritual court (b); but that the proper remedy is, in case of a fee certain, by an *indebitatus assumpsit*, or in case of an uncertain fee, by *quantum meruit*; and in such suits it is said not to be necessary to prove a retainer, that being implied by law.

vide Ld. Raym. 703. Cum. 18. and Vent. 165. where notwithstanding it is said, that for such fees as are due by provincial constitutions they may sue in the spiritual court. [(b) The same law of an apparitor, *Pearson v. Campion*, Doug. 629.]

If a legatee takes a bond from the executor for payment of the legacy, and afterwards sues him in the spiritual court for the legacy,

Lev. 78. Pet-
lerv. Yealman.
[1 Sid. 89.
S. C. 1 Keb.
399. S. C.

March, 45.

Bulst. 67.
Jon. 230.

March, 45.

Bulst. 67.
(a) 2 Roll. Abr.
287. S. P. adjudged.

2 Roll. R. 41.
287.

Hob. 15.
Latch, 205.
Bulst. 179.
Lit. R. 165.
Poph. 133.
Roll. Abr. 282
Show. R. 10.
Cro. Eliz. 228.
3 Leon. 265.
Green v.
Penilden.

2 Roll. R. 59.
3 Leon. 268.
Mod. 167.
2 Keb. 615.
3 Keb. 33
441. 516
Salk. 333.
pl. 11. 5 Mod.
238. Bunb.
170. and
4 Mod. 254.
where *per*
Holt, if a pro-
ctor might sue
in the spiritual
court for his
fees, he would
avoid the
statute of limi-
tations; *et*
10 Mod. 262.

Yelv. 38.
2 Vern. 31.;

but 2 Roll. R.
160. S. P. cont.
|| See 9 Barn.
& C. 489. ||

Stedman v.
Hay, Com. R.
568.

Nutkins v.
Robinson,
Bunb. 247.
Snowden v.
Herring, Id.
289.

Scammell v.
Wilkinson,
2 East, 552.

legacy, a prohibition be granted; for by taking the obligation the nature of the demand is changed; and it becomes a debt or duty recoverable in the temporal courts.

[Where a person is sued in the ecclesiastical court for a seat the church, if he would obtain a prohibition, and oust the ordinary of jurisdiction, he must shew such a legal title as cannot be tried in the ecclesiastical court, which can only be by *prescription*, and *prescription* can in such case be no otherwise proved than by shewing repairs; therefore, in a declaration in prohibition, the plaintiff regularly ought to set out a custom of repairing: but if he do not, and if the defendant do not demur, but go to trial, it will be aided by the verdict, for the plaintiff ought not to have a verdict, unless he proves a custom to repair.

If a churchwarden has made up his accounts, and had them allowed at vestry; if there is a libel against the churchwarden in the spiritual court, relating to his accounts, a prohibition shall go.]

|| Where a suit was instituted in the spiritual court to obtain a *general* probate of the will of a woman, made during her coverture, with the assent of the husband, and the wife had survived him, a prohibition was granted; for by granting such a probate the spiritual court would be giving effect to a will which by the general rules of law could not have effect; for the husband could not by any assent enable his wife to dispose, by will made during the coverture, of property which she might acquire after his death, but only of property over which he himself had a disposing power. ||

2. Where they determine on a Matter of Freehold.

F. N. B. 40.
2 Roll. Abr.
286. Lit. R.
164.

Cro. Jac. 270.
Vent. 41. cited.

Dyer, 151. 264.
Hob. 265.
2 Roll. Abr.
284, 285.
2 Show. 50.
pl. 56. Cro.
Car. 16.

Sid. 279.
2 Keb. 5. Lev.
179.
(a) Where the
legacy was to

Matters of freehold and the rights of inheritances, are only determinable in the temporal courts; so that if the ecclesiastical courts intermeddle with those a prohibition lies.

As, in a feoffment of tithes and lands, where there is no livery, if they adjudge the tithes to pass, notwithstanding there is no livery, a prohibition will lie.

So, if a man devises, that his lands shall be sold for the payment of his debts, and that the overplus shall be paid to such and such persons in certain shares, the legatees in this case cannot sue in the ecclesiastical court; for the provisions intended them arise originally out of lands, and their proper remedy in this case is in a court of equity.

But if a rent be devised out of a farm for years, the ecclesiastical courts may hold plea thereof; for the term for years being only a chattel is testamentary (a), and consequently, the rent devised thereout.

arise as well out of a term for years, as out of lands of inheritance, and the executor received it; but being dead without payment, so that no action of account could be brought at common law against his executor, it was held that the ecclesiastical court should have cognizance thereof. Cro. Jac. 279. Action of account is given against executors, by stat. 4 Ann. c. 16. § 27.

The rights of offices for life in the ecclesiastical or Court of Admiralty are determinable at common law: as, in the question concerning the validity of two patents, by which the office of a registrar to a bishop was granted, it was held, that this should not be tried in the spiritual court, though the subject-matter be spiritual; because the office itself being matter of freehold, is for that reason of temporal cognizance.

2 Roll. Abr. 285, 286.
Noy, 91.
Latch, 228.
Palm. 450.
Godb. 590.
Cro. Car. 65.
2 Roll. R. 306.
Raym. 88.
Lev. 125. 4 Mod. 27. Comb. 306.

Trespass on a glebe being freehold cannot be determined in the ecclesiastical court.

A parson libelled against the defendant in the spiritual court of York for having cut elms in the church-yard; and a prohibition was granted, upon suggestion that they grew on his freehold.

[A prohibition was granted to a suit in the spiritual court for breaking a church wall, and cutting down the boughs of a tree in a church-yard; for the rector having a freehold in him has a right to bring his action, whereby the party would be subjected to a double prosecution. Besides, the ordinary cannot punish a trespass committed on the body of the church, unless it hinder divine service.]

¶ But the Court of K. B. refused a prohibition, on application by a rector, to restrain the ordinary from granting a faculty to a parishioner, for stopping up a church window and erecting a monument, after the rector had expressed his dissent on citation; for the spiritual court had jurisdiction of the matter, and if the rector's dissent were improperly disregarded, that was matter of appeal, not of prohibition.¶

3. *In what Cases a Prohibition lies when they determine on Criminal Offences.*

It is clearly agreed, that the spiritual courts have no jurisdiction as to crimes and capital offences; so as to punish persons guilty of treason, felony, or other offences, which are cognizable in the king's temporal courts. But it is held, that a spiritual person may, especially after a conviction for a criminal offence at common law, be proceeded against *pro salute animæ*, and in order to a deprivation. (a) And this jurisdiction they are indulged in from a necessity of purging their body of all scandalous members. But they are not to inflict a collateral punishment for such matters as are only indictable at common law; and if they take upon them to do so, a prohibition lies.

And therefore if a clerk be convicted of homicide or manslaughter, and afterwards libelled against, the libel ought not to charge that he is an homicide, or that he is guilty of manslaughter, &c. and if it do, a prohibition lies. But the regular way is only to charge that he was convicted of homicide, &c. and so the sentence of deprivation ought to be grounded on the conviction in the temporal court, without any further examination of the matter, by which the verdict there given is not to be impeached, but affirmed. And though the person convicted desire that he

Bro. Jurisdiction, pl. 41.

Ld. Raym. 212.
Hilliard v. Jeffreson.

Binsted v. Collins,
Bunb. 229.

Bulwer v. Hase, 3 East, 217.

Keilw. 181.
Dyer, 295.
Cro. Jac. 450.
March, 174.
Hob. 288.
2 Ld. Raym. 1507. ¶ (a) See Free v. Burgoyne, 5 Barn. & C. 400.
8 Dow. & Ry. 179.¶

Hob. 121. 288.
Cro. Jac. 450.
Searl's case. Comp. Incumb. 53, 54.

may be admitted to his defence in the spiritual court, to prove his innocency against the verdict, yet this is not to be allowed him, because this would be to impeach in an improper court a sentence given in a proper court.

5 Mod. 164.
Boyle v. Boyle.

So, where a libel was exhibited in the ecclesiastical court against a woman *causâ jactitationis maritagi*, and she suggested, that the person libelling was indicted at the sessions in the *Old Bailey* for marrying her, he then having a wife living, *contra formam statuti*, and that he was thereupon convicted, and had judgment to be burnt in the hand; that being tried by a jury and a court which had a jurisdiction of the cause, and the marriage found, a prohibition was prayed and granted.

Jon. 320.

If a matter of ecclesiastical cognizance be made felony or treason by act of parliament, the spiritual courts (unless there be a saving of their jurisdiction in such statute) cannot take cognizance thereof, nor of any defamation in relation thereto.

Lev. 138.
Sid. 217.
Keb. 721. 762.
Slader v. Smal-
broke.

A layman forges orders, and obtains a benefice, for which he is prosecuted in the ecclesiastical court in order to deprivation; and he prays a prohibition, because forgery is triable at common law; but the prohibition was denied, for the forgery is touching an ecclesiastical matter, and he is suable there for it in order to his deprivation only.

Free v. Bur-
goyne,
5 Barn. & C.
400.

¶ By 27 Geo. 3. c. 44. § 2. no suit shall be commenced in any ecclesiastical court for fornication or incontinence, or for striking or brawling in any church or church-yard, after the expiration of eight calendar months from the time of the offence. This statute is held not to apply to proceedings for deprivation of the clerk on the ground of fornication; and therefore where a suit was instituted in the spiritual court against a clerk, charging (among other things) fornication committed more than eight months before the commencement of the suit, a prohibition was directed as to proceeding for reformation of manners, but a consultation was awarded as to proceeding for deprivation.¶

Comb. 71.

If the spiritual court proceeds against a man for writing a libel, a prohibition lies; for this is an offence indictable at common law.

F. N. B. 42.
2 Roll. Abr.
304.

The ecclesiastical courts cannot punish or hold plea *pro reformatione morum* in case of legal perjury, or *pro læsione fidei* in a temporal matter; as, that the party will pay a debt, make a feoffment, &c. So, if a jury give a false verdict, they cannot be punished for this in the ecclesiastical courts.

Jenk. 184.
Keilw. 59.
pl. 5.

But, for perjury in their own courts, and in matters in which they have cognizance, as matrimony, tithes, testaments, &c. they may punish, and no prohibition lies.

2 Roll. Abr.
286. Hob. 246.
Hetl. 132.

If a presentment be made by the churchwardens of a parish in the ecclesiastical court, that *J. S.*, a parishioner, is a railer and sower of discord among the neighbours, a prohibition lies; for this belongs to the leet, and not to this court, unless it was in the church, or such like.

4. *Where the Ecclesiastical Courts determine on Acts of Parliament.*

The construction of acts of parliament is of temporal cognizance; so that if the spiritual courts expound them in a different sense than they ought to do, a prohibition lies; as, if upon the statute 32 H. 8. c. 38., which only prohibits marriages within the *Levitical* degrees, the ecclesiastical courts should molest or call in question marriages without those degrees, a prohibition lies; because they act contrary to that which is declared to be lawful by the statutes of the realm. But, where they are not bounded by any law, their jurisdiction still continues, and therefore within the *Levitical* degrees they are still judges of incest.

So, if it be made a question in the ecclesiastical court, Whether the words of the statute 25 H. 8. c. 22. have given sufficient power to the archbishop to grant marriage licences, and they determine against the power, a prohibition lies; for by this they determine against an act of parliament, which is a temporal affair: but, if they allow the power, they may determine as to the form of the licence, the notice, and other circumstances requisite, &c.; for in these they have a jurisdiction, as such licences have been, and still are, notwithstanding this statute, of ecclesiastical cognizance.

If an administration is granted to the next of blood, and upon this an appeal is sued to the delegates, and there they intend to revoke the said sentence, and to grant it to another, who is not nearer of blood by our law, but is by the ecclesiastical law; a prohibition lies: because this being ordained by statute ought to be interpreted according to our law.

If there be a controversy, whether a person hath disposed of the guardianship of his child pursuant to the statute 12 Car. 2. c. 24., or whether he hath revoked such disposition; this cannot be determined in the ecclesiastical courts.

On a motion for a prohibition to the ecclesiastical court, to stay a suit there against a person for brawling in the belfry, and striking a man there, the statute of 5 & 6 E. 6. c. 4. was suggested; and it was alleged, that all statutes are construable by the common law, and that the person striking was mayor of the town, and that he came there to suppress a riot: but (*absente Holt*) the prohibition was denied; because this offence was conusable in the ecclesiastical court before this statute *ratione loci*; and the statute, though it provides a penalty, does not alter the jurisdiction.

The defendant was presented in the ecclesiastical court for working upon holidays, *viz.* carrying hay on St. John Baptist's day in church-time; but a prohibition was granted, because this was out of the statute by the very words of the act 5 & 6 E. 6. c. 3., it being a work of necessity: and this being an holiday by act of parliament, it belongs to the judges of the common law to determine whether it was broken or not.

4 Leon. 16.
Vaugh. 206.
2 Inst. 614. 618.
2 Lev. 64.
|| *Vide* 5 East,
345. 3 *ibid.*
472.||

Jon. 259, 260.

2 Roll. Abr.
503.

Vent. 207.
Lady Chester's
case. 3 Keb. 30.

2 Ld. Raym.
850. Wey-
mouth v.
Collins.
|| See *Ex parte*
Williams,
4 Barn. & C.
313. 6 Dow.
& Ry. 373.||

Godb. 218.
Wheeler's
case.

5. *In what Cases they have a concurrent Jurisdiction, and may determine Incidents.*

2 Inst. 492.
9 E. 2. *Articuli Cleri*.
Cro. Eliz. 655.
6 Mod. 156.
Vide 4 Co. 20.
a. in the abbot
of St. Alban's
case.

(a) Vent. 3. 120. 265. Ld. Raym 578. 2 Salk. 550. pl. 10. 6 Mod. 252.

Bro. Prohibition, pl. 21.
2 Inst. 492.

The ecclesiastical courts have in some instances a concurrent jurisdiction with the temporal courts; as, in laying violent hands on a clerk (a), a pension by prescription, &c. So that, if a clergyman be beaten, an action at law lies for the battery; as also a suit in the spiritual court for irreverence to his character. But such proceedings in the ecclesiastical court must be *pro salute animæ*, and to punish the sin, not to recover damages.

But if a clerk be arrested by (b) process of law, he cannot for this sue in the ecclesiastical court.

(b) If a person be proceeded against for defamation in the spiritual court, for giving evidence in a court of justice, he may have a prohibition. Bro. Prohibition, 21. 2 Bulst. 296. Roll. R. 61. — Cook sued Webb in the spiritual court for saying that he had a *bastard*; Webb, the defendant, alleged in the spiritual court, that the plaintiff was adjudged the reputed father of a bastard by two justices of peace, according to the statute, whereupon he spoke these words, and they of the spiritual court accepted his confession, but would not allow his justification, wherefore he prayed a prohibition; which was granted him. Cro. Jac. 535. Webb v. Cook.

Cro. Eliz. 753.
Pryn's case.

So, if a clergyman be only assaulted, no remedy is to be had in the spiritual court, but in the common law courts.

2 Inst. 608.
(c) On the
statute 5 &
6 E. 6. c. 4.
against brawling, &c. in a

So, if one be sued in the ecclesiastical courts for laying violent hands on a clergyman; the party being an officer or constable may (c) suggest, that the plaintiff made an affray upon another, and that he, to preserve the peace, laid hands on him, and so have a prohibition.

church or church-yard, it hath been held, that he who strikes another in a church or church-yard cannot justify or excuse himself by shewing that the other assaulted him. Cro. Jac. 367. — But in laying hands on a clerk in any other place he may justify. Moor, 915. Cro. Eliz. 655.

7 Mod. 80.

Also it is said, that though the crime of laying violent hands on a clergyman be within the express words of the statute of *circumspecte agatis*, that yet the party is not punishable in the spiritual court before he is found guilty in a temporal court; and that if he be proceeded against sooner, a prohibition lies.

Cro. Car. 89.
Cro. Jac. 538.
Jon. 440.

In case of criminal conversation with a man's wife, an action lies at common law, in which the husband recovers damages, and the offender is likewise punishable in the ecclesiastical court for adultery.

7 Mod. 80.

So, in case of a lewd woman who hath a bastard chargeable on the parish, though by the statute 7 Jac. 1. c. 4. she is to be sent to the house of correction, yet she may be proceeded against for incontinency in the spiritual court.

2 Salk. 552.
7 Mod. 79.
Galizard and
Rigault; and
2 Ld. Raym.
809. S. C.
where it is
said that the
court was of

The defendant libelled against plaintiff in the ecclesiastical court, for having solicited the chastity of his wife, after the plaintiff had been indicted for an assault upon the same woman, with an intent to ravish her, and convicted and fined upon it; and after an action of assault and battery against him for the same offence, which action was depending at the same time that the prosecution was in the spiritual court; and all this matter appearing

ing on the pleadings, the question was, Whether a prohibition should go to stay the proceedings in the ecclesiastical court, or a consultation should be awarded? and it was held in this case, that a prohibition should be granted; for that this being an attempt and solicitation to incontinence, coupled with force and violence, it did by reason of the force, which is temporal, become a temporal crime *in toto*.

afterwards, an apparent fault being in the pleadings, they refused to hear the civilians, and gave judgment that the prohibition should stand.

So, if *A.* calls *B.* *whore* and *thief*, the action shall be sued at common law; and *B.* cannot libel against *A.* in the spiritual court for the word *whore*, and have an action at law for the word *thief*.

You are a bawd, and thou keepest a bawdy-house; the keeping a bawdy-house indictable at common law, makes the whole of temporal cognizance; but calling *whore* or *bawd* only are punishable in the ecclesiastical courts. 2 Salk. 552. pl. 13. 2 Ld. Raym. 809.; *et vide* 2 Inst. 488. where Lord Coke, *Mere spiritualia sunt quæ non habent mixturam temporalium*.

But on a motion for a prohibition for saying of a parson that *he preaches nothing but lies and malice in the pulpit*, on suggestion that these words were actionable at common law, the court refused to grant it; for that these words concerning and relating to an ecclesiastical person and an ecclesiastical matter, it was fit to be tried there.

So, where the words were, *You are known by the name of bawdy Nell, and do live with another woman's husband*; and an action being brought at law for these words, grounded on a special damage sustained by the defendant's speaking them, and also a suit in the ecclesiastical court, it was moved for a prohibition; for being actionable at law by reason of the special damage, the party ought not to be twice punished for the same offence; but the court refused to grant a prohibition.

If there be a mutual contract of marriage between a man and a woman *per verba de futuro*, and either of them refuse; for this breach of contract an action lies at common law for the temporal loss to the party, although there might have been a remedy in the ecclesiastical courts for enforcing such contract. (a)

suit now in the ecclesiastical courts to compel marriage by reason of any contract, &c. 26 G. 2. c. 25. § 15.

If the churchwardens take away the bells of a church, they may be proceeded against in the ecclesiastical courts for such sacrilegious taking; and the rather, as they are churchwardens (b), although an action lies against them at common law by their successors; and the remedy in this case is said to be most proper in the spiritual court, because at common law damages only are recovered, but in the ecclesiastical court they decree a restitution of the thing *in specie*.

in the ecclesiastical court for taking away two bells out of the steeple, for these reasons, that the churchwarden is a corporation and the property is in him, and he may bring trover at common law; *et vide* 2 Inst. 492. Roll. R. 255. || *Vide* 4 Term R. 351.||

J. S. sued his brother, whom his father made executor, for his reasonable part of the goods of the father, in the spiritual court, according

this opinion; but at the prayer of the defendant's counsel they ordered that it should be argued by civilians; but

2 Roll. Abr. 295.

2 Ld. Raym. 809. — So, if *A.* says of *B.*,

being a matter

being a matter

5 Lev. 17. Crandon v. Walden.

2 Ld. Raym. 1101. Evans v. Brown.

Salk. 24. pl. 6. 120. 6 Mod. 155. 172. Ld. Raym. 386. See 12 Mod. 214. (a) No

26 G. 2.

Carth. 467. 5 Mod. 411. Sid. 281. Welcome v. Lake. (b) It is said in 2 Salk. 547. pl. 2. that a prohibition was granted to stay a suit

2 Lev. 128. 1 Trafford v. Trafford.

(a) Where in matters of legacies the courts of equity and ecclesiastical courts have a concurrent jurisdiction, *vide* 2 Vern. 47. 2 Vent. 362. Prec. Chan. 546.

2 Ld. Raym.
1506.
Fitzg. 189.

If a parish-clerk be guilty of several scandalous offences, which are punishable at common law, yet he may be proceeded against in the spiritual court in order to a deprivation, though his office be for life.

2 Inst. 493.
613.
12 Co. 65.
2 Bulst. 227.
Cro. Eliz. 66.
Hob. 12.
Hetl. 87.
2 Roll. Abr.
298. Sid. 89.
161. Cro. Jac. 269. Ld. Raym. 73.

It is laid down as a rule in a great variety of cases, that the ecclesiastical courts having cognizance of the principal thing, they shall have it of incidents and accessaries. But this hath been understood in this manner, that if such incident matter be merely temporal, or if a temporal matter be pleaded in bar to an ecclesiastical demand, they must proceed in the ecclesiastical court, according to the temporal law, otherwise they will be prohibited.

2 Roll. R.
42. Godb.
272. Cro.
Eliz. 666.
Hob. 188. 247
Latch, 217.

As, if a release be pleaded to a demand of tithes, or payment in bar of a legacy, which can only be proved by one witness, and for this reason is rejected by the ecclesiastical courts, because their law requires two witnesses; there a prohibition will be granted.

Noy, 12. Moor, 413. Vent. 291. Sid. 161. Show. 153. Carth. 142. 2 Salk. 547. pl. 1. Ld. Raym. 220. 3 Mod. 283. Comb. 160. Holt, 752. pl. 1.

2 Inst. 653.
Latch, 48.
2 Lev. 63.
3 Bulst. 231.
Rol. Rep. 419.
2 Co. 45.

So, although tithes, oblations, mortuaries, and pensions are of ecclesiastical conusance, yet, if to a demand of these a *modus* (b) or custom is pleaded, such custom, like all others, must be determined in the temporal courts; and (c) if the ecclesiastical courts take upon them to determine it, a prohibition will lie.

(b) But if a *modus* be there pleaded and admitted, no prohibition shall go; *secus*, if the question be, *Modus* or no *modus*. 2 Salk. 551. pl. 13. *Per* Holt C. J. — If they agree in the *modus*, and only vary in the manner of payment, no cause for a prohibition. Winch. 33. [So, a prohibition shall not go to stay a suit for a mortuary, unless the custom hath been denied in the spiritual court. Johnson v. Oldham, 1 Ld. Raym. 609. 12 Mod. 416. S. C. (c) Churchwardens libel against the rector, that there hath been time out of mind, and is, a chapel of ease within the parish: and that the rector of the parish, time out of mind, hath repaired and ought to repair the chancel of the said chapel; and that the chancel being out of repair, the defendant, being rector, hath not repaired it. The rector denied the custom in the spiritual court, and a decree was made for the rector, that there was no such custom, and costs were taxed there for the rector. The churchwardens moved for a prohibition; and it was argued for the prohibition, that it ought to be granted, because it appears that the libel is upon a custom, which the defendant hath denied; and it may be, the question was in the spiritual court, custom or not, which is not triable there, but at the common law; and then this appearing upon the libel, that the court hath no jurisdiction, a prohibition may be granted after sentence. But all the court held the contrary. For by Holt C. J. — The reason for which the spiritual court ought not to try customs is, because they have different notions of customs, as to the time which creates them, from those which the common law hath; for in some cases the usage of ten years, in some twenty, in some thirty years, make a custom in the spiritual court; whereas by the common law it must be for time immemorial. And therefore, since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs,

customs, by which in many cases the inheritances of persons may be bound. But in this case that reason fails; for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged that there hath not been any custom allowed by their law, which allows a less time than the common law to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded if the custom had not been denied, (for libels there may be upon customs,) but the custom being denied and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs: for the design of the motion for a prohibition is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them; since it appears that they have vexed the defendant without cause. *Churchwardens of Market Bosworth v. the Rector of Market Bosworth*, 1 *Ld. Raym.* 455. — The vicar of *N.* was libelled against in the spiritual court, for that by custom out of mind, the vicars of *N.* had, by themselves or others, said and performed divine service in the chapel of *C.*, for which there was such a recompence, and that he neglected. The defendant came for a prohibition, and without traversing this custom suggested, that all customs were triable at common law. And it was urged, that it was enough for a prohibition that a custom appeared to charge the vicar with a duty for which he was not liable of common right. But by *Holt C. J.* — A parson may be bound to an ecclesiastical duty by custom, and when he is bound by custom the spiritual court may punish him if he neglects that duty: the custom might have a reasonable commencement by composition in the spiritual court, and begin by an ecclesiastical act: and a bare prescription only is not a sufficient ground for a prohibition, unless it concerns a layman; whereas here it is an ecclesiastical right, an ecclesiastical person, and an ecclesiastical duty, and the prescription not denied. *Jones v. Stone*, 1 *Ld. Raym.* 578. 2 *Salk.* 550. *S. C.* And if the subject of the suit be within the jurisdiction of the spiritual court, the mere suggestion of a custom in the pleadings there, if they do not go on to try it, will be no ground for a prohibition. *Dutens v. Robson*, 1 *H. Black.* 100.] ||5 *Barn. & C.* 21.]

But if there be but one witness to prove a nuncupative will, *Carth.* 143. and the ecclesiastical court refuse the probate thereof, because to every such will the law requires two witnesses, no prohibition lies, because there is no other way of authenticating such will but in the spiritual court.

So, where the churchwardens libelled for a church-rate, which was sentenced against them, and then they appealed to the metropolitan, but pending the appeal one of the appellants released to the appellee all actions, suits, and demands, but the other appellant proceeded in his and his partner's name to reverse the sentence; whereupon the appellee prayed a prohibition: it was adjudged that no prohibition lay; for the principal matter being of ecclesiastical cognizance, things dependent thereon will be so too; and whether this release will bar both the churchwardens is what they are to determine, and not the Court of *B. R.*

A libel was exhibited on a custom, that the constable of the town should collect the rates assessed for repairing the parish church; which he refused to do; and on a motion for a prohibition, it was suggested, that it was not triable there, whether the party was constable and duly elected or not; but the court denied to grant one, because this matter is pleadable there, and prohibitions ought not to go unless, upon a trial of the matter, their law and proceedings cross the common law, and in that case a prohibition lies only till trial here, and after that a consultation shall be granted.

But it hath been resolved, that if a feme covert sue another in the spiritual court for incontinence with her husband, and recover costs, if the husband release them the wife is barred; for since the husband is liable to the charges of the suit expended

Yelv. 172.
Noy, 129.
Cro. Jac. 234.
Starkey v. Barton and Gore.

Hard. 510.
Goddin v. Wainwright.

5 *Mod.* 69.
Salk. 115. pl. 4.
Ld Raym. 73.
Chamberlain v. Hewitson.

See 12 Mod.
891.

Ld. Raym. 74.
per curiam.

by the wife, he shall have the costs in recompense; besides, the wife cannot have a chattel interest exclusive of her husband.

But, if the husband and wife are divorced *a mensa et thoro*, and the wife has alimony allowed her, and she sues for defamation, or other injury, and recovers costs, the husband releases them, yet the wife shall recover them; because they come instead of that she has expended out of her alimony, which was a separate maintenance, and not in the power of the husband.

(M) The Offence of disobeying a Prohibition.

F. N. B. 40.
Bro. Att. Bro.
pl. 5. pl. 9.
pl. 11.
And. 279.

(a) Though
the writ of

prohibition was not directed to the party. 19 H. 6. 54. — And such attachment may be awarded against a peer of the realm. 21 E. 3. 3. pl. 7. 2.

2 Jon. 46.

Dr. Wain-
wright's case.

An attachment was granted, upon affidavit, that the party proceeded after a prohibition delivered to him, in a suit for a seat in a church which the plaintiff claimed by prescription; and upon his appearance and examination upon interrogatories he confessed the matter, and was fined five marks.

Moor, 599.
Leon. 111.

And not only an attachment lies for proceeding in the same cause pending a prohibition, but also for instituting a new suit for the same thing; as, if a parson libels for tithes, and a prohibition is brought, and he libels for tithes of another year, the first not being determined, an attachment shall be awarded.

Cro. Car. 559.
2 Jon. 128.
Vent. 348.
3 Lev. 360.

In an attachment upon a prohibition, the plaintiff shall recover damages and costs against the party for proceeding after the writ of prohibition awarded.

Iveson v.
Harris, 7 Ves.
251.

|| A proceeding on a bail-bond in the marshalsea court, assigned, according to the practice of that court, to one of the officers, is not a proceeding in contempt of a prohibition from chancery restraining the original action.

Whether a prohibition issue providently or improvidently, until it is superseded a proceeding in breach of it is a contempt. ||

RELEASE.

(a) But it is
contrary to
the nature of
a release to

A RELEASE is the giving or discharging of a right of action which a man hath or may claim against another, or that which is his; or, it is the conveyance of a man's interest or right which

which he hath to a thing to another who hath possession (a) give possession. 4 Co. 25.
 thereof, or some estate therein. (b)
 Hutt. 65.—And therefore one tenant in common cannot release to his companion, because they have distinct freeholds. Co. Lit. 200. (b) A release cannot operate but upon an estate, interest, or right. Roll. Rep. 197.

Releases are distinguished into express releases, or releases in deed, and those arising by operation of law; and are made of lands and tenements, goods and chattels, or of actions, real, personal, and mixed. Co. Lit. 264. a.

These are to be adapted to the nature of the case, and the purposes for which the release is intended; so that if a man be disseised of lands, or dispossessed of goods, and release all actions, he may, notwithstanding, enter into his lands, or retake his goods, the right and property being still in him, though he has divested himself of his remedy. Hob. 163.
 4 Co. 63.

So, where a man has divers means to come to his right, he may release one, and yet take advantage of the other: but if a man has not any means to come to his right but by way of action, there by a release of all actions his right by judgment of law is gone, because by his own act he has barred himself of all means to come at it. 8 Co. 152.
 Co. Lit. 286.

Heretofore releases were construed with much nicety and great strictness, and being considered as the deed or grant of the party, were, according to the rule of law, taken strongest against the releasor. They now, however, receive such interpretation as other grants and agreements do, and are favoured by the judges as tending to repose and quietness. Dyer, 56, 57. a.
 Plow. 289.
 Hetl. 15.
 8 Co. 148.
 Show. 154.

Hence it hath been established as a general rule in the construction of releases, that when there are general words only in a release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the special words. Mod. 99.
 Ld. Raym. 235.

For the better understanding hereof we shall consider,

(A) Releases that are express and by Deed: And herein,

1. *Of the Words and Ceremony requisite in an express Release.*
2. *How far a Covenant or Agreement may operate as a Defeasance or Release.*
3. *How far a Disposition by Will may operate as a Release.*

(B) Release by Operation of Law, how created, and the Effect thereof.

(C) Releases of Lands and Hereditaments, how they enure: And herein,

1. *Of*

1. *Of Releases that enure by way of Mitter le Estate.*
 2. *Releases by way of Mitter le Droit.*
 3. *Releases that enure by way of Extinguishment.*
 4. *Releases that enure by way of Enlargement : And therein, of the modern Manner of Conveyancing by Lease and Release.*
 5. *What Estate or Interest passes by the Release : And therein, of the Words requisite to an Enlargement.*
- (D) Who in respect of their Right and Interest are capable of releasing.
- (E) Of Releases by Executors and Administrators.
- (F) How far the Husband's Release shall bind the Wife.
- (G) To whose Benefit a Release shall enure ; and who shall be bound thereby, though not a Party to the Release.
- (H) How far a Possibility or Contingent Interest may be released.
- (I) How the operative Words in a Release have been construed : And therein, of the Words.
1. *Claims and Demands, what are released thereby.*
 2. *By a Release of all Actions and Suits.*
- (K) Release, in what Cases restrained to the special Purpose for which it was given.
- (L) What Right and Interest shall be said to be released : And therein, of Misrecitals and Exceptions in Releases.

(A) Releases that are express and by Deed : And herein,

1. *Of the Words and Ceremony required in an express Release.*

Lit. sect. 445.
Co. Lit. 264.
(a) Plow. 140.

LITTLETON tells us, that the proper words of a release are *remisise, relaxasse, et quietum clamasse*, which have all the same signification. Lord Coke adds (a), *renunciare, acquietare*; and says that there are other words which will amount to a release : as, if the lessor grants to the lessee for life, that he shall be discharged of the rent ; this is a good release.

So,

So, it hath been held, that a pardon by act of parliament of all debts and judgments amounts to a release of the debt, the word *pardon* including a release. Sid. 765.—
So, the words *ei reddidit* enure as

a release. Cro. Jac. 696. — So, an obligee's acknowledging himself on good consideration satisfied, or discharged of all bonds, debts, and demands, is in judgment of law a good release. 9 Co. 52. Show. 351.

An express release must regularly be in writing and by deed, according to the common rule, *eodem modo quo oritur eodem modo dissolvitur*; so that a duty arising by record must be discharged by matter of as high a nature: so of a bond or other deed. Co. Lit. 264. b.
Roll. R. 43.
2 Leon. 76.
213.
2 Roll. Abr.

408. 2 Saund. 48. Moor, 573. pl. 787.

But a promise by words may before breach be discharged or released by words only. Sid. 177.
2 Sid. 78. Cro.
Jac. 483. 620.

As where in *assumpsit* the plaintiff declared that the defendant for valuable consideration assumed to go a certain voyage in such a ship before *August* following, and alleged a breach in the non-performance; to which the defendant pleaded, that, before any breach, the plaintiff the fourth of *April* at such a place *exoneravit* *eum* of the said promise; on demurrer the plea was held sufficient, without shewing how he discharged him, or that such discharge was in writing. Cro. Car.
318.
Langdon v.
Stokes.

But where in *assumpsit* for 5*l.* upon exchange of a horse, to be paid upon request, the defendant pleaded that before the action brought the plaintiff did exonerate him of this agreement, this plea was resolved to be ill; for though a parol agreement may be discharged by parol before cause of action accrued, yet, after that, it cannot be discharged but by deed; and here the cause of action did accrue at least upon request, and therefore he should have pleaded the exoneration before the request. Mod. 262.
2 Mod. 259.
S. C. Edward
v. Weeks.

In trespass for riding the plaintiff's horse, the defendant pleaded that such a day the plaintiff *exoneravit* him of the trespass; and this was held an ill plea, in not shewing that the discharge was in writing. Sid. 295.
Westlake v.
Perse.

A release of a right in chattels cannot be without deed. Leon. 283.
per Anderson
C. J.

2. How far a Covenant or Agreement may operate as a Defeasance or Release.

A covenant perpetual, as that the covenantor will not sue, without any limitation of time, is a defeasance (a) or absolute release. And this construction has been made to avoid circuitry of action; for if in such case the party should, contrary to his covenant, sue, the other party would recover precisely the same damages which he sustained by the other's suing. But, if the covenant be, that he will not sue till such a time, this does not amount to a release, nor is it pleadable in bar as such, but the party hath remedy only on his covenant. Moor, 23.
pl. 80. 811.
Roll. Abr. 959.
Bridg. 118.
2 Bulst. 95.
290.
Hard. 113.
3 Lev. 41.
2 Salk. 575.
pl. 1. 575.
pl. 4. 2 Ld.
Raym. 786.

Carth. 210. Ld. Raym. 419. 691. (a) A defeasance is only a conditional release, and may be executed as well after as at the time of the original contract. 2 Saund. 48. Cro. Eliz. 625.

Cro. Eliz. 352.
And. 307. Roll.
Abr. 939.
Deux v.
Jefferies.

As in debt upon an obligation the defendant pleaded that the plaintiff by indenture, &c. did covenant that he would not sue the bond before *Michaelmas*, intending thereby that this was a suspension of the action, and consequently a release; but upon demurrer the court adjudged, that it only amounted to a covenant, and that for breach thereof an action of covenant would lie.

Carth 63.
Salk. 573. pl. 1.
Ailoffe v.
Scrimshire;
et vide
Show. 46. S. C.

So, if the obligee covenants and grants to and with the obligor, that during ninety-nine years he will not put the bond in suit; this is only a covenant on which an action will lie, but it cannot be pleaded in bar of the bond.

Morley v.
Freer, 6 Bing.
547.

|| So, also, a covenant not to sue on a bond during the life of the obligor, and that if any person to whom the obligee should assign the bond should recover the principal, the obligee would pay the obligor interest during his life on the amount recovered, was held no bar to an action by an assignee of the bond in the name of the obligee, since such covenant did not amount to a release.

Kesterton v.
Savery,
2 Chitt. 541.

So, also, if the covenant be conditional and the condition not performed; as where a creditor covenanted (in an assignment of effects to trustees for creditors) not to sue the debtor if the trustees fairly accounted for the effects, and the trustees refused to account, the covenant was held not a release of the debts. ||

Cro. Car. 551.
March, 95.
2 Salk. 575.
pl. 3. Ld.

If two are jointly and severally bound in an obligation, and the obligee by deed (*b*) covenants and agrees not to sue one of them; this is no release, and he may notwithstanding sue the other.

Raym. 688. See 12 Mod. 415. 448. 550, 551. (*b*) But if two are jointly and severally bound in a bond, a release to the one discharges the other. Ld. Raym. 420. || But a covenant not to sue one is not a release, and does not discharge the other. *Dean v. Newhall*, 8 Term R. 168. *Hutton v. Eyre*, 6 Taunt. 289. and see *Twopenny v. Young*, 3 Barn. & C. 208. ||

2 Vent. 217.
Gawden v.
Draper. Ld.
Raym. 691.
S. C. cited *per*
Holt, and
admitted to
be good law;
but he said,
that if the
300*l.* had
been a rent,
he should
have been of
opinion that
the second
deed would
have amount-
ed to a grant
of the rent for

A. covenants with *B.* to pay him 300*l.* for the use of the wife of *A.* only for her life; in covenant brought on this, and breach assigned that there was so much of the 300*l.* arrear, defendant pleads that there was another indenture between him and the plaintiff since the date or delivery of the deed of covenant declared on, reciting the said covenant and agreement for the payment of the 300*l.*, wherein it was covenanted and agreed, that so long as *A.* and his wife did cohabit, the payment of the 300*l.* should cease; and avers, that they did cohabit for the time the said arrear became due, and pleads this in bar of the first agreement; and though in this case there could not have been any great mischief in construing the deed pleaded a defeasance or release, there being no other parties to the deed; yet, as this was a sum in gross, and the covenant temporary and not perpetual, it was adjudged no bar.

43 Ass. pl. 44.
Co. Lit. 265,
Ld. Raym.
690. cited.

If the collateral ancestor of the disseisee release to the disseisor with warranty, and the disseisor make a deed reciting the release with warranty, and covenant, though he be empleaded or ousted, yet

yet he will not take advantage of the deed or warranty, that is a defeasance; and if the disseisor plead the release with warranty in bar of an action brought by the disseisee, he shall be rebutted from the warranty by his own deed. But in this case if the disseisor had covenanted only not to bring a *warrantia chartæ*, or not to vouch, there it would only have been a covenant, because there would have remained a remedy upon the warranty.

A. having a rent-charge issuing out of three acres, *B.* purchased two acres thereof, and *A.* covenanted and granted to and with *B.* not to distrain in those two acres for the rent. By *Glanvil* it was held a release; but *Anderson contra*; but *per cur.* — If it be a release, the tenant of the other acre may plead it, for thereby the rent was extinct. Noy, 5.

If *A.* be bound to *B.* in a certain sum, and *B.* covenant and grant with *C.* a stranger to the bond, that if *A.* do such a thing, the obligation shall be void; this does not amount to a release. Bro. Estranger al Fait, pl. 21.

¶ And a deed *inter partes* cannot operate as a release to a stranger. Therefore a charterparty made between *A.* and *B.* in consideration of a former charterparty between *A.* and *C.*, which former charterparty, in consideration of the freight *B.* was to pay, was thereby declared null and void; *A.* agreeing to cancel the first in consideration of the second, and *C.* being thereby acquitted of all claims which *A.* might have against him in virtue of the first charterparty, was held not to operate as a release from *A.* to *C.* of the first charterparty. Storer v. Gordon, 3 Maule & S. 308.; and see Carstairs v. Rolleston, 5 Taunt. 551.

If a letter of licence contain the following words, *viz.* that if the creditor sue within such a time his debts shall be forfeited, such licence is pleadable in bar as a release; for the words, *shall be forfeited*, make an absolute defeasance upon a suit commenced. Carth. 64. 210. Show. 46. 330. 350. 2 Show. 446.

Obligee reciting the bond covenants to save the obligor harmless: it is an absolute release; and if upon a contingency, it is a conditional release, because it has an express relation to the bond. 2 Salk. 573. pl. 2.

An award that all suits shall cease hath the effect of a release, and the submission and award may be pleaded in discharge as well as a release. 2 Mod. 228. Strangford v. Green.

3. How far a Disposition by Will may operate as a Release.

It seems agreed, that a will, though sealed and delivered, cannot amount to a release, because it is ambulatory and revocable during the testator's life; also by reason of the executors' consent requisite to every disposition of a personal thing by will, and the injury that might accrue to the testator's creditors were a will allowed to operate as a release. Stil. 286. Vent. 39.

And therefore where in debt upon an obligation, by the representative of a testator, the defendant pleaded, that the testator by his last will in writing released to the defendant, this was adjudged ill, and that no advantage could be taken hereof by plea. Sid. 421. Pidgeon v. Harrison.

But

1 P. Wms.
83. pl. 16.
Elliot v.
Davenport.
2 Vern. 721.
S.C. ||See
3 Atk. 581.||

But it hath been held in equity, that though a will cannot enure as a release, yet, provided it were expressed to be the intention of the testator that the debt should be discharged, the will would operate accordingly; and Lord *Coxe* said, that in such case it would be plainly an absolute discharge of the debt though the testator had survived the legatee.

2 P. Wms.
352. pl. 95.
Rider v.
Wager.
[See the cases
of Sibthorpe
v. Moxom,
and Toplis v.
Baker, Vol. V. p. 148.]

So, in another case, it was held by Lord *King*, that a release by will can only operate as a legacy, and must be assets to pay the testator's debts; and if a debt so released by will be afterwards received by the testator himself in his lifetime, the legacy is extinct, and such release by will intimates no more than that the executors shall not after the testator's death trouble or molest the debtor.

2 Vern. 115.
Fish v.

A. devised to his servant *B.* a legacy of 50*l.* and 20*l.* per ann. for his life; and by his will acquits, exonerates, and discharges *B.* of all debts, accounts, reckonings, and demands whatsoever at the death of the testator: *B.* had a trunk of testator's in which were medals, jewels, &c. and it was made a doubt, and directed to be tried at law, whether by these words the trunk, &c. passed or not.

2 Vent. 136.
Roberts v.
Bennet.

A. devises 100*l.* to *B.*, and by his will releases to *B.* all debts and demands; and afterwards *A.* lends *B.* 100*l.* and the question was, Whether the will should discharge the 100*l.* lent without any new publication? The court doubted; however they decreed payment of the 100*l.* legacy, and left the executor to recover the 100*l.* lent, if he could, at law.

2 Vern. 522.
admitted.

If a debt is mentioned to be devised to the debtor without words of release or discharge of the debt, and the debtor die before the testator, this will be a lapsed legacy, and the debt will subsist.

Maitland v.
Adair, 3 Ves.
jun. 231.
||See 2 Price,
34.||

[In the will of *John Adair* was the following clause: "I devise to my brother, the Rev. Mr. *Adair*, 2000*l.* I also return him "a bond for 400*l.* with interest due thereon, which he owes "me." It appeared by the Master's report, that the above bond was a joint bond in the *Scotch* form by the testator's brother and his son. The question was, Whether this disposition of the bond by the will amounted to a release, or was only a legacy, and therefore lapsed by the death of the testator's brother in his lifetime, and the bond was still remaining in force against the co-obligor and executor of his father? Lord Chancellor —There is not the least doubt as to the bond. It is distinctly a legacy to the brother. The enquiry directed, whether it remained in the hands of Mr. *Adair*, shews what the court thought at the hearing. There is no foundation therefore for *Thomas Adair*, the son, to have the bond delivered up.]

Reeves v.
Brymer, 6 Ves.
519. *Per*
Master of the
Rolls.

||A mere declaration by a testator to his bond debtor, that he will not sue for the money, is not sufficient to constitute a release; but if such declaration be reduced into writing, and by a testamentary paper, this may operate as a gift of the money due on the bond.||

(B) Release by Operation of Law, how created, and the Effect thereof.

RELASES by operation of law are created sometimes by deed, or may be without; as, if the lord disseise the tenant, and make a feoffment in fee; or, if the disseisee disseise the disseisor's heir, and make a feoffment in fee; this is a release in law of the seignory in the first case, and both of the right and action of the disseisee in the second.

Co. Lit. 264. b.

If a disseisee release to his disseisor's lessee for life, his right is gone for ever; but if he disseise his disseisor's heir, and make a lease for life, his right is released but during the lessee's life, for a release in law is more favourably taken according to the party's intent than an express release in deed.

Co. Lit. 264, 265.

If the obligor makes the obligee his executor, and he accepts of the executorship, this in law is a release of the action (a), but still the debt or duty remains, for which the executor may retain, but such retainer can only be against creditors who are in an equal degree with himself.

Co. Lit. 264. Plow. 184, 185. Hutt. 128. ||3 Ves. & Bea. 194. ||

there are not assets, the action is not so much as suspended, and the executor may sue the heir of the obligor where the heir is bound. Roll. Abr. 940. Salk. 304.—So, if a creditor is made executor with others, he may sue the others, especially if he hath not administered. Cro. Car. 372. Jon. 345. Off. of Exec. 52. [And the bare appointment of a creditor to be executor, if he refuse to act, will not extinguish his legal remedy for the recovery of his debt. Rawlinson v. Shaw, 5 Term R. 557.]

(a) But if

So, if the obligee makes the obligor his executor, who administers several goods, but dies before probate, this in law is a release. So an administrator who is a creditor may retain so much of the intestate's assets as will satisfy himself. But an executor *de son tort* who is a creditor cannot retain, because this would be allowing him to take advantage of his own wrong.

8 Co. 136. Off. of Ex. 31. Salk. 300.

A. and *B.* are bound in an obligation jointly and severally to *C.*, and after *A.* makes *D.* his executor, and dies, and *D.* takes upon him the execution of the will, and fully administers all the goods of *A.*, and after the obligee makes the same *D.* his executor, and dies; and the question was, Whether this was a release or extinguishment of the obligation as to *B.*? and adjudged to be no release, because he had it in another's right.

Cro. Car. 372. Jon. 345. Roll. Abr. 934. Dorchester v. Webb.

Debt upon bond by the plaintiff as executor of the obligee; the defendant pleaded that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of seventeen: the plaintiff demurred. *Per cur.*—This cannot be a suspension of the action, because the defendant was only executor in trust for the plaintiff during his minority.

Ld. Raym. 605. Caweth v. Philips.

If *A.* and *B.* be jointly and severally bound to *C.*, and *A.* make *C.* his executor, or (as the case was) make *D.* his executor, who makes *C.* his executor; in this case, if *C.* has not received satisfaction of the assets of *A.* he may sue *B.*, for being jointly and severally bound, he may sue which of them he pleases.

2 Lev. 73. Cock v. Cross.

Sid. 79. If an obligor administers to the obligee, and makes his executor, and dies, the creditor of the obligee may well bring an action against him.

8 Co. 136.
Salk. 306. If the obligee makes the obligor his executor, this is a release in law, in regard it is the proper act of the obligee, who thereby makes the executor the only person capable to receive and pay, &c.

8 Co. 136.
Leon. 90.
2 Mod. 315.
(a) But if an administrator, having no assets, pays a debt of the intestate to the value of the bond out of his own money, this will amount to a release. Salk. 306.

Plow. 264.
Leon. 320. If the debtee makes the debtor and another co-executors, and one of them makes his executor, and dies, the surviving co-executor shall not have an action to recover the debt against the executor of the debtor, because the debt was once extinct; for it could not be brought but in the names of both the co-executors, notwithstanding one alone administered; and it could not be brought in both their names, because the debtor could not sue himself.

Salk. 308.
per Holt. If the obligee makes the obligor and others his executors, and the obligor refuses, but the others administer, and the obligor dies first, yet the debt is released, for the obligor, notwithstanding the refusal, might have come in and administered, and the probate by the others was for his benefit.

Salk. 304. 306.
Cro. Car. 373.
Off. of Ex. 30.
Yelv. 160.
Chan. Ca. 292.
and the case of Selwin v. Browne, which *vide* title *Executors*, Vol. III.
It is said by Ch. Just. *Holt*, that a creditor making his debtor executor does not operate as a legacy, or amount to a bequest to him of the sum due, but to a payment and release; the meaning whereof is, that such executor having assets sufficient to pay the debts and legacies of the testator, is discharged of the debt due from himself, as he by law is entitled to all the residue of the testator's personal estate after payment of debts and legacies. But it hath been adjudged, that in case of a deficiency of assets either for the payment of debts or legacies, such debt is to be deemed assets, and the executor accountable therewith as so much of the testator's personal estate. (b)

||(b) See 11 Ves.
87. 90. note.
15 Ves. 264. Roper on Legacies, vol. ii. p. 67. *acc.*||

Carey v. Gooding,
3 Br. Ch. R.
110. [A testator bequeathed to his brother 500*l.*, and the like sum to his nephew, and appointed them his executors. The brother was indebted to the testator 7000*l.*, and the nephew was indebted to him 1000*l.*, at the time of his decease. A bill being filed by the next of kin, praying an account of the personal estate of the testator, and particularly of the sums in which the executors were indebted to him, and payment of the same to the plaintiffs; it was contended on behalf of the defendants, that the appointment of the brother and nephew executors was an extinguishment of the debt: and this was clearly so at law; and that there is no case in equity where it has been holden otherwise, except where there

there has been a direct gift of the residue; as in the case of *Brown v. Selwin*, Ca. temp. Talb. 240.; and even there Lord Talbot spoke of it as an undecided point: but that there was no case where it had not been holden an extinguishment against the next of kin. But Lord Thurlow said he thought it had been a settled point in a court of equity, that the appointment of the debtor executor was no more than parting with the action; and declared it a trust for the next of kin.]

If an infant at the age of seventeen make his debtor executor, this in law is a release; for as the law gives him power to make an executor, it gives his executor the same advantages with others. Co. Lit. 264.

If a feme obligee marry the obligor, or one of the obligors; or if there be two feme obligees, and one of them marry the obligor; these are releases in law. 8 Co. 156. Co. Lit. 264.

But if a woman, executrix of the obligee, take the debtor to husband, this is no release in law, because she hath the debt in another right; and if this amounted to a release in law it would be a *devastavit*, which is a wrong the law will not suffer. 8 Co. 156. Co. Lit. 264. Cro. Eliz. 114. S. P. adjudged that it was suspended but not extinguished, for that after the husband's death an action would lie against his executor. Moor, 236. pl. 368. Leon. 320.

If *A.* and *B.* are bound in an obligation jointly and severally to *C.*, and *C.* makes *D.* the wife of *A.* his executrix, and dies, and *D.* administers, and after *A.* the husband of *D.* makes *D.* his executrix, and dies, leaving sufficient assets to pay the debt, and after *D.* dies, and *E.* takes administration of the goods of *C.* the obligee not administered, yet he can have no action upon the obligation against *B.* the other obligor; because that when the obligor made the executrix of the obligee his executrix, and left assets, the debt was presently satisfied by way of retainer, and then by consequence no new action could be had for the debt. 2 Roll. Abr. 935. Hob. 10. Moor, 855. Frier v. Gildridge.

By an intermarriage all contracts between the husband and wife for debts due *in presenti* or *in futuro*, or upon a contingency which may become due during the coverture, are released and extinct, because the husband and wife make but one person in law; and it is holden by Just. Gould, that if there was an express agreement that they should not be released by the intermarriage, it would be void, as inconsistent with the state of matrimony. Co. Lit. 264. 8 Co. 156. Dyer, 140.

But it is the better opinion, and founded on a great variety of cases, that promises, covenants, and agreements for the performance of a thing which is not to happen during the coverture, as payment of money after the husband's decease, are not released by the marriage. Hob. 216. 227. Hutt. 17. Noy, 26. Cro. Jac. 571. Palm. 99. Roll. R. 343.

2 Roll. Abr. 407. Godb. 271. 2 Roll. R. 162. Lit. R. 32. Hetl. 122. 2 Sid. 58.

Also it hath been adjudged, by two judges against *Holt C. J.*, that where *A.* entered into a bond to his intended wife, conditioned to leave her at his death 1000*l.* if she survived him, that such bond was not released by the marriage, as nothing would be due during the coverture, and as it would be contrary to the express agreement of the parties. But the Ch. Just. Vol. VI. R r insisted

Ld. Raym. 515. Carth. 511. Comb. 242. Lill. Ent. 214. Salk. 325. Holt, 309. pl. 12. Comyn, 67. pl. 42.

Freem. 512.
pl 687. 515.
pl. 691.
12 Mod. 288.
Gage v. Acton.

insisted strenuously that a bond differed from a promise or covenant, being *debitum in presenti*, though *solvendum in futuro*; and that the rule of law could not be controlled by the intention of the parties.

2 Vern. 290.
480. Preced.
Chan. 237.

Also, where a man entered into a bond to his intended wife, conditioned to leave her 1000*l.*, and the husband mortgaged his estate and died, not leaving personal assets to discharge the bond; it was decreed in equity, that admitting the bond void at law, yet it ought to be made good in equity, and that she ought to redeem and hold the land till she was satisfied her debt.

[It is now settled that such a bond may be enforced at law against the heirs of the husband. *Milbourne v. Ewart*, 5 Term R 381.; and *Hayes ex dim. Foord v. Foord*, there cited.]

Cannel v.
Buckle, 2 P.
Wms. 243.

The feme gave a bond to her intended husband, that in case of their marriage she would convey her lands to him in fee: they married, the wife died without issue, and then the husband died. It was adjudged, that the bond, though void in law, yet was good evidence of the agreement in equity; and the heir of the husband should compel a specific performance against the heir of the wife.

(C) Releases of Lands and Hereditaments how they enure: And herein,

1. Of Releases that enure by way of Mitter le Estate.

Co. Lit. 193. b.
273. b.
||See Cru. Dig.
vol. iv. p. 84.
123.||

RELEASES, says my Lord *Coke*, may enure four manner of ways: 1. By way of *mitter le estate*. 2. By way of enlargement or creation of estate; upon both which a rent may be reserved. 3. By way of *mitter le droit*. 4. By way of extinguishment; upon which two last no rent can be reserved.

Co. Lit. 273. b.

When two or more become seised of the same estate by a joint title, as by a contract or descent as joint-tenants or coparceners, and one of them releases to the other his or her claim, right, and pretensions, such release is said to enure by way of *mitter le estate*.

Co. Lit. 273. b.

(a) But if there are three joint-tenants, and one releases to another of them, such release makes a degree. Co. Lit. 273. b. Winch, 3. — So does the release of one coparcener to another. Co. Lit. 273. (b) Booth, 35.

Vide title
Joint-
tenants,
vol. iv.

And herein it is to be observed, that joint-tenants can only regularly pass their estates by release; and that by reason of the privity which must necessarily be in releases which enure by way of *mitter le estate*, a fee-simple passes without the word *heirs*.

Vide title
Joint-

But if there be two tenants in common, they cannot release to each other, but they must pass their estate by feoffment, &c., because

because this estate being established by different notorieties, each having passed by distinct liveries, they must pass to each other by a distinguishing livery, else it cannot be known in whom such parts are as formerly had passed by a distinct livery.

¶ *A.*, *B.*, and *C.* are tenants in common in tail; *B.* releases to *A.* and *C.*, and their heirs, all his undivided part, and all his estate and interest therein, *habendum* to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the use of them, their heirs and assigns; and *B.* covenants with *A.* and *C.*, their heirs and assigns, that he, his heirs, &c. will warrant and for ever defend the premises to *A.* and *C.*, (without the word "heirs,") against all persons; and that *A.* and *C.*, their heirs and assigns, should quietly enjoy, &c.: Held, that the release passed the interest of *B.* to *A.* and *C.* as tenants in common, and not as joint-tenants; and that the warranty annexed to the release created a discontinuance of *B.*'s estate-tail, and barred *B.*, and those claiming under him, as against those claiming under the release, of a subsequently acquired right in fee.¶

As to coparceners, they having in respect of the descending line distinct estates, they may pass the same by feoffment, &c. or may release to each other, and shall join in an assise, as each is seised *per my et per tout*.

If there are two coparceners, and the one enters in the name of both, and the other releases to him, this countervails entry and feoffment, and is good cause of voucher; but where one enters in his own name only, and claims to him alone, and the other releases to him, this is only an extinguishment of the right, and no making of the estate.

If there be two parceners of a rent, and one of them marry the tertenant, and the other release to her, this shall enure by way of *mitter le estate*, and yet the rent was suspended at the time of the release: but if she had released to the husband, it would have enured by way of extinguishment.

One joint-tenant of a reversion depending on a lease for life may release to the other; but if the rent be arrear, the one cannot release his interest in the arrearages to the other.

If *A.* feme sole and *B.* are joint-tenants for life, and *A.* takes *C.* to husband, and after *A.* and *C.* levy a fine to *B.*, by which they grant the land to *B.* *et quicquid habent*, &c. and his assigns, with warranty, and after *B.* dies, living *A.*, yet the lessor may enter into the whole, and there shall not be any occupant of any part, because this fine enures as a release, not by *mitter le estate*, but by way of extinguishment.

If one joint copyholder release to his companion, this is good without surrender or admittance; for the first admittance was of them and every of them, and the ability to release was from the first conveyance and admittance.

If land be given to two upon condition that they shall not alien, and one of them release to the other, this is no breach of their condition.

If two joint-tenants in fee let the land for life, reserving a rent

tenants and Tenants in Common, vol. iv.

Doe v. Prestwidge, 4 Maul. & S. 178.

Vide title Coparceners, vol. ii.

21 E. 3. 27.
Bro. Releases, 16.
2 Roll. Abr. 403.

Co. Lit. 273. b.
Raym. 413.
cited.

2 Roll. Abr. 403.
Lev. 167.

2 Roll. Abr. 409.
2 Roll. R. 598.
485.
Eustace v. Seawen.

Winch, 3.
Wase v. Pretty.

Winch, 3.

Vaugh. 45.

to them and their heirs, if one release to the other and his heirs, this release is good, and he only to whom it was made shall have the rent of tenant for life, and a writ of waste without attornment to such release, for the privity which was once between the tenant for life and them in the reversion.

2 Jon. 136.
Raym. 413.
Harrison v.
Belsey.
Vent. 345.
S. C. but
says it was
adjudged that
the contingent
remainders
were de-
stroyed.—
•• See
Ferne on
Contingent
Remainders,
(3d edit.)
259. &c. ••

A. and *B.* joint-tenants for their lives, remainder to the first son of *A.* in tail, and so to the second, &c. remainder to the right heirs of *B.* Before any issue had *A.* releases to *B.* and his heirs, and after hath issue a son; and the question was, If by this release before the birth of a son the contingent remainders were destroyed? And though it was urged that this uniting of the estate for life with the remainder in fee, being by conveyance and act subsequent to the limitation of the contingent remainders, and before they came in being, had destroyed them; yet it was adjudged by three judges against *Dolben*, that these contingent remainders were not destroyed, for that to some purposes the whole fee was executed in *B.* immediately upon the first conveyance, and this release of *A.* gave him no greater estate nor in any other degree than he had before, for after such release he is in of the whole estate by the lessor, as he was before, and as he would have been had it come to him by survivorship.

2. Releases by way of *Mitter le Droit* how they enure.

Co. Lit. 274.
276.

|| Words of
inheritance
are not neces-

sary in releases by way of *mitter le droit*, as the disseisor to whom, or to whose feoffee or heir the release is made, acquires the fee by the disseisin, and cannot take it under the release.
Co. Lit. 274. b. n. (1).||

Lit. sect. 472.

If there be two disseisors and the disseisee release to one of them, he shall hold out his companion; because the disseisor comes in by no lawful or established act of notoriety, which ought to be defeated before the manner of possessing can be altered; and therefore though he possessed as a joint-tenant before the release, yet, after the release, he shall oust his companion, because he was possessed of the whole before by wrong, and now being possessed by right, it follows that the possession of the other wrong-doer is no possession at all.

Co. Lit. 276. a.
(a) That the
feoffees are in
by title, and
are presumed
to have a war-
ranty, which
is much fa-
voured in law.
Co. Lit. 276.

But if a disseisor had enfeoffed two, the release of the disseisee to one should enure to both (a), because coming in by the legal notoriety of a feoffment, that must be defeated by an act of equal notoriety before the title can be altered, because the feoffment must stand good as an act that gives warning to all persons in whom the freehold subsists, till by some act of equal solemnity it appears that the freehold is in another.

Co. Lit. 274,
275.

So, where a disseisor makes a lease for life, the remainder in fee, and the disseisee releases to the tenant for life, or to the remainder-

remainder-man, this enures to them both ; because coming in by a known conveyance, it cannot be altered unless it were defeated by an act of equal notoriety.

If a disseisor makes a lease for life, and the disseisee releases to tenant for life, this shall not enure to him in reversion, because the release cannot alter the estate that passed by the feoffment without some act that destroys the feoffment. Co. Lit. 276.

So, if there be two disseisors, and they make a lease for life, and the disseisee release to tenant for life, this shall enure to them all. Co. Lit. 276.

If there be tenant for life, the remainder in fee, and tenant for life be disseised by two, and he release to one of them, he shall not hold out his companion. So, if the remainder-man had released to one of the disseisors, he should not hold out his companion. Co. Lit. 276.

But if tenant for life and he in remainder join in a release to one disseisor, he shall hold out his companion ; because when the possession is notoriously in them both, each of them are capable of a release, and when one has obtained a release, it makes his possession rightful, and his holding out his companion makes it immediately notorious that the estate is in him alone. Co. Lit. 276.

So also, if the disseisors make a lease for years, and the disseisee releases to one of them, this shall enure to them both ; because he cannot make it notorious that the estate is in him alone, because he cannot hold out his companion during the continuance of the lease for years. Co. Lit. 276.

So, if two joint-tenants are disseised by two, and one releases to one of them, he shall not hold out his companion ; because he cannot hold him out of the whole, because he has not the whole right, and so there can be no act of notoriety whereby the estate may appear to be in one disseisor. Co. Lit. 276.

If the king's tenant for life be disseised by two, and he release to one of them, this enures to both ; because he can only be disseised of an estate for life, since the reversion in the king cannot be devested. (a) Co. Lit. 277.
(a) There is not any such position in fo. 277. either a or b. — In 276. a. it is said, if the king's tenant for life be disseised by two, and he release to one of them, he shall hold out his companion, for the disseisor gained but the estate for life. 8 Co. 152.

If there be tenant for life, remainder in fee, and they be disseised, tenant for life cannot release to him in remainder, because the naked right cannot be transferred. Co. Lit. 276.

If the heir of the disseisor be disseised, and the disseisee release to such disseisor, and after the heir recover against such disseisor, the right of property goes along with it ; because when the heir recovers he defeats the possession of the disseisor as if it had never been, so that the disseisor can never recover in any action ; for in the writ of right he must lay the possession in himself or some of his ancestors : and this he cannot do in this case, for here there never was any possession in him but what was totally defeated and destroyed ; and he cannot recover by the old possession of the disseisee, for that was turned into a naked right, which Co. Lit. 276.

which could not be transferred but to a true and real possession; and here being no possession but such as stands defeated, it is the conveyance of a naked right, which the law will not allow.

Co. Lit. 277.

If the heir of the disseisor be disseised, and the disseisee release to the disseisor upon condition, and the condition be broken, this revests the naked right in the disseisee; because when the condition is broken the release is as if it had never been, and therefore the disseisee may recover by virtue of his ancient seisin.

Co. Lit. 276.

If two men gain an advowson by usurpation, and the right patron releases to one of them, he shall not hold out his companion, but it shall enure to them; for their clerk came in by admission and institution, which are judicial and notorious acts.

3. Releases that enure by way of Extinguishment.

Co. Lit. 279.

b. 280.

|| *Vid. tit. Ex-*
tinguishment,
vol. iii.||

In some cases where the releasee cannot have the thing released by way of *mitter le droit*, &c. yet the release shall enure by way of extinguishment against all manner of persons: as, when the lord releases his seignory to his tenant of the land, or when the grantee of a rent-charge or common releases to the tenant. And such releases absolutely extinguish the rent, &c. although the releasee be only tenant for life.

Lit. sect. 456.

If a lease be made to one for life, reserving rent to the lessor and his heirs, if the lessee be disseised, and after the lessor release to the lessee and his heirs all his right in the land, and after the lessee enter; in this case the rent is extinct, but the right of the reversion doth not pass.

Lit. sect. 454.

If there be lord and tenant, and the tenant be disseised, and the lord release to the disseisee all the right which he has to the seignory or in the land, this release is good, and the seignory extinct.

Co. Lit. 268.

Lit. sect. 454.

(a) See the
stat. 21 H. 8.
c. 19. and Co.
Lit. 268. b.

(b) For the dis-
seisee is tenant
to him in right and in law.

But yet, if the tenant, notwithstanding he is disseised, puts his beasts on the land, and the lord takes them for rent arrear, the disseisee shall compel (a) him to avow on him; and if the lord avows upon the disseisor as his tenant, and the disseisee reply and shew the special matter how he was tenant and was disseised, this shall abate the lord's avowry. (b)

Co. Lit. 268.

But if the tenant be disseised, and the lord accept rent from the disseisor, and then the lord distrain his beasts for rent in arrear, he may compel the lord to avow on him; and the lord cannot traverse the disseisor's title, having once admitted it by acceptance of the rent from him.

Co. Lit. 268. b.

[But 48 E. 3.

9. seems to
the contrary,
because when
the tenant

And, according to my Lord *Coke*, if after such acceptance the disseisee should put in his beasts, and the lord should distrain them, the disseisee cannot compel the lord to avow on him, because it was his own laches to let the disseisor continue till rent was due and accepted.

pleads the disseisin to compel the lord to avow upon him, it is strange that the lord, by his own act of acceptance, should maintain his avowry, and destroy the feudal contract. *Gilb.*

Ten. 64, 65.]

So,

So, if the disseisor dies seised the heir of the disseisor comes in by title, and then the disseisee cannot compel him to avow upon him, for he has lost the right of possession; and the disseisee cannot put his beasts on the ground, and therefore cannot compel the lord to avow on him, and therefore the lord must take the heir who has such right of possession to be his rightful tenant; but because the disseisee may enter and occupy the land before the descent cast, therefore the lord may release to him and discharge the contract, which is to his benefit, and is still so far subsisting that he may take advantage of it. Co. Lit. 268.

So, where donee in tail releases to the disseisor all his right, yet if he in the reversion releases to him afterwards, it shall extinguish the rent. Co. Lit. 280.

There is a diversity between a seignory and a bare right to land; for a release of a bare right to land to one who has but a bare right is void, but a release of a seignory to him who has but a right is good to extinguish the seignory. Co. Lit. 268.

But if there be lord and tenant, and the tenant make a feoffment in fee, and afterwards the lord release to the feoffor, this extinguishes nothing; for by the feoffment the relationship between the lord and tenant is destroyed, and the feoffor only of necessity becomes tenant in the avowry till the lord procures his arrears. Co. Lit. 269. Lit. sect. 457.

If a feme mesne marries her tenant, and the lord releases to the feme, the seignory is extinct; but if he releases to the husband both the seignory and mesnalty are extinct. Co. Lit. 280.

If the tenancy be given to the lord and a stranger, and the heirs of the stranger, and the lord release all his right to his companion; this not only passes his estate in the tenancy, but also extinguishes his right in the seignory. Co. Lit. 280.

If lessee for years be ousted, and he in the reversion disseised, and the lessee release to the disseisor, the disseisee may enter, for the term for years is extinct and determined. But were it in the case of a lessee for life it would be otherwise, because the disseisor has a freehold whereupon the release of tenant for life may enure. Co. Lit. 275.

Lessee for years devised the term to his wife for life, the remainder of the years to *J. S.*, who by deed released all his right, interest, term for years, possession, and demand in the said land to him who had the reversion in fee; and by this it was held, that the possession was extinguished in the reversion; and that the reversioner may after the death of the wife well enter. Jon. 389. Johnson v. Trumper.

If the lord releases his right in one acre, this extinguishes the whole seignory. Moor, 56. pl. 161. *per cur.* Dals. 60. *et vide* And. 235.

So, if a man has a rent-charge out of twenty acres, and he releases all his right in one acre, this extinguishes all the rent. Bro. Releases, pl. 18.

But it hath been held, that if the grantee of a rent-charge releases part of his rent, such release does not extinguish the whole rent. Co. Lit. 148., *et vide* Cro. Eliz. 742.

Dyer, 157. b.
pl. 29.

If the lord releases to his tenant all his right to the land and seignory, *salvo sibi dominio suo*, this does not extinguish the tenure, but only the annual services.

4. *Releases that enure by way of Enlargement: And therein, of the modern Manner of Conveyancing by Lease and Release.*

Co. Lit. 273.
Finch, 44.
5 Co. 124.
Dyer, 302.
(a) Possession
countervails,
and is equal to
livery.
Dyer, 269.
pl. 20. margin.

Releases enure by way of enlargement when the possession and inheritance are separated for a particular time, and he who hath the reversion or inheritance releaseth to the tenant in possession all his right or interest in the land. Such release is said to enlarge his estate, and to be equal to an entry and feoffment, and to amount to a grant and attornment. And herein the law requires privity of estate, that the releasor have a right, and the releasee such a possession (a) as will make him capable of taking an estate.

Co. Lit. 273.
2 Roll. Abr.
401.

And therefore if there be lessee for life or years in possession, the lessor may enlarge their estates by release. So, if they assign or grant over, the estate or interest of grantee or assignee may be enlarged by the release of him in reversion.

44 Ass. 35.; but
vide Brownl.
207.

So, if there be a lessee for life, remainder in tail, the remainder in fee, he in remainder in fee may enlarge the estate of the lessee by release, notwithstanding the mesne remainder.

Co. Lit. 272.

But if *A.* makes a lease for life, and lessee for life makes a lease for years, and *A.* releases to the lessee for years and his heirs, this is void; because there is not the consent of the tenant for life, who is immediate tenant to the reversioner, and ought to attorn to his grants.

Co. Lit. 270.
Dyer, 4. pl. 2.
Carter, 62.

So, if a man leases for twenty years, and the lessee assigns for ten years, a release by the reversioner to the assignee is void for want of privity. But a release to the lessee is good, for he hath the possession notwithstanding the assignment; the possession of the lessee being always considered the possession of the lessor, and that he holds as his bailiff.

Co. Lit. 273.

If a man makes a lease for years, the remainder for life, and afterwards releases to the tenant for years, this is good; because the tenant for years holds of the reversioner, and pays him the services, and ought to attorn to his grants, and not he in the remainder for life; and therefore where tenant for years accepts a release of the reversion, it must in consequence be good. And in this case a release to him in the remainder for life would be good likewise, because the lessee in the original creation took the estate for years subject to such remainder for life, and therefore there needs no consent from the lessee for years to enlarge the estate.

Co. Lit. 273.
a.

If tenant by the curtesy grants over his estate, he is not afterwards capable of taking a release; for his estate is created merely by law, and he remains tenant to the heir, and subject to waste, and is compellable to attorn to the grants of the reversioner; yet is he not capable of a release, because he has no notorious possession *in pais*, which may be enlarged into a fee.

But

But the grantee of tenant in dower, or by the curtesy, is capable of taking a release, because of the privity and notoriety of possession. 2 Roll. Abr. 400, 401.

If a feme covert be tenant for life, a release to the husband and his heirs is good, for there is both privity and an estate in the husband, whereupon the release may sufficiently enure by way of enlargement; for by the intermarriage he gains a freehold in right of his wife. Co. Lit. 275. b. Keilw. 129. pl. 97.

If an infant makes a lease for life, and the lessee assigns it over to another with warranty, the infant at full age brings a *dum fuit infra ætatem* against the assignee, and he vouches the assignor, who enters into the warranty, the demandant cannot release in fee so as to enlarge the estate, because the vouchee has no possession. Co. Lit. 273. a. b.

But he who aliens pending the writ may, as long as that writ is pending, accept a release from the demandant. So may a vouchee after he hath entered into the warranty, for though they be not tenants, yet the law and the parties have allowed them as tenants *inter se* for that suit. Lit. sect. 490. Co. Lit. 266. 284. b. Hob. 358.

If a man makes a lease for life, the remainder for life, and the first lessee dies, a release to him in the remainder, and to his heirs, is good before he enters to enlarge his estate; because he hath an estate of freehold in law in him, which may be enlarged by release before entry. Co. Lit. 270. b.

But at common law a release to a lessee for years before entry is void; yet it is said by my Lord Coke, that if a man makes a lease for years, the remainder for years, the first lessee enters, a release to him in the remainder for years is good to enlarge his estate. Co. Lit. 270.

And if a lease for years be made to two, albeit the lessor before they enter cannot release to them to enlarge their estate, yet one of them may before entry release to the other. Co. Lit. 270. b.

If an advowson (a) be granted for years, the patronage for years is in the grantee, and he may accept a release in fee of the patron. But if one, two, or three avoidances are granted, the patronage is not separated, nor can such grantee accept of a release in fee of the patron in fee who hath the inheritance. Jon. 19. (a) If a man seised of a rent in fee grants it for life, he may enlarge it by release.

45 Ass. 8. 2 Roll. Abr. 400.

If A., a member of a corporation, disseise B. to his own use, or if a mayor and commonalty disseise B., and B. in the first case release to the mayor and commonalty; or, in the second, to a particular member of the corporation; nothing passes by these releases, for they are distinct persons, and claim in different rights, consequently there is no privity. 8 H. 6. 1. Bro. Releases, pl. 62. 2 Roll. Abr. 403.

If a man sues execution upon an *elegit* (b) of the lands of his debtor, and the debtor who hath the inheritance confirms his estate, he may afterwards enlarge it by a release, for the confirmation hath created a privity between them. 51 Ass. 15. 2 Roll. Abr. 401.

(b) So, of a tenant by statute merchant or staple. Co. Lit. 270. b.

A release

Co. Lit. 270. A release by a lessor to his lessee at will, having entered by
 Lit. sect. 460. force of such lease, is good in respect of the privity between
 Dyer, 269. b. them, and as it would be a vain thing for the lessor to make
 pl. 20. Owen, livery and seisin to one already in possession of the land by his
 28, 29. S. P. own agreement.
 and that such lessee shall have aid.

Cro. Eliz. 850. But if tenant at will makes a lease for years, and the lessee
 Shaw v. enters, he only is the disseisor, and a release or confirmation to
 Barber. the tenant at will afterwards is void, because the privity is deter-
 mined.

Co. Lit. 270. A release to a tenant at sufferance, as where lessee for years
 b. Dyer, 28. holds over, is void; for though there be a possession yet there
 pl. 19. Cro. is no privity, which is equally requisite.
 Eliz. 268.
 3 Leon. 152. Brownl. 207. Cro. Jac. 179.

Co. Lit. 271. If one enter of his own wrong, and takes the profits, his words,
 a. "to hold it at the owner's will," cannot qualify the wrong, for
 he is a disseisor, and in such case the owner's release to him is
 good: or, if the owner consented, he is tenant at will, and in
 such a case the release is likewise good.

The ancient manner of conveyancing was by feoffment, but the
 manner of making livery and seisin begetting many nice ques-
 tions, grew troublesome, which put lawyers upon new devices, and
 introduced the modern manner of conveyancing by lease and re-
 lease. This method is said to have been first (a) invented in
 King Charles the First's reign, and has its validity from the
 reasons drawn from the statute of uses; for, by the bargain and
 sale for a year, the bargainee by force of the statute is in pos-
 session without entry, and when the bargainor releases to him
 in possession, the lease is merged, and the bargainee hath the
 inheritance. For, as at common law, if a man granted a lease,
 and the lessee entered, this divided the estate, and left a rever-
 sion in him, and the possession in the lessee; but still, by the
 common law, the lessee (b) before entry could not accept of a
 release, having only an *interesse termini*; and now though the
 lessee does not enter, yet the statute vesting the estate or use in
 him for a year he is deemed to be in the actual possession, and
 so capable of a release as much as a lessee in possession was at
 common law. But yet this lessee cannot have trespass till an
 actual entry.

Lessee for years cannot make a lease for years within the
 statute of uses, so as by this means to give the possession, and
 make his lessee capable of a release of the reversion.

In ejectment upon a special verdict the only question was,
 whether a lease for a year upon no other consideration than re-
 serving a pepper-corn, if it be demanded, could operate as a
 bargain and sale, and so make the lessee capable of a release?
 And resolved that it should, the reservation making a sufficient
 consideration to raise an use in the same manner as a bargain
 and sale does.

A release

A release to *cestui que use* is good: so to a *cestui que trust*, who being in possession may at least be considered as tenant at will. Godb. 299.
Hard. 491.
Carter, 162.

5. *What Estate or Interest passes by the Release: And therein, of the Words requisite to an Enlargement.*

Releases, like other conveyances, regularly require words of inheritance; so that if the lessor release to his lessee for years, without saying to him and his heirs, such lessee hath only an estate for his life. Lit. sect. 465.
Co. Lit. 275. b.
Jenk. 200.
Jon. 328. Cro.
Car. 355.

So, if a release be made to tenant by statute staple or merchant, or *elegit*, by him in the reversion of all his right in the land, by this a freehold passes for the life of the releasee; it being the greatest estate that can pass without apt words of inheritance. Co. Lit. 275. b.
2 Vent. 328.

If a lessor release to his lessee *pur auter vie*, he gives him an estate for his own life. Co. Lit. 275. b.

A chantry priest incorporate took a lease to him and his successors for 100 years, and afterwards took a release from the lessor to him and his successors; and it was adjudged, that by the release he had but an estate for life, for he had the lease at first in his natural capacity, for that it could not go in succession; and the words *his successors* could not give him an estate of inheritance in the same capacity he had the lease, for want of the words *his heirs*. Comp. Incumb. 373.

But if the lord releases all his right to the tenant, the seignory is extinct without the word *heirs*; for this instrument is to discharge the estate of the tenant, and therefore has a necessary relation to the estate which the lord at first created, and consequently it refers to those words that in the original of the estate gave him a fee-simple. Co. Lit. 9.
Coke R. on
Fines, 7.

So, in releases that enure by way of *mitter le estate*, the word *heirs* is not requisite; as, where there are two coparceners, and one of them releases to the other, this gives a fee without the word *heirs*, because it hath a necessary relation to the estate whereof the other was seised. Co. Lit. 9. 292.

So, if there be two joint-tenants, and one release to the other, this passeth a fee without the word *heirs*, because it refers to the whole fee, which they jointly took and are possessed of by force of the first conveyance. But tenants in common have distinct estates, and cannot enlarge the estates of each other without proper words of inheritance. (a) Co. Lit. 9. 200.
[(a) But tenants in common cannot release to each other, the freehold being several.]

If lands be given to baron and feme, and the stranger in fee, and the stranger release to the baron (b); this gives him the fee without other words of inheritance. And. 45.
(b) *Secus*, had the release been made to the wife. Dyer, 265. a. pl. 34.

A release by one of a bare right for a day or an hour is as good as if it was made to the other and his heirs; for the disseisee cannot release part of his estate in the right, because he has no right Co. Lit. 274.

right to any estate but that whereof he was seised, therefore he must release his right to that or none at all.

(D) Who in respect of their Right or Interest are capable of releasing.

Co. Lit. 265. b. **A** BARE authority cannot be released; as, where a man by Roll. R. 197. will directs that his executors shall sell his lands, this being 5 Bulst. 51. a power only, and no matter of interest in the executor, he (a) So, if *cestui que use* had devised that his feoffees should sell the land, and they had made a feoffment over, yet might they have sold the use. Co. Lit. 265. b. cannot release (a) it to the heir.

Co. Lit. 237. But though these powers in strangers cannot be released, yet 265. Co. 110. a power of revocation in the feoffor or party from whom the 4 Leon. 153. estate moved may be released by deed, or by levying a fine, which is a release in law; for it is in nature of a condition, whereby he may restore himself to his former estate whenever he pleases, and consequently such power, like other reservations, may be released.

21 E. 4. 40. After one has found surety of the peace all the king's subjects 2 Roll. Abr. have an interest in it, and neither the king nor party against 401. whom it is found can release it.

18 H. 6. 25. In trespass or *detinue* by the villein the release of the lord is 2 Roll. Abr. a good bar. 402.

19 H. 6. 64. If a commonalty be disseised, and after every one release for 2 Roll. Abr. himself, it is not good, because it ought to be by their common 402. seal.

Noy, 5. A person who procures an outlawry in debt may release the Albany v. party, for the release is a satisfaction to him; and the outlawry Manny. in this case being pardoned by act of parliament, the party is absolutely discharged.

5 Bulst. 29. If *A.* covenants with *B.* that *C.* shall pay to *D.* 8*l.* yearly, and Roll. R. 196. *D.* takes *J. S.* to husband, who releases the payment to *A.*, this 2 Roll. Abr. release does not discharge him; for *J. S.* is a stranger to the 402. Quick v. covenant, and hath no right in him. Ludburrow.

2 Roll. Abr. If *A.* has judgment against *B.* for debt or damages, and after 402. Jon. 258. extends the land of *B.* for this debt, and then assigns over the Cro. Car. 214. land extended to *C.* for all his estate therein, and after *A.* releases Flower v. to *B.* the judgment; this shall avoid the extent, so that *B.* may have an *audita querela* against *C.* the assignee, and therein shall Elgar. avoid the extent (b), because *A.*, notwithstanding the assignment, continues privy to the judgment, and might after the assignment have acknowledged satisfaction of the judgment, and so defeat the estate of the assignee. And this release is all one as if he had acknowledged satisfaction of the judgment.

21 E. 3. 58. If one joint-tenant of a rent in fee releases all his right, yet 2 Roll. Abr. this does not pass the moiety of his companion (c); but in per- 411. sonal actions one joint-tenant may release the whole; but if the (c) 2 Co. 68. personalty be mixed with the realty, it is otherwise.

A release

A release by the common vouchee is no bar, for he renders nothing, and can be at no loss. Cro. Eliz. 2, 3.

So, if the plaintiff in ejectment, who is a mere nominal person and trustee for the lessor, release the action; or if an action be brought in his name for the mesne profits, and he release it, this in either case is no bar; but from the power the courts now exercise of regulating all proceedings in these actions, is such a contempt for which the party may be committed. Raym. 95. Skin. 247. pl. 1. Comb. 8. Salk. 260. pl. 15. ||But now it is held, that *John Doe* is the real

plaintiff for the purpose of releasing the action. 4 Maule & S. 300. 2 Chitt. R. 523. And that the lessor of the plaintiff, having parted with his interest, cannot release the action. ||

If a lessor after assignment of the reversion release to the lessee all covenants and demands, yet the assignee may have an action of covenant for rent due after the assignment, for it runs with the reversion at common law, before the stat. 32 H. 8. (cap. 34.), and passes by the grant of the reversion, and therefore the lessor could not release it after the assignment. 2 Jon. 102. 2 Lev. 206. Harp. v. Bird. Cro. Car. 503. L. P.—that a creditor, after an assignment of his debt,

cannot release the debtor. 2 Chan. Ca. 169. ||*Vid.* 1 Bos. & P. 447. ||

If by prescription the inhabitants of ancient messuages in a certain vill are entitled to have common within the vill by reason of their commorancy, such common cannot be released, for though one inhabitant should release it, a succeeding one might claim it. (a) Cro. Jac. 152. Smith v. Gatewood. (a) *Vide* Gateward's case. 6 Co. 60.

where such a claim is pleaded as a custom, and adjudged bad in law, for the reason in the text, among other reasons.

If by the custom of a manor the tenants thereof are to choose among themselves one to collect the lord's rents for a year, and so on annually; the lord may discharge or release a tenant of this burden, but then the others shall not be further charged than before, for when it comes to his course who is discharged the lord himself must collect it. 21 E. 4. 45. 47. 2 Roll. Abr. 401, 402.

If two churchwardens sue in the spiritual court for a levy towards the reparation of their church, and have sentence to recover, and costs assessed, and after one of them releases, yet the other may proceed for the costs, &c.; for churchwardens have nothing but to the use of the parish, and the corporation consists of both, and one only cannot release or give away the goods of the church. March, 73. Jenk. 305. Cro. Jac. 235. Yelv. 173. 2 Brownl. 215.

A servant who distrains (b) in right of his master, or one who is robbed (c) of his master's money, cannot, on an action brought by him on the statute of *hue and cry*, release to the prejudice of his master; nor can the ordinary (d) release an administration bond. (b) 3 Bulst. 110. Roll. R. 246. (c) 4 Mod. 305. Comb. 263. (d) Holt's R. 660.

||Where a lessor whose bailiff had made a distress for rent commenced an action in the bailiff's name, and *with his consent*, against the sheriff, for taking insufficient pledges in replevin, and the bailiff without the lessor's privity released to the sheriff, and the release was pleaded *puis darrein continuance*, the Court of Common Pleas set aside the plea. Hickey v. Burt, 7 Taunt. 48.

So,

Legh v. Legh,
1 Bos. & P.
447.; and see
Mountstephen
v. Brooke,
1 Chit. R. 390.
and tit. *Obliga-*
tion, vol. v.,
and 4 Barn. & A. 419.

So, where the obligor of a bond, after notice of its being assigned, took a release from the obligee, and pleaded it to an action brought by the assignee in the name of the obligee, the Court of Common Pleas set aside the plea, nor would they under those circumstances suffer the obligor to plead payment to the obligee.

Barker v.
Richardson,
1 Young & J.
362.; and see
4 Moo. 192.
7 Moo. 356.

If one of several plaintiffs *fraudulently* release the action, the court will set aside a plea of release; but the fraud must be clearly made out by the affidavits of the party seeking to set aside the release.||

Cro. Eliz. 808.

But a sheriff may release an obligation taken by him for the appearance of a person whom he arrests.

Lev. 235.
Offley v.
Ward. Lit.
R. 149. L. P.

In debt on a single bill made to *A.* to the use of him and *B.* the defendant pleads a release made to him by *B.*, on which the plaintiff demurs, and without difficulty it was adjudged for the plaintiff; for *B.* is no party to the deed, and therefore can neither sue nor release it; but it is an equitable trust for him, and suable in Chancery if *A.* will not let him have part of the money; and the book of *Edward* the Fourth, cited to prove that he might release in such a case, was denied to be law.

(E) Of Releases by Executors and Administrators.

5 Co. 28. Off.
Exec. 35.
Plow. 281.

AN executor may, before probate of the will, release a debt due to the testator, for he derives his authority from the testator, and not from the act of the ordinary; in like manner may he pay debts, and take releases, &c.

39 E. 3. 26.

(a) *Vide infra.*

And it hath been held, that if an executor releases all actions, this will extend as well to actions which he hath in his own right, as to those which he hath as executor (a); but yet in some cases such general words may, according to the intention of the parties, be restrained.

Vide title
Executors and
Administrators,
vol. iii.

If there be two executors, and one of them release a debt due to the testator, this shall bind both, for each hath an entire authority and interest different from other joint-tenants; and hence it is held, that, if one executor release to his companion, nothing passes thereby, because each was possessed of the whole before.

7 Taunt. 421.
4 Moo. 192.
Vide 1 Chitt.
390, 391.
Dyer, 319.
pl. 15. Cro.
Car. 420.

||And unless a strong case of fraud is made out, the court will not controul the legal power of one of several plaintiffs to release the action.||

But if there be two executors, and one of them refuse to join in action, upon which he is severed, after such severance he cannot release the action.

Pasch. 11 G. 2.
in *B. R.* Wil-
liams v. Penn.
—In the

In the case of *Williams v. Pen* it was adjudged, in *B. R.*, that if there be two administrators, and one of them release a bond due to the intestate, that this shall bind his companion, and be a good

a good discharge to the obligor; as the statute 31 E. 3. cap. 11. gives an administrator the same power over debts due to an intestate as an executor had, and as an administrator by releasing without consideration is equally liable to a *devastavit* with an executor.

case of Hudson v. Hudson, Mich. 1737. in *Canc.* Lord Hardwicke was of a contrary opinion, on the difference the law makes between an executor and an administrator, the former coming in not by the act of the ordinary, but by the will of the testator, consequently his authority and interest in the assets greater, &c. [The law, however, is as stated in the text; the opinion of Lord Hardwicke in Hudson v. Hudson was applicable only to the particular circumstances of that case. *Jacomb v. Harwood*, 2 Ves. 265.]

An infant executor, upon an actual payment and full satisfaction made to him, may release a debt due to his testator, but cannot without, for that this would be a *devastavit* in him.

5 Co. 27.
Co. Lit. 172.
And. 177.
Moor, 146.

As, if a bond be forfeited, and the infant executor only receive the principal sum without the penalty, and give a general release of all the debt; this release at law is no bar of the penalty. (a)

Cro. Car. 490:
Kniveton v. Latham.
(a) But now, since stat.

4 Ann. c. 16. whereby the penalty is saved on payment of principal and interest. *Qu.* If principal and all interest be paid to such infant executor, if his release will not operate as in the preceding case?

Qu. If prin-

If an executor release a debt due to the testator, this shall charge him to the value of the debt, though perhaps he did not receive near so much as was due; but if he release an account, this resting in uncertainty, he cannot be charged with more than he actually receives.

Hob. 66.
Cro. Eliz. 43.
And. 138.

If an executor voluntarily release a debt, he shall not be relieved against it in equity, although a creditor may.

Vern. 455.

It hath been held in Chancery, that if there are two executors, and they join in a receipt, and one only receives the money, that as to creditors, who are to have the utmost benefit of the law, each is liable for the whole, though one executor alone might release, and the joining the other was unnecessary; but as to legatees, and those claiming distribution, who have no remedy but in equity, the receipt of one executor shall not charge the other, for the joining in the receipt is only matter of form; the substantial part is the actual receiving, and this only is regarded in conscience.

Salk. 318.
pl. 26. *per* Ld.
Harcourt.

(F) *How far the Husband's Release shall bind the Wife.*

BY the intermarriage the husband acquires such an interest in all debts due to the wife, that he may release them, and such release shall bind the wife.

17 E. 3. 66.
2 Roll. Abr. 410.

Baron alone may release waste done by lessee for life before coverture, upon a lease made by the feme.

42 E. 3. 18.
2 Roll. Abr. 402.

So, all rights accruing to the wife during coverture may be released by the husband.

Salk. 115. pl. 4.
Ld. Raym. 73.

The husband may release the wife's right under the statute of distributions.

Lucas, 63.

Moor, 665.

Cro. Eliz. 908.

Noy, 45.

Vern. 261.

If a husband and wife are divorced *a mensa et thoro*, and a legacy is left to her, the husband may release it.

So, where a legacy was given to a feme covert who lived separate from her husband, and the executor paid it to the feme, and took her receipt for it; yet, on a bill brought by the husband against the executor, he was decreed to pay it over again with interest.

Salk. 115. pl. 4.

per Holt C. J.

Ld. Raym. 75.

If a feme covert sues a woman in the spiritual court for adultery with her husband, and obtains a sentence against her and costs, the husband may release those costs, for the marriage continues, and whatever accrues to the wife during coverture belongs to the husband.

Roll. R. 426.

Roll. Abr. 343.

3 Busc. 264.

But if the husband and wife be divorced *a mensa et thoro*, and the wife have her alimony, and sue for defamation or other injury, and there have costs, and the husband release them, this shall not bar the wife; for these costs come in lieu of what she hath spent out of her alimony, which is a separate maintenance, and not in the power of her husband.

Innell v. New-

man, 4 Barn.

& A. 419.; et

vide 9 East,

470.

¶ Where a husband and wife lived separate under a deed, by which the husband stipulated that his wife should enjoy, as her separate property, all effects, &c. which she might acquire, or which by any gift, grant, or representation she or he in her right might be entitled to, and that he would not do any act to impede the operation of the deed, but would ratify all lawful or equitable proceedings to be brought in his or their names, for recovering any property; the wife having, as executrix of *A. B.*, commenced an action on a promissory note in the names of her husband and herself, the husband released the debt, which release was pleaded *puis darrein continuance*. The court ordered the plea to be taken off the file, and the release to be given up to be cancelled, as being in fraud of the deed of separation.

Manning v.

Cox, 7 Moo.

617.

A general release given by a trustee in fraud of his trust to lessees of the trust estate, is void, and if pleaded by the lessees, will be ordered to be taken off the file.¶

[See Vol. I.] ¶title "BARON AND FEME."¶

(G) To whose Benefit a Release shall enure; and who shall be bound thereby, though not a Party to the Release.

Co. Lit. 232.

Moor, 856.

2 Roll. Abr.

410. Hob. 10.

2 Sid. 41. 2 Salk. 574.

IF two or more are jointly and severally bound in a bond, a release to one discharges the others; and in such case the joint remedy being gone, the several is so likewise.

2 Roll. Abr.

411.

So, if there are two conusees of a statute, and one of them releases to the conusor; this shall extinguish the statute as to the other also.

So,

So, if two executors sell the goods of the testator for a certain sum of money, and take an obligation for the money, the release of one of them shall bar both.

17 E. 3. 66.
2 Roll. Abr.
411.

So, where there are two executors, and one only has the possession of the goods which are taken away by a stranger; though he only in whose possession the goods were may bring an action, yet the release of his companion shall bar him.

Bro. Release,
26.

Also, if two are bound in an obligation, and the obligee releases to one of them, proviso that the other shall not take advantage of it, this proviso is void.

Lit. R. 190.
|| *sed vide*
2 Brod. & B.
38. ||

But if *A.* be bound to *B.* and *C.*, *solvend.* the moiety to *B.*, and the other to *C.*, this is a several obligation, and the release of one shall not prejudice the other.

Moor, 64.

So, where several enter into several covenants in the same deed, a release to one of the covenanters will not discharge the others.

Cro. Eliz. 408.
470. 2 Salk.
574.

So, if two are bound to the king, and he releases to one of them, this will not discharge the other.

5 Co. 56.

If *A.* and *B.* are named obligors jointly and severally, and *A.* only seals the bond, and then the obligee releases to *A.*, and after *B.* seals the deed, this release shall enure to the benefit of *B.* though it was not his deed at the time of the release; for the release does not defeat the deed, but is only a bar by plea, and both were bound for one and the same debt, which is satisfied by the release.

2 Roll. Abr.
412. Cro. Eliz.
161.

If divers commit a trespass, though this be joint or several at the election of him to whom the wrong is done, yet, if he releases to one of them, all are discharged; because his own deed shall be taken most strongly against himself. Also, such release is a satisfaction in law, which is equal to a satisfaction in fact. But he who would take advantage of such release must have the same to produce.

Co. Lit. 232.
Hob. 66. Noy,
62. 5 Co. 97.
Brownl. 189.
Cro. Jac. 444.

If trespass be brought against three, and judgment be given against one, and the plaintiff enter a *noli prosequi* against the other two, if the *noli prosequi* be before judgment, it will discharge the whole action. So, if judgment had been against all three, and the plaintiff had entered a *noli prosequi* against the two; for nonsuit or release, or other discharge of one, discharges the rest.

Hob. 70.
Parker v.
Laurence.
|| *Qu.* whether
this doctrine
is correct, ex-
cept as to
actions of *con-*
tract ? ||

In trover against two one pleaded not guilty, and a verdict against him; the other pleaded a release, and verdict for him: on motion for judgment against him who was found guilty it was denied, because the trover being joint, a release of all actions discharged both.

4 Mod. 379.
Kiffin v. Willis.

In replevin by *A.* against *B.*, *B.* makes consuance in right of *C.* for *damage-feasant* to the freehold of *C.*, which is adjudged against *A.*, and judgment that *B.* shall have return irreplegiabie with costs and damages. In a *scire facias* brought by *B.* to have

2 Roll. Abr.
412. Sibley
v. Rawlins.
2 Lutw. S. C.
cited, and said,

that if *C.* had been party to the original suit, it would have been otherwise.

execution of the costs and damages, if *A.* pleads the release of *C.*, in whose right conusance was made of all demands, this is no bar, inasmuch as *C.* was not party to the suit, nor liable to any costs or damages, had the matter been adjudged against *B.*, and therefore *B.* was entitled to the costs and damages, which *C.* could not release.

Vent. 35. Lev.
272. 2 Keb.
530. Stokes v.
Stokes.
3 Mod. 279.
S. C. cited.

A. and *B.* took an obligation from *J. S.* for the payment to them of a sum of money, and this was done by them as trustees, and for securing the payment of legacies to younger children; *A.* brought an action on this bond, to which *J. S.* pleaded a release from *B.*, but upon *oyer* it appeared that the release was of all actions which *B.* had on his own account; and in truth *B.* did not know of the taking the bond, nor was he privy to the suit; and though it was objected that the release of one obligee discharged the bond, and that it must be on his own account, yet it was adjudged, that the release did not bar, for that the words, *on his own account*, must have been put in for some purpose, and could not in this case be for any other, but to distinguish demands which *B.* had in his own right from those he had in right of or in trust for others.

6 Co. 25. a.
Ruddock's
case. Cro.
Eliz. 648. Jenk. 263.

Where divers are to recover in the personalty, the release of one is a bar to all, but it is not so in point of discharge.

Eliz. 648. Jenk. 263. Palm. 319. Owen, 22. Hutton, 40.

3 Mod. 135.

As, if there are two plaintiffs who are barred by an erroneous judgment, and they afterwards bring a writ of error, the release of one shall bar the other; because they are both actors in a personal thing to charge another, and it shall be presumed a folly in him to join with another who might release all.

3 Mod. 109.

But if an action be brought against four, and judgment against them, on which they bring a writ of error, and the defendant in error plead the release of one of them, this is no bar; for it being brought to discharge themselves of a judgment, the release of one cannot bar the other, because they have not a joint interest but a joint burden, and by law are compelled to join in a writ of error.

7 Taunt, 421.
4 Moor, 192.
Vide 1 Chitt.
390, 391.

|| Unless a strong case of fraud is made out, the court will not interfere with the legal right of one of several co-plaintiffs to release an action.||

(H) How far a Possibility or Contingent Interest may be released.

10 Co. 48. a.
Cro. Eliz. 552.

IT is a general rule in our books that a mere possibility cannot be released, and the reason hereof is, that a release supposeth a right in being, and it was thought to countenance maintenance to transfer choses in action, possibilities, and contingent interests.

Lit. sect. 446.

Hence it is held, that an heir at law cannot release to his father's

father's disseisor in the lifetime of the father; for the heirship of the heir is a contingent thing, for he may die in the lifetime of the father, or the father may alien the lands.

Co. Lit. 265. a
10 Co. 51.
Bridgm. 76.
S. P. though

the words *quæ quovismodo in futuro habere potero* are inserted in the release. — But if the heir releases with warranty, it bars him when the right descends. 2 Leon. 20. Hob. 150. || See 8 East, 552. ||

So, if the conusee of a statute releases to the conusor all his right to the land, yet he may afterwards sue execution, for he has no right to the land but only a possibility.

And. 153.
Co. Lit. 265.
Cro. Eliz. 552.
2 Roll. Abr. 405.

So, if a creditor releases to his debtor all the right and title which he hath to his lands, and afterwards gets judgment against him, he may extend a moiety of the same land, for he had no right to the land at the time of the release, and the land is not bound but in respect of the person.

2 Mod. 281.
2 Lev. 215.

So, if the plaintiff release all demands to the bail in the King's Bench, and afterwards judgment be given against the principal, execution may be sued against the bail, for that at the time of the release there was only a possibility of the bail becoming chargeable.

5 Co. 70.
Hoe's case.
Co. Lit. 265.
Moor, 469.
Cro. Eliz. 579
Moor, 469.

Hutt. 17.; *et vide* the case of Harrison v. Huxley, Moor, 852. — ** *Sed quæ* if the release was on consideration, and intended to discharge them as bail; if the court, on motion, would not stay proceedings against them? **

So, if *A.* recovers in trespass against *B.* in *B. R.*, and *B.* brings a writ of error, pending which *A.* releases to *B.* all executions, and after the judgment is affirmed and new damages given to *A.* for the delay upon the statute of 3 H. 7. [cap. 10. and *vide* 19 H. 7. cap. 20.], this release shall not bar *A.* to have execution of those damages, because he had not any right to have execution, nor to any duty at the time the release was made.

2 Roll. Abr.
404. Cro. Jac.
537. Roll.
R. 11. Child v.
Durant.

A lease to the husband and wife for life, the remainder to the survivor of them for twenty-one years; the husband grants it over, and though he survived, yet the grant was held void because it was contingent.

Poph. 5.
10 Co. 51.
Hutt. 17.
Raym. 146.

If the next presentation to a church be granted to *A.* and *B.*, and living the incumbent *A.* release all his estate, title, and interest to *B.*, this release is void, it being of a chose in action: *secus*, had the release been made after the avoidance, at which time the interest would have been vested in *A.*

Cro. Eliz. 175.
600. Owen, 85.
Leon. 167.
5 Leon. 256.
and Dyer, 244.
10 Co. 48.
Like point.

From the reasons herein it was held, that if at common law a woman before marriage had accepted of a jointure in bar and satisfaction of dower, this would not have bound her, because at the time she had no right to dower.

4 Co. 1. Ver-
non's case. —
If a husband
makes a lease
for life and

dies, the wife may release her right of dower to him in reversion, though she has no present cause of action against him. Co. Lit. 265.

has no present

A city orphan cannot at law release her orphanage part to her father, for she hath no right in her during the lifetime of her father. But it hath been held in equity, that such release being for a valuable consideration, as upon the marriage of a daughter, and a portion given her by the father, it may operate as an

Blanden v.
Barker, 1 P.
Wms. 658.
Preced. Chan.
545.
[See acc. Cox

v. Belitha, 2P. Wms. 273. agreement to waive the orphanage, and hath accordingly been so decreed.
Lockyer v.

Savage, 2 Stra. 947. Medcalfe v. Ives, 1 Atk. 63. *Secus*, if a mere voluntary release, Morris v. Burroughs, 1 Atk. 401.]

10 Co. 47. If there be a devise of a term for years to *A.* for life, remainder to *B.*, *B.* may release his right to *A.*, and such release shall extinguish his interest, though it was objected that *B.* had only a possibility at the time of the release made.
Lampet's case.

14 Co. 47. But it was held in the above-mentioned case of *Lampet*, and
4 Co. 66. Sid. hath in like manner been held in other cases, that *B.* could not
188. Raym. assign over his interest to a stranger in the lifetime of *A.*, the
146. same being only a chose in action, and a mere possibility, inas-
much as an estate for life is in supposition of law a larger estate
than for any number of years.

2 Vern. 563. But later resolutions, especially those which have been in courts
of equity, have made a great alteration in this doctrine.

Moor, 806. As in the case of *Cole v. Moore*, where one possessed of a term
devised it to *A.* for life, remainder to *B.*, and made *A.* executor;
B. devised this remainder to *C.* and died in the lifetime of *A.*, and
in order to defeat *C.* of his interest, *A.* assigned his term to a
third person: it was decreed by Lord Chancellor *Ellesmere*, that
A., the executor and devisee for life, was a trustee for *B.*, and
should not be at liberty to destroy this remainder, but that the
executor should preserve the lease, so as it might go according to
the will, with the performance whereof the executor was intrusted.

Chan. Ca. 4. So, in the case of *Goring v. Bickerstaff*, where a trust of a term
was devised to *A.* for life, remainder to *B.*, it was agreed by all
that *B.* might assign over his trust, which shews that a trust of a
term in remainder may be transferred over by deed.

1 P. Wms. 572. One possessed of a term for years devised it to *A.* for life, re-
Wind v. mainder to *B.* *B.* in the lifetime of *A.* devised his remainder to
Jekyl. *J. S.*, who devised it over; and the question was, Whether *A.* (the
devisee for life) being dead, the devisee of *J. S.* should have the
term, or whether it should go to the administrator *de bonis non*?
and it was decreed for the devisee of *J. S.*, and the administrator
de bonis non of *B.* was directed to assign over the term to him.

And in the case of *Theobald v. Duffay*, in the House of Lords,
March 1729-30, it was (*inter alia*) determined, that a possibility
of a term is assignable for a good consideration.

5 Co. 70. It is laid down in *Hoe's* case, that a duty uncertain at first,
2 Mod. 281. which upon a condition precedent is to be made certain after-
wards, is but a possibility, which cannot be released.

Yelv. 215. As a *nomine pœne* waiting on a rent, which cannot be released
Brownl. 116. till the rent is behind, as the nonpayment of the rent makes the
Bridges v. *nomine pœne* a duty.
Enion.

Yelv. 192. So, if a man covenants to pay 10*l.* on the birth of a child, the
Neale v. Shef- covenanter cannot be released of the 10*l.*, it resting merely in
field. contingency whether such child will ever be born or not.

Yelv. 215. So, if an award be, that upon the plaintiff's delivering the de-
fendant by a certain day a load of hay, the defendant shall pay
him 10*l.*; in this case the 10*l.* cannot be released before the day;
for

for it rests merely in possibility and contingency whether the money shall ever be paid, for it becomes a duty on the delivery of the hay only, and not before.

In debt upon a bond against the defendant as administrator, &c. the defendant pleaded a release, whereby the plaintiff, reciting there were several controversies between the defendant and him about a legacy and the right of administration, releases to the defendant all his right, title, interest, and demand of, in, and to the personal estate of the intestate; and on demurrer this was held to be no plea. A difference was taken by Ch. Just. *Holt* between a release of all demands to the person of the obligor or administrator, and a release of all demands to the personal estate of the obligor or administrator, that the last will not discharge the bond as the other may, because the bond does not give any right or demand upon the personal estate, &c. until judgment and execution sued.

2 Salk. 575.
pl. 4. 2 Ld.
Raym. 786.
Topham v.
Tallier.

If *A.* promises *B.*, in consideration that he will sell to his son certain merchandize at such a price, that if his son does not pay it at the feast of St. *Michael* next ensuing, he himself will pay it; and before *Michaelmas* *B.* releases all actions and demands to him who made the promise, this shall not release the *assumpsit*; for till *Michaelmas* it cannot be known whether his son will pay it or not, and till default of payment by him the other is not bound to pay it, and so it is a mere contingency till *Michaelmas*, which cannot be released.

2 Roll. Abr.
407, 408. *Bris-*
cot v. Aier.

(I) How the operative Words in a Release have been construed: And therein of the Words,

1. *Claims and Demands, what are released thereby.*

LITTLETON says, that a release of all demands is the best release to him to whom it is made; and Lord *Coke* says, that the word *demand* is the largest word in law except *claim*; and that a release of demands discharges all sorts of actions, rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, &c.

Lit. sect. 508.
Co. Lit. 291.

But, notwithstanding the large import of the word *demands*, yet there are several instances (which *vide infra*) where the generality of the words hath been restrained to the particular occasion for which the release was made.

By a release of all demands, all actions real, personal, and mixed, and all actions of appeal, are extinct.

8 Co. 154.

So, a release of all demands extends to inheritances (*a*), and takes away rights of entry, seizures, &c.

Co. Lit. 291.
(a) But, if the
king releaseth

all demands, yet as to him the inheritance shall not be included. Bro. Prerogative, pl. 62. Bridgm. 124.

|| A reversion shall not be included in the general terms of the release of a debt. ||

8 Ves. 417.

By a release of all demands made to the tenant of the land, a common of pasture shall be extinct.

Co. Lit. 291.

Cro. Jac. 170. A release of all demands will bar a demand of a relief, because the relief is by reason of the seignory to which it belongs.

2 Roll. Abr. 407. Jordan v. Sanders. If *A.* being possessed of goods loses them, and they come to the hands of *B.*, who being in possession, *A.* by deed releases to *B.* all actions and demands personal which at any time before *habuit vel habere potuit* against *B.* for any cause, matter, or thing whatsoever; this shall bar *A.* of the property of the goods, so that *B.* has the absolute right in him by this release.

Lit. sect. 508. 2 Roll. Abr. 407. By a release of all demands all manner of executions are gone; for the recoveror cannot sue out a *feri facias*, *capias*, or *elegit*, without a demand.

Co. Lit. 291. Bridgm. 124. By a release of all demands to the conusor of a statute merchant before the day of payment, the conusee shall be barred of his action, because that the duty is always in demand; yet, if he releases all his right in the land, it is no bar.

Cro. Jac. 500. So, a bond conditioned to pay money at a day to come is a debt and duty presently, and may be discharged by a release of all actions and demands before the day of payment.

Yelv. 214. Cro. Jac. 500. But in an action of debt for nonperformance of an award made for the payment of money at a day to come, there is no present debt, nor any duty before the day of payment is come, and therefore it cannot be discharged before the day, by a release of all actions and demands.

10 Co. 51. in Lampet's case. So, if a man devises a legacy of 20*l.* to *J. S.* at the age of twenty-three, though the legatee, after he attains the age of twenty-one, and before the day of payment, may release it, yet by the word *demands* it is not released, but there must be special words for the purpose.

Hancock v. Field, Cro. Jac. 170. 2 Roll. Abr. 407. Noy, 123. (b) For the difference when broken or not, *vide* Dyer, 217. Lit. R. 86. Moor, 34. 5 Leon. 69. 10 Co. 51. 5 Co. 71. Hoe's case, Co. Lit. 292. 8 Co. 153. And. 8. 64. A release of all demands does not discharge a covenant not broken (b) at the time; as, where a lessor, on payment of 60*l.* to him by the lessee due on a judgment, released to him all demands; it was adjudged, that this did not release a covenant for repairs not then broken. But it was held, that a release of all covenants would have released the covenant.

Witton v. Bie, 2 Roll. Abr. 486. Cro. Jac. 123. 2 Roll. R. 20. Poph. 136. If lessee for life grants over his estate by indenture, reserving rent during the continuance of the estate, and afterwards releases to the assignee all demands; this shall discharge the rent, for he had the freehold of the rent in him at the time.

2 Roll. Abr. 408. in the case of Witton v. Bie. So, if lessee for years grants over by indenture all his estate, reserving a rent during the term, and after releases to the assignee all demands, this shall release the rent; for though he cannot have an action to demand all the estate, yet this is an estate in him of the rent, and assignable over; and in an action of debt for any arrearages after, he shall claim it as a duty accrued from the said estate; and it shall not be said that the duty arises annually upon the taking of the profits, but this had its commencement and creation by the reservation and contract, which was before.

If there be lessee for years rendering rent, and the lessor grant over the reversion, and the lessee attorn, and after lessee assign over his estate, and after the assignee of the reversion release all demands to the first lessee, yet this shall not release the rent, for that there is neither privity of estate nor contract between them after the assignment. But, if the release had been made to the assignee, it had extinguished the rent.

Collins v. Harding, 2 Roll. Abr. 408. Moor, 544. Cro. Eliz. 606.

If he who has a rent-charge in fee releases to the tenant of the land all demands from the beginning of the world till the making of the deed of release; this shall discharge all the rent, as well that to come as what is past.

20 Ass. pl. 5. 2 Roll. Abr. 408.

It is said by *Littleton* and Lord *Coke*, that by a release of all demands a rent-service shall be released; but this, it is said, is to be intended of a rent-service in gross as a seignory; and therefore in the case of

Lit. sect. 510. Co. Lit. 291.

Hen v. Hanson, where, in covenant brought on a covenant in a lease for years to pay the rent reserved, the defendant pleaded a release by the plaintiff of all demands at a day before the rent in question became due; the plaintiff replied, that the release was in performance of an award of all matters in controversy between the plaintiff and defendant; upon demurrer, it was adjudged by *Foster, Mallet, and Windham*, that the rent was not discharged by this release, as it became due by the perception of the profits, and was not like to a rent-charge, or a rent parcel of the seignory; and they held, that this rent being incident to the reversion, and part thereof, was no more released hereby than the reversion itself was; and that this construction should the rather prevail, as it was not the intention of the party to release this rent. But *Twisden contra* — he said, that in releases and deeds when words are heaped up, the party that is to take the advantage may take the strongest word and in the strongest sense, and that is the reason they are put in; and as to the intent, that must be gathered from the words; and men must take care what words they use, *oportet politiam obedire legibus non leges politiæ*; and he said, he could see no difference between this rent and a rent in fee: both are rent-services, and neither demandable before they become due, otherwise than as in 40 E. 3. 47. it is said, there is a continual demand betwixt lord and tenant; and in this case there is a tenure between the lessee and him in reversion; and the reason why the reversion is not touched by this release is, because it can work only by way of extinguishment, and not by way of passing an interest. But it was adjudged *ut supra*.

Lev. 99, 100. Sid. 141. Keb. 499. 510. *Hen v. Hanson*.

The plaintiff declared upon a lease for years, *reddendum* 30s. at *Lady-day* and *Michaelmas*, and assigned for breach nonpayment of a year's rent due and ending at *Lady-day* 1689, the defendant pleaded a release, dated the 18th day of *November* 1688, of all demands; and upon demurrer judgment was given for the plaintiff; for the growing rent not due, which is incident to the reversion, is not discharged, though the first half-year's rent, which was a duty demandable, was released; but here the re-

2 Salk. 578. pl. 1. *Stephen v. Snow*.

lease being pleaded as a bar to all, which it is not, the plea is naught, and judgment must be given for the plaintiff.

2. By a Release of all Actions and Suits.

Co. Lit. 292.

A release of all actions discharges a bond to pay money on a day to come; for it is *debitum in presenti, quamvis fit solvendum in futuro*; and it is a thing merely in action, and the right of action is in him that releases, though no action will lie when the release is made.

Co. Lit. 292.

But a release of actions does not discharge a debt before the day of payment, for it is neither *debitum* nor *solvendum* at the time of the release; nor is it merely a thing in action, for it is grantable over.

Co. Lit. 295.

Bulst. 178.

Cro. Eliz. 897.

Moor, 133.

(a) But such

release shall release the arrearages incurred before. 39 H. 6. 43. 2 Roll. Abr. 404.

Co. Lit. 292.

If one releases *omnes querelas aut loquelas*, this is as large as a release of all actions, and releases all causes of action, though no action be then depending.

Scott v.

Lifford,

1 Camp. 250.

¶ And so a general release in the common form discharges all actions in respect of any thing that has happened before the date of the release, although the cause of action was not then complete. Thus, in an action by the payee against the drawer of a bill, such a release given to the acceptor, who had become bankrupt, and obtained his certificate, renders him a competent witness for defendant: for, if a verdict should pass against the drawer, and he should thus have a right of action against the acceptor, still this would have reference back to the acceptance, and be discharged by the release.¶

Co. Lit. 287.

By a release of all manner of actions, all actions, as well criminal as real, personal as mixed, are released.

Co. Lit. 284.

(b) But not

after the

grantee has

made his election. Jones, 215.

A release of actions real is a good bar in actions mixed: as assise of *novel disseisin*, waste, *quare impedit* (b), annuity; and so is a release of actions personal.

Co. Lit. 287.

2 Hawk. P. C.

c. 23. s. 137.

In an appeal of robbery or felony a release of all actions personal will not bar, because an appeal, in which the appellee is to have judgment of death, is higher than a personal action. But a release of all manner of actions, or of all actions criminal, or of all actions mortal, or of all actions concerning pleas of the crown, or of all appeals, or of all demands, will be a good bar of any such appeal.

Co. Lit. 288.

And in an appeal of *maihem* a release of actions personal may be pleaded, because damages only are recovered.

Co. Lit. 289.

8 Co. 153.

2 Inst. 40.

Yelv. 209.

Co. Lit. 288.

A release of all actions is regularly no bar of an execution, for execution is no action, but begins when the action ends.

Also, a release of all actions does not regularly release a writ of error; for it is no action, but a commission to the justices to examine

examine the record; but if therein the plaintiff may recover, or be restored to any thing, it may be released by the name of action.

But a release of all actions is a good bar to a *scire facias*, though it be a judicial writ, for the defendant may plead to it, and it is in nature of a new original given by the statute. Co. Lit. 290. Comb. 455.

So, in replevin, a release of all actions is a good bar, for the avowant is defendant, though in some respects he is plaintiff. 2 Roll. R. 75.

By a release of all suits a man is barred of a writ of error. Latch, 110.

So, by a release of all suits a man is barred of execution, because it cannot be had without application to the court, and prayer of the party, which is his suit. Co. Lit. 291. 8 Co. 153.

If a disseisee releases to the disseisor all actions, this is no release of his right of entry; for when a man has several means to come at his right, he may release one of them, and yet take benefit of the other. Co. Lit. 28. b. 8 Co. 151.

So, if a man by wrong takes away my goods, if I release to him all actions personal, yet by law I may take the goods out of his possession. Co. Lit. 28. b. Skin. 57. pl. 1.

If a man releases all actions, by this he shall release as well actions which he has as executor as those in his own right. 39 E. 3. 26. 2 Roll. Abr. 404.

2 Ld. Raym. 1307. S. C. cited by Powell, and said by him to be clearly so, unless there was an action of his own for the release to work upon.

If a man releases all quarrels — a man's deed being taken most strongly against himself — it is as beneficial as all actions, for by it all actions real, personal, and mixed, are released. Co. Lit. 292.

So, if a man releases *omnes loquelas*, it is as large as *omnes actiones*, and extends as well to actions in courts of record as base courts. Co. Lit. 292.

So, a release of *omnes exactiones* (a) is equal to a release of all actions. Co. Lit. 292.
(a) For *exactio* derivatur ab *exigendo*, and *exigere* signifieth to require or demand. Co. Lit. 292. a.

¶ In an action on the 9 Ann. c. 14. by the assignee of a bankrupt, to recover money lost by the bankrupt at play, the bankrupt, who had obtained his certificate, was called as a witness to prove the loss: it was held, that he was incompetent, but that his competency was restored by three releases: 1st, A release by the bankrupt to his assignee; 2d, A release from all the creditors to the bankrupt; 3d, A release from the assignee to the bankrupt. ¶ Carter v. Abbott, 1 Barn. & C. 444. 2 Dow. & Ry. 575.

(K) Release, in what Cases restrained to the special Purpose for which it was given.

ON the rule of law, that every man's deed shall be taken strongest against himself, and on what is laid down in *Altham's case* (b), *generalis clausula*, &c. it hath been insisted, that general words in a release are to be taken strongest against the releasor, and are not to be qualified or restrained by any special recital. Plow. 282. 10 H. 6. 42. (b) 8 Co. 148.

But herein the sure rule and distinction seems to be, that where there

Hob. 74.
Dyer, 240.
Mod. 99.
3 Mod. 277.
Ld. Raym.
[2 Ves. 310.]
Cro. Eliz. 370.
Owen, 71.
S. C. Raym.
299. S. C.
cited.

there are general words all alone in a deed of release, they shall be taken most strongly against the releasor; but where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital.

Indeed, in the case of *Rotherham v. Crawley*, where, upon a reference to arbitration of some controversies relating to relief and heriot claimed by the lord of his tenant, a release was awarded, which was drawn up of *all reliefs, duties, and amercements*, and this release being pleaded to an action of debt on an obligation, it was insisted, though the word *duty* might in strictness extend to a bond debt, that yet it ought not to have this construction in the present case, it being placed between the words *relief* and *amercements*, which shewed that the parties intended duties of the same nature; but it was adjudged otherwise; and that the word *duty* working an extinguishment of the bond at law, the force of the word was not to be controlled by the intention of the party.

But in the following cases the intention of the party has been principally regarded:

Hetl. 9. 15.
Abree v. Page.

As where in debt upon an obligation the defendant pleaded a release of all errors, and all actions, suits, and writs of error whatsoever; it was adjudged, that the release extended only to writs of error, and did not release the obligation, though the word *actions*, had it stood singly, would have done it.

2 Roll. Abr.
409. cited by
Tanfield to
have been ad-
judged Trin.
5 Jac. 1. in
B. R. 3 Mod.
277. Carth. 119.

If a man receives 10*l.* of another, and by his deed acknowledges the receipt thereof, and thereof releases, acquits, and discharges him, and of all actions, suits, debts, duties, and demands; by this release nothing is discharged but the 10*l.*, and the action and demands thereof, for the last words have reference to the first, and so are limited by them.

Show. 155. S. C. cited, and doubted of by *Holt* C. J., who said that no such case was to be found.

Lev. 99.
Sid. 141.

In the case of *Hen v. Hanson* it was held, that a release, made in performance of an award, did not discharge a growing rent, though the release contained general words, for this reason (*inter alia*) that it was not the intention of the parties.

2 Jon. 104.
2 Lev. 214.
2 Show. 46.
pl. 32. 3 Keb.
814. 840.

So, in the case of *Morris v. Wilford*, a release of the wife's customary part, with general words, was held only to extend to the special matter recited.

Payler v. Ho-
mersham,
4 Maule & S.
423.; *et vide*
1 New R. 113.

¶ So, where a release recited that the defendant stood indebted to his creditors (of whom the plaintiffs were two), in the several sums set opposite to their respective names; and that they had agreed to take of defendant 15*s.* in the pound on the whole of their respective debts; and the creditors, in consideration of the said 15*s.* in the pound, did release defendant from all manner of actions, debts, claims, and demands in law and equity, which they, any or either of them, had, or should or might have, against him, by reason of any thing from the beginning of the world to the date of the release. The plaintiffs sued the defendant on a bond, and he pleaded this release; to which the plaintiffs replied (setting

(setting out the release on oyer), that the bond was given by defendant as surety for one *H.*, to secure the repayment of bills drawn by him on the plaintiffs, and of all monies which they should advance to *H.*; and that the sum set against their names in the release was due to the plaintiffs on defendant's own account; and the monies secured by the bond were not, nor was any part thereof, included in the sum set against their names in the deed. On demurrer to this replication, it was held sufficient; and that the general words of the release were restrained by the special recital, and did not extend to the bond-debt.

So, a release was given by the plaintiffs to *Ellerman*, one of two partners, with a proviso that nothing therein contained should prejudice any claims of the plaintiffs against *Forbes*, the other partner, or against the joint estate of *Forbes* and *Ellerman*; and that it should be lawful for the plaintiffs, at any time, to prosecute any actions against *Ellerman*, jointly with *F.*, or against *E.* separately, for the purpose of recovering their debt from *Forbes* and *E.*, either out of the joint estate of *F.* and *E.*, or from *Forbes* or his estate separately. An action was brought by the plaintiffs against the two partners jointly, and *Ellerman* pleaded this release. The plaintiffs set it out on oyer, and replied that the action was brought against *E.*, jointly with *F.*, for the purpose of recovering the plaintiffs' debt, either out of the joint estate of *F.* and *E.*, or from *Forbes* or his estate separately. To this replication the defendant demurred. But the court overruled the demurrer, and held that the release was no bar to the action; for it was to be construed according to the express intent of the parties, and in such a way as to give effect to the whole instrument; and the exception and proviso qualified the generality of the release. (a)

So where a deed, containing a general release of all debts, &c., recited that the releasee had previously agreed to pay to the releasor 40*l.*, for certain premises; and that in consideration of the said sum of 40*l.* being now so paid as hereinbefore is mentioned, and also in consideration of 10*s.* a piece, well and truly paid to the said releasor and *J. S.*, the receipt of which said several sums of money they did thereby acknowledge, they did release &c.; and there was a receipt for 40*l.* indorsed on the release; but it appeared that, in fact, it had not been paid: it was held, that this deed of release was no estoppel from suing for the 40*l.*, since the general words of release were qualified by the recital, which stated only an agreement to pay, and not an actual payment of, the 40*l.*||

So, where the plaintiff released all demands on his own proper account, it was adjudged by the whole court, that an obligation taken by the plaintiff in his own name, in trust for the children of *J. S.*, was not discharged thereby.

So, where in covenant to pay an heriot *post mortem J. S.*, or 40*s.* at the election of the plaintiff, the death of *J. S.* was set forth, and that afterwards the plaintiff chose to have the 40*s.*, for which he brought his action, and assigned the breach in the nonpayment; the

Solly v. Forbes, 2 Bro. & B. 38.
4 Moo. 448.

(a) If *Ellerman*, or his separate property, had been taken in execution contrary to the terms of the instrument, it seems he might have had a remedy by action, taking it as a covenant not to sue.

Lampon v. Corke, 5 Barn. & A. 606.; and see *Baker v. Dewey*, 1 Barn. & C. 704.
Rowntree v. Jacob,
2 Taunt. 154.

2 Lev. 272.
Stokes v. Stokes, Vent.
35. S. C. by the name of
Nokes v. Stokes.

2 Mod. 281.
2 Lev. 210.
Vent. 314.
Trevil v. Ingram.

the defendant pleaded, that the plaintiff released to him all actions and demands, &c.; but this release was made in the lifetime of *J. S.*, and there was an exception in it of heriots; upon demurrer, it appearing that neither the heriot nor 40s. were in demand at the time of the release given, and it appearing plainly by the exception in the release not to be the intention of the parties to release the heriots, judgment was given for the plaintiff.

A. recovered against *B.* a judgment for 600*l.*, and made *J. S.* and *J. D.* his executors, and died; *B.* made *C.* his executor, and devised a legacy of 5*l.* to *J. D.*, and died; *J. D.*, by deed, acknowledged the receipt of the 5*l.* of *C.*, and thereby released the said legacy, and all actions, suits, and demands which he had against *C.* as executor to *B.*, and after argument in *B. R.* it was adjudged that nothing was released but the 5*l.*

In *assumpsit* against the defendant for 7*l.* the plaintiff declares, that whereas he had mortgaged to the defendant certain copyhold lands, redeemable upon payment of such a sum of money, the defendant, in consideration that the plaintiff would release to the defendant his equity of redemption, assumed to pay to the plaintiff 7*l.* The plaintiff avers, that he did release his equity of redemption, but that the defendant has not paid the 7*l.* The defendant pleads this release in bar of the action, because, after the words *equity of redemption*, the scrivener had added, and *all actions, duties, and demands*; and on demurrer, the question in (*a*) *C. B.* was, whether this 7*l.* was released by those general words? and adjudged that it was not.

If an obligation be dated and delivered the 23d of *January* 5 Jac., and obligee make a release, which is dated 22d of *January* 5 Jac., but delivered after 23d of *January*, and by this deed he releases to the obligor all actions *usque diem hujus præsentis temporis*, this release shall not discharge the obligation; for *hujus præsentis temporis* shall be taken the present time when the deed was dated. (*b*)

||(b) *Styles v. Wardle*, 4 Barn. & C. 908. *acc.*||

In trespass, assault and battery, the defendant pleaded a general release of all actions, &c., from the beginning of the world *usque ad diem datûs* of the said release; and it happened that the battery was done upon that very day in which the release is dated; so that it was held that this action was not discharged, for the release did not include that day, and the defendant should have traversed all, &c., after the date of the day of the release.

(L) What Right or Interest shall be said to be released; and herein, of Misrecitals and Exceptions in Releases.

Co. Lit. 274. A RELEASE of a bare right for a day or an hour, &c., is as good as if it was made to the other and his heirs.

Co. Lit. 274. A release may be on condition, but a condition cannot be released on condition.

Lutw. 638. But a release on condition that releasee shall pay releasor so much money, is not good; but if the release be worded in this manner,
per Treby
C. J.

5 Mod. 277.
3 Lev. 269.
Show. 150.
Carth. 119.
Cole v.
Knight.

Ld. Raym.
235. Thorpe
v. Thorpe.

(a) *Vide* the arguments in this case in *B. R.* as reported. Salk. 171. pl. 3.
Lutw. 245. Ld. Raym. 664.

2 Roll. Abr.
410. *Vide*
Dyer, 56. 307.
2 Roll. R.
255. Palm.
218. 2 Brownl.
300. Cro.
Eliz. 14.
2 Mod. 280.

5 Mod. 182.
Dixon v.
Terry.
||*Sed vide* Co.
Lit. 46. b. n. 8.
Cowp. 714.||

manner, that if the releasee pay so much at a day to come, then he releases, &c., this is a good release.

If one man finds the goods of another, and the owner releases to him who is in possession, this vests the property in him (a), but such release must be by deed.

2 Roll. Abr.
407.
(a) Leon. 285.

If one makes a lease for ten years, remainder for twenty years, and he in the remainder releases to the first lessee, the releasee shall have thirty years for his term; for ten years shall not be drowned, because a chattel cannot be drowned in a chattel.

Co. Lit. 275.

The lord *paramount* cannot release to the tenant *paravaile*, saving to him part of the services, but the saving in that case is void. But if there be lord and tenant by fealty, and 20s. rent, the lord may release all his right in the seignory, saving fealty and 10s. rent; but the lord, upon his release to the tenant, cannot reserve a new kind of service.

Co. Lit. 305. b.

A release of common in one acre is an extinguishment of the whole common.

And. 255.
Show. 550.

An entire thing (b) cannot be released as to part; but if a man be bound to perform two things, the obligee may discharge the party of one of them.

3 Bulst. 232.
(b) What shall be said an entire thing, vide
21. Moor, 413.

Palm. 247. Owen,

A release of covenants shall release the bond for performance of covenants. So, in the case of *Hen v. Hanson* (c) it was agreed, that if the rent was released, the covenant for payment of it was released likewise.

Dyer, 356.
(c) Lev. 99.
Sid. 141.

If a man brings an appeal of *maihem*, and after releases the action, the release shall bar him to have an action of battery of the same battery.

45 Ass. 39.
2 Roll. Abr.
413.

If a rent-charge issues out of three acres of land, and he who has the rent releases all his right in one acre, the rent is all extinct, because all issues out of every part, and it cannot be apportioned.

2 Roll. Abr.
414.
|| Vide tit. *Ex-*
tinguishment,
Vol. III. ||

When execution is had of twenty acres, by a release of one acre, the execution is gone, and is a discharge of land and body.

And. 266.
Owen, 21.
Hetl. 79.

A release of all advantages of account is a good bar to an action of debt upon that account.

8 Co. 152.

If I release to *A.* all actions which *J. S.* has against him, the release to *A.* is good, and the last words shall be rejected (d); for a deed may be qualified and abridged by latter words, but not totally destroyed.

Dyer, 56.
pl. 21.
(d) If a release be limited as to one obligee,
Lit. R. 191.

proviso that the other shall not take advantage of it, the proviso is void.

A release to *A.* and *B.* of all actions, is a release of all several actions which the releasor has against them, as well as all joint actions.

Ld. Rayn. 235.

A release excepting one bond, excepts suits and actions for that bond.

Cro. Eliz. 726.

If *A.* recite that he had recovered judgment against *B.* before the justices in *Derby*, whereas in truth the judgment was had in *B. R.*, this misrecital, it is said, will make the release void.

Dyer, 50. 87.;
et vide Plow.
191. 395.;
|| *sed vide*
antè, p. 635. ||

5 Barn. & A. 606., and

THE Profession have already been apprized by Mr. FEARNE, that the former collection in this Abridgment under the title "REMAINDER," seems to be an extract from a Manuscript Treatise, apparently of the Lord Chief Baron GILBERT, upon that subject. In the following pages of this volume they will find the whole of that Treatise, which, by the unsolicited kindness of Mr. HARGRAVE, was communicated to Sir HENRY GWILLIM, with a permission to print it at length. The parts of the Treatise which appeared in print for the first time in the last Edition, are distinguished by being included between inverted commas; the other parts are marked with a single inverted comma. The additional collections of the Compiler of the Abridgment are left without any distinguishing mark; the passages added by Sir HENRY GWILLIM are, as usual, inserted between crotchets; those for which the present Editor is responsible, are distinguished by the ordinary mark ||.

C. E. DODD.

REMAINDER AND REVERSION.

“ ALL that it seems necessary to observe by way of introduction to the ensuing head, is, that after such time as the feudal property came to be extended and enlarged to a perpetual and durable estate, and that donations were frequently made to the feudary and his heirs, this gave him the absolute ownership and property in the feud, and, consequently, as absolute a power of disposing thereof to such persons, and upon such terms, as he thought fit; so that if he aliened the estate to any person for life or years, or any like interest, as the whole benefit he intended the person should be capable of, yet he left a reversion in himself, which being alienable, he might at the same time limit it to go over to any other person after the first interest determined. And this he might likewise limit and circumscribe as he thought fit, and make a further limitation over to any third person, and so on till he gave it out in as large a manner as he himself enjoyed it. All the limitations after the first were called ‘Remainders,’ either from their being a part of what remained and was left in the donor; or, from the nature and manner of their existence, as not being to come to the person intended, till after the preceding estates spent. But, because upon such donations made the donors either reserved particular services to themselves, or in default of such reservation, the law created and raised to them certain duties and services to be done by the tenant, as a recompense and consideration for his enjoying the feud; therefore the tenant could in no case alien or dispose of the feud without a particular licence of his lord for that purpose, since this would have been a breach of that trust the law had invested him with, and might have endangered the peace and security of the lord by subjecting him to the person of his greatest enemy. And as the tenant in such case had no power to alien without his lord’s licence, so neither could he alien in such a manner as to leave his lord for any time, though never so small and inconsiderable, without a tenant to do his services, which the lord could in no sort be supposed to dispense with by his licence. For, besides the danger that might possibly happen in that interval, the services being created at the same time with the feud, and coming to the lord in lieu thereof, were to be as perpetual and unalienable as the enjoyment of that was to be. And since the services to be performed were such as none who were uncertain of enjoying the feud during their lives would either undertake, or think themselves under a sufficient encouragement to perform as they ought, because, if they held the feud but for years, and should happen to survive those years, they would then be

“ come

Cowell, and
Terms of the
Law, tit.
“Remainder.”
Co. Lit. 49. a.
145. a. 26. 51.
Moor, 344.
Vaugh. 269.

Co. Lit. 43. a.
b. 2 Inst. 65,
66. 501.

9 Co. 135. Co.
Lit. 269. a. b.

“ come destitute of a provision and support for their lives, notwithstanding all their former labours and services to the lord; and, consequently, from such tenants the lord could not expect a faithful and zealous discharge of their duties; therefore the services were always to be performed by such as held the feud for life, at least; and, consequently, the tenant could not by his alienation leave the lord without such a one. For this reason it was, that if a lease was made for years, remainder to the right heirs of *J.S.*, there would be no tenant of the freehold to do the services. So, if a lease were made for life, or a gift in tail, to begin at a future day or time, such lease or gift were made void; for until the commencement, the lessee or donee would have nothing, and, consequently, be under no obligation to do the services; and the lessor or donor in the mean time, having parted with their interest *pro tanto*, would be regardless of the services. To prevent, therefore, this inconvenience and danger to the lord, the law adjudged such lease, gift, or remainder to be void; and, consequently, the first tenant continued tenant still to the lord, and as such was obliged to a performance of the services. These reasons, though they now seem antiquated, may perhaps be of equal force with the reason now commonly urged, from the danger of suffering the freehold to be at any time in abeyance, expectancy, or suspense, because the rights of strangers would suffer thereby, for want of a person in the mean time to charge with a præcipe for recovery thereof. But yet it was not absolutely necessary, that the estate of freehold or inheritance should be the present and only subsisting interest: for if a lease were made for years, remainder for life, or in tail, and livery thereupon, this remainder was good; for here was no time wherein the lord was without a tenant of the freehold, and his being obliged to all the feudal services might perhaps be one reason why so little regard was had to the interest of the lessee for years, he being no ways able to control or impeach the acts or disposition of the freeholder.

6 Co. 57, 58.

“ Another thing observable is, that as the tenant could in no sort alien without his lord's licence, nor could that licence be so interpreted as to deprive the lord of a tenant qualified to do his services, so, when he had, by a sufficient provision, taken care of his lord, he might then carry over the disposition to any other person as far as he pleased. For it would have been unreasonable to compel him to assign over the whole fee to any other person, when no exigencies of the tenure required it, and would also have taken away his power of providing for others, whom he might lie under equal obligations to take care of. Hence came the notion of remainders; and the reason why they were to be limited and pass out of the grantor at the same time with the particular estate, seems to arise from the nature of the licence formerly given for alienation. For as the tenant could not alien at all without his lord's licence, so neither could he alien for any longer time, or to any other person, than such

1 West. pl. 567.

“ licence

" licence warranted. Therefore, if he had a mind to dispose of
 " the feud to several persons in succession, he was to procure a
 " licence for that purpose, and by proper limitations to let in all
 " persons within the benefit of it at the same time, lest by death
 " or otherwise he might be afterwards prevented from pursuing
 " it. And these remainders are now limited of such sorts of
 " inheritance as will not come within the rules of this reasoning.
 " And though licences for alienation are ceased, yet it has been
 " thought fit to observe the rules deducible therefrom in the
 " limiting and settling of such remainders. But, before we enter
 " into a particular division of this head, it will be necessary to
 " observe further, that anciently the tenant being possessed of
 " the entire property of the feud, might, upon his alienation in
 " fee, have erected a seignory to himself, to arise out of the ten-
 " ancy. And this practice was encouraged, because it multiplied
 " feudal tenants, and brought greater force into the field. But,
 " though these seignories were so far in the nature of reversions,
 " that upon determination of the tenancy in fee by escheat or
 " forfeiture, the tenancy came back again to the first tenant, and
 " he became seised thereof in fee as he was before; and though
 " the seignories themselves were then alienable, as the rever-
 " sion now is, and carried with them the rents and services, as
 " a grant of the reversion now does; yet, whether they might
 " have then limited a remainder over upon a tenancy in fee, as
 " they may now do, where the reversion would otherwise vest
 " in themselves, is uncertain, since there was no reason of con-
 " venience to multiply such remainders, though they found it con-
 " venient to multiply such seignories. But, however it happened
 " before the statute of *quia emptores*, yet after that statute no one
 " could have disposed of the fee without a remainder upon it.
 " For the fee in all cases by that statute was to be holden of
 " the first feudal lord; and, consequently, the tenant, who made
 " the alienation, had nothing further to expect in the tenancy,
 " either as a seignory, reversion, or escheat; but these now be-
 " longed to the first feudal lord, and therefore the tenant could
 " not dispose of what belonged to another: for the reason of
 " making that statute was, that the tenant might not erect seign-
 " ories to himself to prevent the escheat to his lord: hence it
 " plainly followed, that every remainder must depend upon a
 " particular and less interest than the fee, and therefore was
 " confined to three cases, *viz.* to estates for years, which is the
 " least certain interest the law knows, to estates for life, and to
 " estates-tail. The estates for years and for life were the an-
 " cient one at common law, and were the terms for which people
 " usually disposed of the feudal interest: the estate-tail came
 " in upon the construction of the statute *de donis*, which made
 " the inheritance to be certainly descendible. And when the
 " statute *quia emptores* followed it so near, they then construed
 " the fee conditional in the donee to be an estate-tail, and the
 " ancient seignory in the donor to be a reversion. If they had
 " not made such construction, the statute of *quia emptores* had

Co. Lit. 22,
 25. a. 2 Inst.
 335.

“ shut out the donor, which had been to carry the matter farther than either statute intended; and therefore, to preserve the force of both statutes, that which was before called a seignory was now called a reversion, that the donor might have his own interest preserved, and yet not be said to erect an intermediate seignory between him and his lord, which the statute of *quia emptores* had forbidden. And all this plainly shews, that a seignory and reversion are in their own nature much the same.

“ But, for the better understanding of this head, we shall consider,

(A) Of what Things a Remainder may be made.

(B) What Words are sufficient to create a Remainder.

1. *Of the Propriety of the Words made use of to pass the Remainder.*
2. *Of the Description or Designation of the Person who is to take the Remainder.*

(C) Of the several Kinds of Remainders as distinguished into Remainders vested, or in Contingency or Abeyance.

(D) Of Remainders in Abeyance or Contingency; what Estate is sufficient to support them; where they are to take Effect; and by what Means they may be destroyed or prevented from coming *in esse*; and therein, of Remainders by way of executory Devise or future Interest.

(E) Of Remainders that arise on Conditions Precedent or Subsequent.

1. *Of the Difference between a Condition and a Limitation, and in case of the Condition when it precedes the vesting of the Remainder as the Cause thereof, and is annexed to the first Estate, and when it is annexed to the first Estate absolutely without any regard to the Remainder.*
2. *Between a Deed and a Will, when in both the same Words of Condition are made use of for vesting the Remainder.*
3. *Between a Limitation over in such Case of a Will, and where no Limitation is made over.*
4. *Between Remainders that are to arise upon Conditions agreeably to the Rules of Law, and such as are to arise upon Conditions repugnant and against the Rules of the Law.*

5. *Between*

5. *Between such Words as actually make a Condition, and such as are only descriptive of the Manner when and how the Remainders are to arise and take place.*

(F) Of Cross Remainders, or those arising by Implication and Construction of Law.

(G) Of vested Remainders, and of the particular Estate to support them in their Creation; how long it must continue; and when by Determination, Grant, or Refusal thereof, the Remainder is discontinued, barred, or destroyed, and when not.

(H) In what Cases a Remainder or Reversion shall be subject to the Acts or Charges of the particular Tenant; and therein, of the Remedies for him in the Reversion or Remainder by Entry, Action, or Receipt.

(I) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

(A) Of what Things a Remainder may be made.

“ **A**LL that it seems necessary to observe for explaining and clearing this point will be resolved by putting a case or two, wherein it has been holden doubtful if the remainder were good.

“ A man seised of lands in fee grants thereout a rent-charge to one for life or years, remainder over to another in fee or in tail, &c. It was doubted, whether this remainder were good, because this rent had no existence at all before the grant; and the grantor cannot be said to have any part of the rent left in him, as he would of land, because he first gave being to the rent, and bounded the time of its existence, which being run out, nothing thereof remains to grant over to another; and a remainder is to be granted out of that which would otherwise be a reversion in the grantor, which here this rent cannot be, being newly created. But in this case, by the better opinion of the books, and a judgment lately in point (a), such remainder of a rent newly created has been holden good. For, as the grantor might at first have granted it in fee or for ever, having such perpetual and durable interest in the fund out of which it was to arise, so he may share and divide the grant, and give part thereof to one, and part to another in succession; and the rather, because the particular estate and remainders are

Plowd. 55. a.

1 Brook, 252.

pl. 8. 254.

pl. 54. 58.

2 Roll. Abr.

415. pl. 2. 26.

70. 76. 78.

(a) 1 Lev. 144.

1 Sid. 285.

2 Keb. 29.

“ but as one estate, as to the grantor, being limited to pass out
 “ of him all at the same time. And as to him, it makes no
 “ difference, whether one or more take benefit jointly, or in suc-
 (a) Mo. pl.100. “ cession one after another. But (a), if he grant such rent for
 “ life or years, without going further, he cannot after grant the
 “ reversion thereof to another, because he has no reversion in
 “ him for the reasons before given. The reason of this case will
 “ go likewise to commons, estovers, &c. newly created.”

4 Mod. 275.
 280. Ld. Raym.
 49. Skin. 446.
 pl. 4. See
 2 Salk. 465.
 pl. 2. Carth.
 252. 350.
 2 Salk. 465.
 pl. 2. Comb.
 334. Rex v.
 Kemp.
 Show. P. C.
 5. 11.
 In the case of *The King v. Kemp*, it was held, that the king
 may grant an estate in an office to commence *in futuro*, or upon
 a contingency; for he hath no inheritance in the office, or the
 execution of it, but in point of interest only to grant. And it
 was said, there was a diversity between offices in fee existing,
 and such as were granted only for life, which being as a new
 thing created, might, as a rent *de novo*, be granted to commence
in futuro.

‘ If one be created baron, viscount, earl, &c. by patent, and
 ‘ after, in the same patent, the same honour be granted to
 ‘ another in remainder, yet this operates as a new grant, and not
 ‘ as a remainder; for the king had no reversion of that honour
 ‘ in him, though he had still the same power of appointing one
 ‘ in succession to take it, as he had of granting it to the first.

9 Co. 48. And.
 pl. 201.
 ‘ So, if one hath the office of park-keeper, forester, gaoler,
 ‘ sheriff, &c. to him and his heirs, he may grant these offices to
 ‘ one for life, remainder to another for life, &c.; for *omne majus*
 ‘ *continet in se minus*, and as they are grantable over in fee, so
 ‘ may they be granted in succession to one for life, with re-
 ‘ mainders over, &c.’

Lev. 220.
 Bridg. R. 113.
 A licence to sell wine may be granted to one for life, remainder
 to another for life; because by such licence not only an authority
 passeth, but an interest, by way of restitution to that which was
 the subject's right before it was prohibited by statute.

“ But before we leave this head, it may be proper to enquire
 “ into the reasons and practice of limiting remainders in personal
 “ goods or chattels; for these in their own nature seem incapable
 “ of such a limitation, because, being things transitory and by
 “ many accidents liable to be lost, destroyed, or otherwise im-
 “ paired: besides, the exigencies of trade and commerce requiring
 “ a frequent circulation thereof, it would put a stop to all trad-
 “ ing, and occasion perpetual suits and quarrels, if such limit-
 “ ations were generally tolerated and allowed. But yet, in last
 “ wills and testaments, such limitations over of personal goods or
 “ chattels have sometimes prevailed; especially, where the first
 “ devisee had only the use or occupation thereof devised to him;
 “ for then it was holden, that the property continued in the exe-
 “ cutors of the testator, and that the first devisee had no power
 “ to alter or take it from them. But in either case, if the first
 “ devisee did actually give, grant, or sell such personal goods or
 “ chattels, the judges would very rarely allow of actions to be
 “ brought

37 H. 6. 30. a.
 Dyer, 7. pl. 8.
 359. pl. 52.
 Cro. Car. 347.
 Plowd. 521. b.
 542. b. Br. tit.
 Devise, pl. 15.
 5 Co. 16, 17.
 1 Roll. Abr.
 610. pl. 4.
 Godolph. Abr.!

"brought by those in remainder for the recovery thereof. Hence it came to pass, that it was a long while before the judges of the common law could be prevailed with to have any regard for a devise over even of a chattel real or a term for years, after an estate for life limited therein, because the estate for life being in the eye of the law of greater regard and consideration than an estate for years, they thought, he who had it devised to him for life, had therein included all that the deviser had a power to dispose of. And though they have now gained that point upon the ancient common law, by establishing such remainders, and have thereby brought that branch out of the Chancery, (which court frequently helped the remainder-man by allowing bills to compel the first devisee to give security, &c.) yet it was at first introduced into the common law under a new name, and took all the sanction it has since received from thence; an account whereof, and how far it has been carried, may be seen at large in the Duke of *Norfolk's* case. But, 'as to personal goods and chattels, the common law has provided no sufficient remedy for the devisee in remainder of them, either during the life of the first devisee, or after his death; therefore the Court of Chancery seem to have taken that branch to themselves, in lieu of the other which they lost, and to allow of the same remedy for such devisee in remainder of personal goods and chattels, as they before did to the devisee in remainder of chattels real or terms for years.

356. *Swinh.*
137. 1 *Bulstr.*
192. 8 *Co.* 95.
2 *Bendl.* pl. 57.
[[As to the limitation of chattels, see *Roper on Legacies*, c. 22. (3d ed.)]]

5 *Ch. Ca.* 1.

"Therefore, where a man devised 600*l.* a-piece to two daughters, and the residue of his personal estate to his son, and if either of his children died during their minority, the survivors to be heirs to the deceased by equal portions; the son died, and the one sister brought a bill against the executors and the other sister to have her own 600*l.* and the half of her brother's personal estate; she had a decree accordingly; but was forced to give security to pay back her own 600*l.* in case she died during her minority; though it was said, if she died during minority leaving issue, it would be a hard case.

1 *Ch. Ca.* 199

"A devise was made of the use of goods, plate, and household stuff to one for eleven years, and after to another, and held a good devise, and a decree to deliver them accordingly after the eleven years.

2 *Ch. R.* 137.
Jolly v. Wills.

"So, upon a devise of the use of certain books, jewels, and rarities, to one for life, and after of the things themselves to another; he in the remainder brought a bill in the lifetime of the first devisee to have security for their forthcoming after the death of the first devisees; and the court, being assisted by two judges, held the remainder good; but ordered them to move for the security another time."

1 *Ch. Ca.* 130.
Vauchell v. Lemon.
[[See *Fearne*, *C. R.* 404. (7th ed.)]]

A farmer devised his stock (which consisted of corn, hay, cattle, &c.) to his wife for life, and after her death to the plaintiff. It was objected, that no remainder can be limited over of such chattels as these, because the use of them is to spend and consume them: but the Master of the Rolls said, the devise over was good but added,

Abr. Eq. 361.
Hale v. Burrodale. [Where the things limited over are of a perishable

nature, the modern way, I believe, is to direct them to be sold, and to allow the tenant for life the interest of the produce of the sale.]

1 P. Wms. 651.
Upwell v. Halsey.

2 Ch. R. 151.
Warner v. Boosley,
Swinb. 137.
God. Abr. 360.
Manning's case. 8 Co. 94.
contra. There, the devise is to the executrix for life, remainder over, and the executory devise adjudged good. || See 1 Chanc. Ca. 129.
2 Freem. 157.
Cas. 172. 1 P. Will. 6. 2 Freem. 206. Cas. 280. 5 Madd. 277. Fearn, C. R. 404. (7th ed.) ||

Salk. 231. pl. 9.
Ld. Raym. 325.
Ayres v. Falkland. See
Pollex. 32.

1 P. Wms. 666. *Vide* Executory Devises, under tit. "*Legacies and Devises*," vol. v. — || Mr. Fearn and Mr. Butler lay it down that a remainder, in the legal sense of the word, cannot be limited in chattels real or personal, after a disposition of them to one for life, or *otherwise*. See Fearn, C. R. (7th ed.) p. 401.; but that such limitation is only good as an executory devise. See the observations on this point in Cornish's Essay on Remaind. p. 92.; and that terms of years may clearly be limited over by way of remainder, after a previous disposition of a partial interest in the term, see Goodright v. Parker, 1 Maule & S. 692. Cotton v. Heath, 1 Roll. Abr. 612. pl. 3. 1 Eq. Ab. 191. pl. 2. Preston on Abs. vol. ii. p. 4. Fearn, C. R. 402. ||

1 Ch. R. 129.
260. 2 Ch. R. 66. 153. 2 Ch. Ca. 94. 2 Vent. 349.

that if any of the cattle were worn out in using, the defendant was not to be answerable for them; and if any were sold as useless, the defendant was only to answer the value of them at the time of the sale. And an account was decreed to be taken accordingly.

A. gives his sister by will 10*l.*, and directs that such part of his personal estate as his wife should leave of her subsistence should go to the sister: whatever the wife has not employed in that way, shall go over and be accounted for.

"But, where a man devised debts and personal estate to one, whom he intended executrix, for life, and after her death to another; the executrix died, and he in remainder brought a bill against her executor for the said personal estate; the bill was dismissed, and the remainder holden void, the first devisee being executrix, in whom the personal estate vested and attached by a right prior to the devise, and so belonged to her executor."

A. being possessed of a term for ninety-nine years, devises it to B. for life, and after to six others successively, for their lives, if the said term should so long continue; and all the seven persons being dead, and the term continuing, it was adjudged, that it should revert to the executors of the testator, and that it did not vest in the survivor of the devisees so as to transmit it to his representatives.

But a devise of a term for years, or personal chattel to one for a day or an hour, is a devise of the whole term or interest, if the limitation over is void, and it appears at the same time that the whole was intended to be disposed of from the executors.

|| Mr. Fearn and Mr. Butler lay it down that a remainder, in the legal sense of the word, cannot be limited in chattels real or personal, after a disposition of them to one for life, or *otherwise*. See Fearn, C. R. (7th ed.) p. 401.; but that such limitation is only good as an executory devise. See the observations on this point in Cornish's Essay on Remaind. p. 92.; and that terms of years may clearly be limited over by way of remainder, after a previous disposition of a partial interest in the term, see Goodright v. Parker, 1 Maule & S. 692. Cotton v. Heath, 1 Roll. Abr. 612. pl. 3. 1 Eq. Ab. 191. pl. 2. Preston on Abs. vol. ii. p. 4. Fearn, C. R. 402. ||

"Where money, goods, or other personal chattels, are devised to one and the heirs of his body, or to one, and if he die, without heirs of his body, the remainder over, this remainder is totally void, and the courts will not allow of a bill by the remainder-man to compel security to have the money, &c. after the death of the first devisee; but it shall go to his executors or administrators. For the first devise gives the absolute property of personal estate, as a like devise of real estate before the statute *de donis* gave a fee, upon which no limitation could be made further; and as the heirs are the representatives to take a real estate, so are the executors to take a personal estate; and this is not within the statute *de donis*, but remains at common law."

If *A.* devise that his goods and furniture shall remain in his house to be enjoyed according to the limitations of his will, by those entitled to the house, the first that would be tenant in tail of the house becomes absolute owner of the goods.

Saunders v. Saunders, admitted. [See Gregory v. Pelham, 5 Br.

P.C. 435. Duke of Bridgewater v. Egerton, 2 Ves. 122. 1 Br. Ch. R. 281. notes. Duke of Marlborough v. Spencer, 1 Br. P.C. 592. Foley v. Burnell, 1 Br. Ch. R. 274. Dom. Proc. 27 April 1785. [Cowp. R. 435. note.] Vaughan v. Burslem. 3 Br. Ch. R. 101.] [Lincoln v. Duke of Newcastle, 12 Ves. 218. 230. Carr v. Erroll, 14 Ves. 478. Deerhurst v. Duke of St. Albans, 5 Madd. 252.]

“ But, where a devise was of money and goods to one for 2 Ch. R. life, and if the devisee died without issue, then to go over to “ another, this was held a good devise over; for the first limitation being expressly for life, the words after could not enlarge “ it by implication, as they would a real estate, and then it falls “ within the common rule of other cases.

“ One by will devised 1300*l.* to his daughter *A.*, to be paid at her age of 21 years, and if she died without issue before 21, “ then to go over to *B.*, provided if she married before 21 without consent of certain persons, then to go over to *C.* She did “ marry before 21 without such consent; and upon a bill brought by *B.* it was decreed, that *A.* should give security, “ &c. for the money, if she died before 21 without issue; and “ the Master of the Rolls who heard the cause said, the law was “ now settled accordingly. But there, the decree was so “ ordered as to serve both contingencies, viz. that upon her “ marriage before 21 without consent, the money should go to “ *C.*, yet so that if she died before 21 without issue, it should go “ to *B.* according to the devise.”

Pawlett v. Doggett, MSS. Gilb. [2 Vern. 86. S. C.]

(B) What Words are sufficient to create a Remainder.

1. *Of the Propriety of the Words made use of to pass the Remainder.*

‘ **T**HE word *Remainder* is no term of art, nor is it necessary to create a remainder. For any other words, sufficient to shew the intent of the party, will create a remainder; because such estates take their denomination of remainders more from the nature and manner of their existence, after they are limited, than from any previous quality inherent in the word *remainder* to make them such. Therefore, if a man gives lands to *A.* for life, and that after his death the land shall revert and descend to *B.* for life, &c. this is a good remainder, and may be pleaded as such.

Roll. Abr. 416. 1 Brook, 253. Plow. 29. 154. 157. b. 159. 170. b. 542. a. Dy. 125. b. 1 Roll. R. 319.

‘ So, if lands be given to one and the heirs male of his body, and to him and the heirs female of his body, this limitation to the heirs female is a remainder; because it is not to take place till the estate to the heirs male is spent.

Co. Lit. 577. a.

‘ So, if lands are given to a widow, and to the heirs of the body of her late husband on her begotten, this is a remainder to the heirs of the body of the husband; because it cannot take effect till after the widow’s death, who hath an estate for life.

Co. Lit. 26. b. 220. a. 2 Mod. 210.

Plow. 152.
Moor, pl. 54.
Dyer, 125.
Roll. R. 319.
Cro. Eliz. 10.
742.

‘ So, an estate limited to *A.* for life, or in tail, *et post decessum ejus*, or *pro defectu talis exitus*, to *B.* and the heirs of his body, is good, though there be not the word *remainder*. So, if a lease be made to *A.* for life, and that after his death *B.* shall have the profit, this is a good remainder to *B.*’ “ And in the common limitations of settlements at this day, the word *remainder* is seldom used.”

6 Co. 17. b.
Raym. 83.

‘ So, a lease to *A.* for life, and that after his death his children shall have it, is a good remainder.

Cro. Eliz. 727.
768. 792.
Moor, pl. 795.
Co. Lit. 299.
Raym. 142.

‘ Nay, though an estate be limited expressly as a remainder, yet, if it be not so in construction of law, the word *remainder* will have no force to make it such. As, where *A.* was seised of lands in fee, and he and *B.* levied a fine to *C.* in fee, who granted and rendered to *B.* in tail, rendering rent, and if *B.* died without issue, *tenementa præd. integrè remanerent* to *A.* and his heirs; *B.* suffered a common recovery; and *A.* distrained for his rent: this was adjudged a reversion, and as such the rent passed with it to *A.*, and was chargeable upon the land in whose hands soever it came, by virtue of a contract which cannot be destroyed by the recovery.

Cro. Eliz. 216.
Leon. 218.
Co. 153. Dy.
253. 3 Leon.
195. Swinb.
123. God. Abr.
356. 2 Roll.
Abr. 415.
1 Bulstr. 193.
Bro. 321. Co.
Lit. 45. Plow.
198. Moor,
441.

‘ But here it may be proper to take notice of a set of words sometimes used in leases for years, which are so far a part of the limitation and description of the first interest, that they cannot again be made use of to pass any further interest in the same land. As, if one make a lease to *A.* for eighty years, if he so long live, and if he happen to die within the said term, *then the lands for the residue of the said term, or for so many years as shall be then remaining of the said term, to go over to another*; this limitation over is void; because the time, or term, of eighty years was not absolute to *A.*, but was determinable upon his death, and by his death the whole term is at an end; as if a lease had been made to him barely for his life, and then to limit the residue of a term, when nothing thereof remains, is repugnant and void. But some opinions incline, that a devise in such a manner would be good, by reason of the intent of the party and the equivocal signification of the word *terminus*, which may, though not strictly, signify also the time or space of eighty years, as well as the estate or interest for eighty years determinable as aforesaid. But now, if a lease be made to *A.* for eighty years, if he so long live, and if he die within the said term, *then the land to go over to another for the residue of the eighty years*, this is a good remainder; because, though the term or interest be determined, yet the land, and part of the years, still remaining, those years may be made the measure of the succeeding interest, as any other number of years may be.’

Mod. 195. 520.
contr. vide
1 Leon. 195.
1 And. 259.

Hob. 313.
Hutt. 87.
Windsore
v. Hobart.

J. S. seised of lands in fee by indenture demises them to *A.* for life, *habendum* to the said *A.*, *B.*, *C.*, and *D.*, his three sons, for their lives and the life of the survivor of them successively: after the death of *A.* it was adjudged in this case, first, that if the sons could take, it must be by way of remainder, they not being parties to the deed, and then it must be as joint-tenants, which could

could not be by reason of the word *successivè*. Secondly, that they could not take in succession, for the (a) uncertainty whose estate or interest was to commence first. *(a) But had it been ascertained by a clause successive sicut nominantur in charta, it had been good.* Leon. 246. Godb. 220.

2. *Of the Description or Designation of the Person who is to take the Remainder.*

“ As to the description or designation of the person who is to take the remainder, so far as it falls within the names of purchase allowed of by law, I shall not here enter into it, that being equally applicable to possessions as well as remainders. All that seems here proper to come under consideration is, how far a limitation in remainder to a man’s own right heirs, or the heirs male or female of his own body, or to the right heirs of another person, shall be good as a remainder, and how far not. As to the limitation to a man’s own right heirs, or the heirs male or female of his own body, this is void, because, say the books, no one can make his own right heir a purchaser either of a fee-simple or a fee-tail, without departing with the whole estate. But this being a reason that carries little satisfaction or instruction with it, we must therefore seek higher, and endeavour to fetch the reason of it from the old constitution whereon all our law seems to be founded, that is, from the nature of the feudal tenure, and the relation that was at first established betwixt the lord and his tenant. And then clearly the reason seems to be this: when donations came to be made to the feudary and his heirs, or heirs male, or heirs female of his body, under certain duties and services, these words, ‘heirs, &c.’ being words of limitation, and appropriated to measure out the length or continuance of the estate intended to be given, and of the present tenant only, the lord could have notice how far he would be capable of performing the services, but not of the heirs, or heirs male or female, &c. who were not then *in esse*, and yet were to be liable to the same services, when they came into the tenancy: therefore the lord was to have the tuition and education of such heirs, &c., in case they happened by reason of their minority to be incapable of performing the services, that so he might, by his care and discipline, secure to himself tenants always capable thereof, either in their own persons, if they happened to be males, or by proper marriages with his tenants, if they proved to be females. And this was the more reasonable, because he gave the tenancy to the heirs, or heirs male, or heirs female, &c., as well as to the tenant himself; and all who came under that description were equally in his view, and within the words of his gift. But now, if the tenant might have broken through this provision of his lord, and have given the tenancy to his heirs, &c., by his own immediate gift, then all these ends of the tenure had been frustrated and defeated; for they coming to the tenancy, not by the donation of the lord, but by the disposition of the tenant, though they would have

Co. Lit. 22.

“ have been still liable to the naked services, yet the lord had lost
 “ the advantages of wardship, marriages, &c., which were annexed
 “ only to those who came in upon the terms of his own donation
 “ by descent; and since they, as heirs, were equally included in
 “ the first donation, and upon the death of their ancestor were to
 “ come in, in virtue thereof; therefore the law construes such gift
 “ or disposition of the tenant, whether in possession or remainder,
 “ to be totally void; either for that then it came too late, the tenancy
 “ being vested in them immediately upon their ancestor's death,
 “ and therefore it was fruitless to give them what they had al-
 “ ready; or to prevent the mischiefs that might accrue to the
 “ lord by settling in such tenants, as for the present might not be
 “ capable of doing the services, and for want of a proper educa-
 “ tion under the lord, would never after be qualified for them.
 “ And this seems to be the true reason of that so often *deccanta-*
 “ *tum* in our books, that a man cannot make his own right heir,
 “ or heir male, or female, a purchaser, without departing with
 “ the whole fee. And therefore when the tenants found that this
 “ would not do to defeat the lord of the wardship and marriage
 “ of their heirs, they then found out the way of making feoff-
 “ ments and other dispositions to their eldest son apparent by
 “ name in their lifetime; and then, though they died leaving him
 “ a minor, and not capable of the services, yet the lord lost the
 “ advantages of wardship, marriage, &c. But to meet with this
 “ devise, and others of the like kind, the statute of *Marlb. c. 6.*
 “ and other subsequent statutes were made, which have secured
 “ the lords against all the evasions of their tenants to defeat them
 “ of the advantages of their seignory.”

2 Inst. 109,
 110, &c. Co.
 Lit. 76. 78.
 6 Co. 78.
 Plowd. 82. a.

Dyer, pl. 20.
 Moor, 720.

“ Therefore, if a man makes a lease for life, or a gift in tail by
 “ deed, remainder to another for life or in tail, remainder to him-
 “ self and his heirs, or to his own right heirs only, this remainder
 “ to himself or to his heirs is void, because the fee continued still in
 “ him, and then he cannot give himself what he had before, and
 “ he cannot give to his heirs as such what the law gives them
 “ by a prior right to vest at the same time with his disposition to
 “ them.”

Leon. 182.
 Moor, 284.
 And. 288.
 Fenwick v.
 Mitford.
 || Vide Co. Lit.

So that if one levies a fine to the use of his wife for life, the
 remainder to the use of his eldest son, and the heirs male of his
 body; and for want of such issue, to the use of his own right heir,
 this limitation to the use of his right heir is merely void, and he
 hath a reversion and not a remainder in him.

22. b. note 3.

Fearne, C. R. 42, 43. 51.||

Dy. 156. Gras-
 wold's case.
 Hob. 30.
 2 Roll. Abr.
 415. pl. 1.
 Co. Lit. 22. b.
 Bendl. 40.
 2 Leon. 25.
 2 Mod. 209.
 1 Ventr. 578.
 1 Roll. R. 259.

“ So, where *A.* by indenture gave lands to *B.* for life, re-
 “ mainder to the heirs male of the body of *A.*, remainder to
 “ his own right heirs; *A.* died, leaving two sons; the eldest
 “ had issue a daughter, and died; it was adjudged for the
 “ daughter against the uncle; either because the estate to the heirs
 “ male was void, the fee being cast upon him by the death of the
 “ ancestor, in virtue of the first donation; or, because, admitting
 “ it to be good, then it was vested in the eldest son by purchase,
 “ being the first taker, and consequently ceased upon his dying
 “ without

“without issue male, and then the daughter is heir of the fee-
 “simple.” (a) ‘But, if a man makes a feoffment in fee to the use
 ‘of himself for life, remainder to the heirs male of his own body,
 ‘this is a good estate-tail executed in himself, for the law con-
 ‘joins his estate for life, and the remainder to the heirs male of
 ‘his body, to prevent that remainder’s being lost by forfeiture or
 ‘determination of the particular estate before it can vest, and the
 ‘limitation is good by way of use, because it is (b) raised out of the
 ‘estate of the feoffees, as if they had given it to him in such manner.

contra per Co. arguendo. Co. Lit. 22. Bendl. 49. Hob. 50. ||(a) Sed vide Harg. Co. Lit. 14. a. n. 6. and Fearne, C. R. 80, 81. (7th ed.) (Butler), from which it should seem

that the youngest son would take after his brother in this case as heir male of the body of *A.*, notwithstanding the eldest son took by purchase; for, according to *Ld. Hale*, it is a *quasi entail*; so that the second reason assigned for the judgment does not seem satisfactory. || (b) So, if one covenants to stand seised to the use of his heirs male on the body of his second wife, he takes an estate for life by implication, and so it is an estate tail executed in himself. *Pybus v. Mitford*, Vent. 372. 2 Lev. 75. *Raym.* 228. Mod. 98. 122. 159. 3 Keb. 229. S. C. adjudged. [In a subsequent case, where the use was limited to the grantor himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder to (the use of) the heirs male of his own body, remainder to his own right heirs; the Court held the limitation to the heirs male of the body to be void, because there was no preceding freehold limited to support it, and that it should not be implied *contrary to the intent* of the conveyance; that there the estate took effect by transmutation of possession out of the seisin of the trustees, and not like *Fenwick* (should be *Pybus*) and *Mitford*’s case, where the owner *covenanted to stand seised* to the use of the heirs of his body. And *Powell J.* held, that even in that case, if there had been an *express estate limited to the covenantor*, it had been different. *Adams v. Savage*, 2 Salk. 679. 2 Ld. *Raym.* 854. 6 Mod. 134. S. C. So, where *A.* by marriage settlement conveyed certain lands to the use of himself for ninety-nine years, if he so long lived, and after to the use of trustees for 200 years, remainder to the use of the heirs male of his own body, remainder to his own right heirs; upon a case referred to the judges of C. B. from the Court of Chancery, they held the limitation to the heirs male of the body of *A.* void, no freehold being limited to any person precedent to that estate; and that no estate of freehold could result to *A.* for his life *by implication*; because another estate, *viz.* for ninety-nine years if, &c. was expressly limited to him, which would be inconsistent with a freehold by implication. *Rawley v. Holland*, Vin. Abr. tit. “Uses,” F. pl. 11.] || See *Fearne, C. R.* 42—44. (7th ed.) ||

‘So, if a man makes a feoffment in fee to the use of *A.* for
 ‘life, or in tail, remainder to the use of *B.* for life, or in tail, re-
 ‘mainder to the use of himself and his heirs, or to the use of his
 ‘own right heirs, yet the use being of the same nature with the
 ‘land, comes back to him in the same manner as that would
 ‘have done; and then having only disposed of part of the estate,
 ‘the use returns, and brings with it the land for the residue of
 ‘the estate undisposed of, as if it had never been out of him,
 ‘and consequently, such residue shall go to the heirs by descent,
 ‘and not vest in them by purchase;’ “And therefore, a lease
 ‘for 1000 years made by the feoffor was holden good against
 ‘the heir, because it took effect out of the reversion, which the
 ‘use brought back to the feoffor himself.”

Cro. Eliz. 321.
Dyer, 135.
Leon. 182.
 2 Co. 91.
Moor, 284.
 744. Co. Lit.
 22. b.

‘So, where one made a feoffment in fee to the use of himself
 ‘for years, remainder to the use of *A.* his son and heir apparent,
 ‘and the heirs male of his body begotten, remainder to the use
 ‘of the right heirs of the feoffor for ever, and after *A.* died,
 ‘leaving two daughters only, and then the feoffor conveyed the
 ‘same lands to another of his sons in fee; it was adjudged a
 ‘good conveyance, and that the daughters of the eldest son,
 ‘though they were heirs at law, took nothing by purchase, for
 ‘the

Co. 130. 2 Roll.
 Abr. 418. 791.
Poph. 3. *Moor*
 720. *Cro. Eliz.*
 354.

‘ the eldest son dying without issue male in the lifetime of the
 ‘ feoffor, if the last remainder could have taken effect at all, it
 ‘ ought then to have so done, because the lease for years was
 ‘ not sufficient to support it till it came *in esse* afterwards, for
 ‘ then there would have wanted a tenant of the freehold in the
 ‘ mean time; and upon the death of *A.* it could not take effect,
 ‘ because his father was then living, and could have no heir dur-
 ‘ ing his life; and therefore the remainder was void, and the
 ‘ whole estate reverted in himself, by the resulting of the use in
 ‘ the same manner as if the limitation had been at common law
 ‘ without any use.

Dyer, 237.
 pl. 51. 190. a.
 2 Roll. Abr. 414.
 Leon. 102.

‘ So, where the husband was sole seised in fee, and a stranger
 ‘ levied a fine to the husband and wife, and the heirs of the
 ‘ husband, and they rendered to the consor for life of the hus-
 ‘ band, remainder to *D.* for life, remainder to the right heirs of
 ‘ the husband, the husband died, and then *D.* died; by the opi-
 ‘ nion of the court of wards and the three chiefs, it was held to
 ‘ be no remainder to the husband, but his ancient reversion, be-
 ‘ cause the husband cannot limit a remainder to his right heirs
 ‘ where the fee was never out him, and therefore the interest of
 ‘ the wife was not gone by her joining in the grant and render,
 ‘ but that she should have it during her life against the heir of
 ‘ the husband.

“ And there a case is cited, where such fine calling it a re-
 “ mainder was not received: for if it were, this would be an easy
 “ evasion to defeat the lord of wardship, marriage, &c. of the
 “ heir, though his ancestor always continued seised of the ancient
 “ fee till his death, and the same by priority of right attached
 “ in his heir immediately upon his death, as included within the
 “ words of the first donation.

2 Br. 6. pl. 93.

“ If a man had made a feoffment in fee before the statute of
 “ uses, to the use of himself for life, remainder to *A.* in tail,
 “ remainder to the right heirs of the feoffor, and died, and then
 “ *A.* died without issue, the heirs of the feoffor (being within
 “ age, he should be in ward for the use coming to the feoffor in
 “ lieu of the land, for so much as was not disposed of shall be
 “ of the same nature with the land itself, and then such a
 “ remainder of lands in possession had been void, because it
 “ vested in the heir by descent in virtue of the first donation,
 “ which was the elder title. And so it shall be, where it is
 “ limited by way of use. But, where a man makes a feoffment
 “ in fee upon condition to re-ensfeoff him, and the feoffee gives it
 “ to the feoffor for life, remainder to another in tail, remainder
 “ to the right heirs of the feoffor; there, in such case, his heir
 “ shall not be in ward by the common law, because, though he
 “ is in by descent, and not by purchase, as shall appear he re-
 “ after, yet he is not in the old reversion; for both the fee and
 “ the use of it were out of the feoffor, being made to a special
 “ intent, and therefore he takes it by descent as a remainder,
 “ for this shuts out the lord from the wardship, &c. because the
 “ intervening remainder upon the death of the feoffor is not held
 “ immediately of the lord, and so his ancestor died not seised

Dy. 172. pl. 12:
 237. pl. 50.
 Cro. Jac. 40.
 2 Co. 92. 9 Co.
 126. 132.

“ of

“ of the fee within the tenure of the lord ; as in the other case
 “ of the reversion he did ; for that was held immediately of the
 “ lord, though he could not have the fruit of it till the deter-
 “ mination of the intermediate estate. But in the other case, if
 “ the remainder-man in tail had died without issue, living the
 “ feoffor, then clearly upon his death, his heir would be in ward,
 “ because his ancestor died seised within the homage and fee of
 “ his lord. But this point of the wardship belongs to another
 “ head, and therefore no further occasion to explain it here.

“ If one makes a feoffment in fee to the use of himself for life,
 “ or in tail, remainder to the use of the feoffee, yet the feoffee
 “ hath no reversion, but it is in nature of a remainder, although
 “ the estate of the feoffor is executed by the statute, and the
 “ feoffee is in by the common law, which concurring with the
 “ statute law shall be preferred, since that can give him no more
 “ than what he has already by the common law. And the reason
 “ why this is a remainder seems to be, because the estate first mov-
 “ ing from the feoffor, the use immediately resulted back to him
 “ in fee, and then, when he limits that use to himself for life or in
 “ tail only, with remainder to the use of the feoffee, though this
 “ cannot give him what he has already, yet it may well serve to
 “ declare in what manner he shall have it ; and the use being
 “ limited in remainder, so shall be the estate, which takes it
 “ supported under such limitations.

“ One makes a lease for years, rendering rent, and after by
 “ will devises a further term to the lessee rendering the same
 “ rent, and devises over the inheritance to a stranger. The
 “ question was, if this should pass to the stranger as a re-
 “ mainder, or a reversion ; because the term and inheritance
 “ being both devised by will, which could not take effect till the
 “ devisor's death, he could have no remainder of that new
 “ term, and consequently could not devise such reversion to
 “ another. But yet, by the better opinion, this should be a
 “ reversion, because the rent would not be incident to it as
 “ a remainder ; and in wills, the intent of the party is prin-
 “ cipally to be regarded. *Sed qu.* because the rent may well go
 “ to the executors of the testator.

“ A copyholder surrenders to the use of *A.* for life, and after
 “ to the use of the right heirs of the copyholder ; and at another
 “ time he surrenders the said reversion to the use of *B.* in fee,
 “ and dies : and then *A.* dies ; and the heir of the copyholder
 “ enters. And by *Coke*, he may ; for the land remains in the
 “ lord till his death, and then his heirs shall be in by purchase,
 “ and not by descent ; and if so, he had nothing in him to make
 “ a surrender of. And he said, the difference was between this
 “ case and where the surrender is, to the use of himself for
 “ life, remainder to another in tail, &c., remainder to his own
 “ right heirs, there, his heirs shall have it by descent. *Sed qu.*
 “ of this case (*a*), for it appears by the books,” “ that if a copy-
 “ holder surrenders to the use of his last will, and devises to *A.*
 “ for life, remainder to *B.* in tail, or surrenders to the use of himself

Co. Litt. 22. b.
 Dy. 362. 1 Co.
 157.

2 Leon. 33.
 Machell v.
 Dunton.

1 Leon. 102.
 Allen v.
 Palmer, Sup-
 plement to
 Co. Copyh. 3.
 Cro. Jac. 376.
 Cro. Eliz. 148.
 441. Leon. 102.
 4 Co. 23.
 [(a) This dis-
 tinction taken
 by *Coke* is
 questioned by
 our author in
 his Law of Te-
 nures (p. 172.),

‘ for

and also by Mr. Fearn, (Contingent Remaind. 66, 67., 7th edit.) It has, indeed, been recognised in the case of *Roe v. Quartley*, 1 Term R. 634.; but as it is now settled, that the surrenderer of a copyhold taking the ultimate limitation is in of his old estate, (see *Roe v. Griffith*, 4 Burr. 1952. *Smith v. Trigg*, 1 Str. 487. *Thrustout v. Cunningham*, 2 Bl. R. 1046.) it should seem, that the above case of *Allen v. Palmer* is (notwithstanding its recognition in that of *Roe v. Quartley*) not now law. See *Watkins's Gilb. Trin.* 456. Co. Copyh. 97. Suppl. 3. 13. 15. 75. Cro. Jac. 376.] || *Watkins Cop.* vol. i. 95. 98.]

Hob. 30.
10 Co. 41.
Vent. 372.

Salk. 241. pl. 2.
Com. 72. pl. 45.
Clark v. Smith;
et vide title
Descent.

Salk. 242. pl. 3.
2 Ld. Raym.
829. Com. 123.
pl. 86. Red-
ding v. Roys-
ton.

4 Mod. 380.
Carth. 272.
Ld. Raym. 33.
Tipping v.
Cossins; *et*
vide Preced.
Chan. 435.
S. C. cited.
|| *Fearn, C. R.*
43. (7th ed.)]

‘ for life, remainder to the use of *A.* for life, remainder to the use
‘ of his will, in these cases the reversion is so in the copyholder,
‘ that he may in his life surrender to the use of any other; so
‘ that all who come in upon such surrenders are in by the copy-
‘ holder, not by the lord, for that nothing remains in the lord,
‘ but so much as is not disposed of remains in the copyholder
‘ as strongly as if it had been limited to him:’ “ And that in
“ these cases the heir may enter before or without admittance;
“ and it is likened to a feoffment in fee to the use of his last
“ will, notwithstanding which he may dispose thereof in his
“ lifetime: and it is also agreed, that a surrender to the use of
“ the right heirs of *J. S.* who is then living is void, or to an infant
“ *en ventre sa mère*, or to the use of one after his death, because
“ the freehold cannot expect. And yet, in these cases, if the
“ estate might continue in the lord in the mean time, they
“ might be good; and *Coke* agrees in the principal case, that if
“ the ancestor had taken an estate for life, his heirs should
“ have it by descent, and not by purchase; therefore it seems to
“ be the same where the law gives him an estate for life, as in
“ this case it does, till the future use comes *in esse*, and then the
“ heir cannot have it by purchase; and consequently the an-
“ cestor’s surrenders to the use of a stranger good. *Quære*
“ *ergo*.”

‘ If a man seised of lands in fee by his will in writing devises
‘ them to one for life or in tail, remainder to his own right heirs,
‘ this is void as a remainder, and the heir shall be in of the old
‘ reversion by descent, because immediately upon the death of
‘ the ancestor the estate descends to the right heir, and so pre-
‘ vents him from taking by the disposition of the will.’
So, if a man devises land to his heir at law, paying a sum of
money or an annual rent, yet the heir, notwithstanding such
incumbrance or charge, takes by descent, and not by purchase.

But, where the estate devised is altered in quantity or quality,
there the devisee, though heir at law, takes by purchase; as,
where *A.* seised in fee of lands, hath issue *B.* and *C.* his daughters,
B. hath issue *D.* and dies; *A.* devises his lands to *D.* in fee; *D.*
dies without issue; his heir of the part of his father shall take
the whole by purchase, and not any part by descent.

A., in consideration of a marriage intended between him and
B. and of a marriage portion, made a feoffment in fee to the use
of himself and his heirs till the marriage, and after to *B.* for life,
then to trustees and their heirs during the life of *A.*, to support
contingent remainders, then to the first, second, and other sons
of his body in tail male, then to the heirs male he should have
by any other wife, and for want of such issue to the heirs of the
body of *A.*, with remainder to his own right heirs; the marriage
takes effect, and they have issue only a daughter; then *A.* levies
a fine

a fine to the use of himself for life, remainder to his wife for life, remainder to *C.* in fee with warranty; and the question was, What estate was vested in *A.* by the first deed, *viz.* Whether the heirs of the body should take by purchase or descent? For if by purchase, then the fine levied afterwards was no bar to them. And the Court was of opinion, that they must take by purchase, because where the ancestor has no estate for life, as in this case he has not, they cannot be words of limitation; and here the estate is expressly limited to trustees and their heirs during his life; (a) and though a man cannot make his own right heirs purchasers by the name of heirs, either in a conveyance by way of use, or by his last will, yet he may make them so of an estate-tail, which is a new created estate, different from what the law makes.

[(a) By reason of the express limitation an estate for life could not arise to *A.* by implication, which distinguished the case from *Pybus v. Mitford*, *supra*, 726.]]

A settlement was made by *A.* to the use of himself for fifty-nine years, if he should so long live, remainder to trustees and their heirs during his life to support contingent remainders, remainder to *B.* his son for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life to support contingent remainders, remainder to the first and other sons of *B.* in tail male successively, with other remainders over, remainder to the right heirs of *A.* Then *A.* by will devises all his lands in possession, reversion, or remainder to trustees and their heirs, in trust by sale or mortgage to raise money for payment of his debts and legacies: and if this limitation to his own right heirs vested the reversion in fee in himself, so as to be subject to his disposition, or if the heirs were to take by purchase, was the question; all the intermediate remainders being determined. And it was argued upon the reason of the above case of *Tipping* and *Cossins*, that the heirs must take by purchase, because he had only an estate for years, and the freehold during his life was expressly limited to trustees and their heirs, and therefore against his own express limitation he should have no resulting use or estate for life. But on the other side it was argued, that the reason of the resulting estate for life was, because it might possibly happen that all the intermediate estates might determine before the death of *A.*, as by his and the trustees joining in a feoffment, &c., which would be a forfeiture of their estates, &c., and therefore of necessity he must have a resulting use for his life: And my Lord Chancellor was clear of this opinion, and said it was his old reversion in him, and devisable by will. But note, this was a remainder limited to his own right heirs.

Eq. R. 20. Preced. Chan. 338. *Eure v. Howard.*

“It appears by what has been already said,” “That wherever the ancestor takes an estate for life, and after in the same conveyance a remainder is limited mediately or immediately to his right heirs, or to the heirs male or heirs female of his body; that in such case the right heirs or heirs male or female, &c. shall not be purchasers, but shall take by descent.

Co. 93. *Shelly's* case. Moor, 136. And. 69. and the S. P. cited in numberless cases. *Vide* as to the extent and

effect of this rule in construction of limitations in deeds, marriage articles, and wills, *Fearne's* C. R. 28. 201. (7th ed.) Butler; *et vide* *Blackstone J.'s* argument in *Perrin v. Blake*, Harg. Tracts, 489.; and Mr. Hargrave's observations on the rule, *ibid.* 551.; Butler's note, 1 Co. Lit. 576. b. (17th edit.)]]

‘Therefore

2Roll. Abr.
417. Roll. R.
317. Raym.
163.

Lit. sect. 578.
Co.104. 2Roll.
Abr. 415.

[2 Burr. 1106.]

‘ Therefore if a lease be made to *A.* for life, remainder to the heirs male or heirs female of his body, or to his right heirs, in this case the remainder is executed presently in *A.*, and he is seised in fee or in tail, according to the respective limitation.

‘ So, if one make a lease to *A.* for life, or a feoffment in fee to the use of *A.* for life, remainder to *B.* for life or in tail, remainder to the right heirs of *A.*, or to the heirs male or female of the body of *A.*, in this case the heirs or heirs male or female of *A.* shall not be purchasers, but shall take the remainder by descent from *A.*, for it was so executed as a remainder in *A.* that he might give or forfeit it as such in his lifetime.’

“ And the reason of these cases seems to be, either the prejudice that might ensue to the lord, or to the donor, by the loss of wardship, marriage, &c. if such heirs should be purchasers, because they then claiming nothing from their ancestor by hereditary succession, would not be liable to the terms and conditions affixed to the hereditary succession only, and then every one would make his heirs purchasers; or from the prejudice that might happen to the heirs themselves, by the loss of such remainder, if the ancestor should do any thing to forfeit or determine his estate for life after the determination of the intermediate estate; for they not being capable of taking such remainder when the preceding estates ended, they could never after lay claim to it, and so an unwary ancestor might defeat his heir of the purchase; or lastly, from the conformity and parity of reason these bear to a limitation to *A.* and his heirs, or the heirs male or female of his body; for, as this gives an estate for life by implication and more, so the other gives him the same in express words and more, *et expressio eorum quæ tacite insunt nihil operatur*. And though there be the interposition of another estate between them, that only breaks the order of the limitation, not the operation of the words, which being the same in both cases, ought to have in both cases the same operation and construction. But, if a lease be made to *A.*, or a feoffment to the use of *A.* for years, remainder to or to the use of *B.* for life or in tail, remainder to or to the use of the right heirs, or heirs male or female of the body of *A.*, these remainders are perfectly contingent and uncertain whether they shall ever take place or not; for if the remainder determine living *A.*, then they are become void, because *non est hæres viventis*, and they cannot take during the life of *A.*, and then these would want a tenant of the freehold; and a tenant to do the services to the lord in the mean time, which the law will not suffer. So, and for the same reason, if a lease be made, or a feoffment in fee to the use of *A.* for years, remainder to the use of *J. S.* who is then living, or to the wife whom *J. S.* shall marry, these are likewise void. It is no objection in the case of the wife, that she cannot do the services in her own person, for her husband would be obliged to do them for her, and, as a recompence, would be tenant by the curtesy after her death.”

‘ Tenant

‘ Tenant for life, remainder in tail, remainder to the right heirs of tenant for life; the tenant for life acknowledges a statute and dies, he in remainder dies without issue; and the question was, If the right heir of the tenant for life should be charged by this statute, and the lands in his hand liable thereto? and adjudged that they should, for that they came to him by descent from the tenant for life, who had them as a remainder vested in him, and might either grant or charge it.’

In dower it was found by special verdict, that the husband of the demandant was seised of the lands, &c. for his life, remainder to *A.* and *B.* trustees for ninety-nine years, remainder to the heirs of the body of the husband; and the question was, Whether this was such an estate-tail executed in the husband, whereof his wife should be endowed? and adjudged that it was, and that the intervening estate to the trustees being only for years ought not to be regarded.

“ If a feoffment be made to the use of *A.* and *B.* during their joint lives, and after the death of either of them, to the use of *C.* for life, and after to the use of the heirs or heirs of the body of *B.*, this remainder is not vested in *B.* presently, but is in abeyance or contingency to vest or not to vest as the case shall happen. For, if *A.* and *C.* die in the lifetime of *B.*, the remainder is void, *quia non est hæres viventis*; and both their estates are determined, and yet the remainder cannot take effect. But, if *B.* dies before *A.*, then his heirs, or heirs of his body, shall have it by descent, as a remainder vested in *B.*, for that upon his death before *A.* the whole estate for life is gone, as if it had been limited to *B.* only for life; and if it had been so limited, his heirs or heirs of his body should not have taken by purchase, for the reasons before mentioned.

“ Having considered the relation of ancestor and heir, let us now consider the relation of testator and his executors, or intestate and his administrators, upon remainders limited to them for years: as, for example, if a lease be made to *A.* for life, or for 99 years, if he so long live, and after his death, or after the determination of that estate, remainder to his executors for 20, &c. years, this term vests in the testator himself, and he may give, grant, forfeit, or dispose thereof, as if it had been expressly limited to himself; and if he dies intestate without disposing thereof, it shall go to his administrators; for the testator and executors, or intestate and administrators, are correlatives as to chattels, as the ancestor and heir are for inheritances; and as heirs are properly made use of for lengthening out the inheritance to the same person, so are executors for lengthening out chattels to the same persons; and as heirs cannot take in the ancestor’s life, so executors cannot take in the testator’s life, because neither the one nor the other can be known till their death; and therefore as a remainder to the heirs vests in the ancestor himself, where he hath an estate for life therein, so does a remainder to the executors vest in the testator himself where he had before any interest limited to him. But, as heirs

Cro. Eliz. 555.
Pethouse v.
Crane.
|| Abel’s case,
18 Edw. 2.
fol. 277.
Blackstone’s
arg. in *Perrin v.*
Blake, p. 501.||

Ld. Raym. 526.
Salk. 254. pl. 4.
Lutw. 719.
Bates v. Bates.

2 Roll. Abr.
418.
|| See this doctrine
controverted by Mr
Ferne in his
C. R. 51, 52.
(7th ed.), who
argues, that
the remainder
vests in *B.*; *et*
vide Merrell
v. Rumsey,
infra, 752.||

1 Roll. Abr.
911. (3) 2 Roll.
Abr. 448. Co.
Litt. 44. b. 519.
b. 1 Co. 154.
Br. Abr. 37.
p. 17. Cro.
Eliz. 658. 666.
840. Moor,
pl. 911. Yelv.
9. 85. Spark v.
Spark, 2 Roll.
Abr. 47. pl. 6.
Moor, pl. 244.
459. 4 Leon.
259. Noy, 52.
Owen, 125.

“ may be in some cases a word of purchase, so may executors
 “ be so. Therefore if one make a lease to *A.* for 99 years, if he
 “ so long live, and if he die within the term, or during the term, then
 “ to his executors or assigns for 40 years, in this case his executors
 “ or assigns take by purchase upon the contingency of his dying
 “ within or during the term; for, if he survives it, they shall not
 “ take at all. And though in this case the term be expressly
 “ made determinable upon his death, and therefore he cannot pro-
 “ perly be said to die within the term, or during the term, since
 “ that dies with him, and his death is the determination of it; yet,
 “ it being at first granted for 99 years, if he so long live, his not
 “ living so long may well be made the condition of the vesting of
 “ a remainder to another; and it being uncertain, whether he will
 “ live so long or not, so is the vesting of the remainder uncertain;
 “ and by consequence it cannot vest in the testator himself, since
 “ he must be dead before it can be known whether it will vest at all;
 “ and then the executors or administrators, if they shall be con-
 “ strued within the word assigns, being the first takers, shall have
 “ it by purchase. Another reason for their taking by purchase in
 “ this case may be, that the owner intended not to part with the
 “ land any longer, if the first lessee outlived the 99 years; but,
 “ if he died sooner, then he was willing to grant it out for a longer
 “ time, and therefore likewise the remainder was contingent.

2 Leon. 7.
 Dy. 309. b.

“ If one make a lease for life to *A.*, remainder to his own exe-
 “ cutors for years, this remainder is good, and the executors must
 “ take it by purchase; for a man cannot limit such an estate to
 “ himself, and therefore the term shall be in abeyance till his death.
 “ And this was construed to be a contingent remainder in the
 “ executors, because it cannot be to the party himself, for two
 “ reasons: 1st, Because he cannot be grantor and grantee to
 “ himself; and therefore where there are not proper parties,
 “ the one to convey, the other to take a right, the grant were it-
 “ self a nullity, and would be of no significance, if it were not
 “ construed a contingent limitation to the executors. 2dly, Be-
 “ cause having the old reversion, this term, if raised to the party
 “ himself, would be merged, and therefore that the party's in-
 “ tentions may take place, it was construed a contingent limit-
 “ ation to the executors.

Cro. Eliz. 666.
 Moor, pl. 244.
 Dy. 309. in
 marg. 314.
 1 Leon. 346.
 2 Leon. 5.
 3 Leon. 20.

“ And here the difference is between where a stranger limits
 “ an estate for life, the remainder to the executors of the tenant
 “ for life, for there the term for years in remainder is vested in
 “ the tenant for life, because the word executors is no more than
 “ a prolongation of his interest; and where a man limits an estate
 “ to himself for life, the remainder for years to his own exe-
 “ cutors, there, since it cannot, for the reasons before mentioned,
 “ admit of that construction, therefore it is a contingent term in
 “ the executors, who take it by purchase. But, where such
 “ limitation is expressly mentioned to be for the performance of
 “ the will, they do not take *jure proprio*, but as assets to fulfil
 “ the intention of the testator.

Moor, pl. 459.
 1024,

“ One levied a fine to the use of himself for life, remainder to
 “ the

“ the use of his wife for life, remainder to the use of his executors for 20 years, or to them, without any remainder to his wife; and after he levies a fine, or makes a feoffment to other uses; and then by his will makes three executors, and dies. The term to the executors shall never arise: for whether this term were in abeyance, as the books say it was, so that he himself could not grant, forfeit, or release it; or whether it vested in the testator himself, yet by such fine or feoffment it is confounded and gone; because if it be an interest vested, it passeth by the feoffment; if it be not vested, the feoffment destroys the particular estate, and then the contingent remainder sinks of course.

“ If a lease be made to *A.* for life, and after his death to the executors or assigns of *B.*, this is no interest in *B.*, but only a naked power in him to name executors or assigns who shall take the term. Yelv. 85.

“ But, if one make a feoffment in fee to the use of himself for life, and after his death to the use of his administrators for 20 years, remainder over; this limitation is absolutely void, and the other remainders shall vest presently, by reason of the interval between the death of the feoffor and the taking out letters of administration, before which time there is no person to take it; and there can be no occupancy of it in the mean time, for the law will not create new estates to supply the intention of the parties.” 1 Leon. 196.

(C) Of the several Kinds of Remainders, as distinguished into Remainders vested, or in Contingency and Abeyance.

“ IF an estate be limited, either at common law, or by way of use, to one for life, or in tail, remainder to the right heirs of *J. S.* who is then dead, this is a good remainder, and vests presently in the person who is heir at law to *J. S.* by purchase; and though a daughter be then heir at law, and after a son be born, yet shall the daughter retain the land against him; for she being heir, and coming within the description at the time when the remainder was limited, it then vested and settled in her immediately as a remainder by purchase, and shall not by any accident after be defeated.” 2 Roll. Abr. 415. Co. 95. 103. Plow. 56.

“ So, if the land be of the nature of gavelkind, yet the eldest son only as heir shall take it, and not all the sons; for the custom extends only to descent of inheritances, and not to purchases, and is to be taken strictly.” Hob. 31. 1 Co. 103. Dav. 31. 1 Br. Abr. 254. pl. 42.

“ But, if *J. S.* be living at the time of the remainder limited to his right heirs, this puts such remainder in abeyance or contingency; that is, in no person, but *in nubibus*, till the contingency happens. For in the feoffor or donor it is not, because he has limited it out of him, and all remainders must pass out of him at the time of the limitation, though they do not presently vest in the person intended: and in the right heirs of *J. S.* it cannot be, Co. 155. Co. Litt. 378. a. 2 Co. 51. 2 Roll. Abr. 415. Plow. 28. 556. Poph. 74. Moor, 720. 3 Co. 20. 10 Co. 50.

Raym. 145.

Pollex. 56.

||But Mr.

Fearne ably
controverts
this doctrine;
and contends
that the re-
mainder vests
in the feoffor
until the con-
tingency hap-
pens. Fearne
C. R. 562—
564. (7th ed.)||

‘ be, because he cannot have heirs during his life; so there is no
‘ person *in rerum naturâ* within the description, to take it; there-
‘ fore it is in the mean time in abeyance or expectancy, to vest or
‘ not vest, as the case happens: for if *J. S.* dies during the par-
‘ ticular estate, then the remainder presently takes place in his
‘ heirs; but, if the particular estate determines by death or other-
‘ wise in the life of *J. S.*, then such remainder is become totally
‘ void, and can never vest, but the estate settles again in the
‘ feoffor or donor, as if no such limitation in remainder had
‘ been; and he becomes tenant to the *præcipe*, and is obliged to
‘ do the services; and though *J. S.* die soon after, yet his heir
‘ can have no benefit by it, not being capable of taking the
‘ remainder when it fell.’

“ But here it may be objected, that then these remainders
“ ought to escheat to the lord, as well as where his tenant dies
“ without heirs; for they actually passed out of the feoffor: and
“ though they cannot vest in the person intended, yet it is not
“ reasonable they should return to the feoffor against his own
“ grant, and when he has by his own act parted with and given
“ them away; but the lord ought rather to have them by escheat.
“ In answer to this objection, it is to be observed, that the reason
“ of the escheat is the death of the tenant without heirs: so are
“ the words of the writ, — *Præcipe A. quod reddat B. decem acras*
“ *terræ cum pertinentiis, &c. quas C. tenuit et quæ ad ipsum B.*
“ *reverti debent, tanquam eschata sua eo quod prædictus C. obiit*
“ *sine hærede.* But *J. S.* neither died without heir, nor, if he
“ had, was he ever tenant to the lord: for nothing vested either
“ in him or his heirs, and therefore the lord can have no escheat
“ as from them; and as to the feoffor, he or his heirs are still *in*
“ *esse*; and since the grantor could not take the remainder, and
“ no other person has right to claim it, it must return back again,
“ and settle in the feoffor, as if no disposition thereof had been
“ made.”

Co. Litt. 3.

Co. 66. 2 Co.

51. Hob. 53.

Moor, 104.

Dyer, 337.

2 Leon. 218.

Roll. R. 254.

‘ But, if there be no such person as *J. S.* at the time of the
‘ limitation, though he be after born, and die during the particular
‘ estate, yet his heirs shall never have the remainder. So, if a
‘ remainder be limited to *A.*, son of *B.* in tail, &c., or to *E.*, wife
‘ of *D.*, where in truth there is no such *A.* or *E.*, though *B.* has
‘ a son after called *A.*, or *D.* marries one *E.*, yet they can never
‘ take the remainder; because, if there be such persons as the
‘ words of the gift import, there the remainder ought to vest in
‘ them presently, and they will never after be made capable of
‘ taking it; but, if there be no such persons then *in esse*, none who
‘ come within that description after can lay claim to it, because
‘ the limitation was present to such persons. But a remainder
‘ limited *primogenito filio*, or *proximo hæredi masculino* of *A.*, or *pro-*
‘ *pinquioribus hæredibus de sanguine puerorum*, or *seniori puero* of
‘ *A.*, or to the right heirs of *A.*, there being then such *A. in esse*,
‘ or to the wife that *A.* shall marry; these are good remainders,
‘ and shall vest when such persons come *in esse* as are within the
‘ description; because here appears no present regard for any
‘ person

‘ person in particular; and therefore if they answer the description at any time before the particular estate determines, it is time enough: and so there is a diversity between a remainder limited to one by name in particular, and such remainder limited by description or circumlocution, or between a general name and a special name.’

‘ Lands devisable by custom were devised to *A.* for life, remainder to *B.* in tail, remainder to the next heir male of the devisor, and to the heirs male of his body; the devisor dies; *A.* enters; *B.* dies without issue; and after *A.* dies; and then one *C.* as heir of the devisor, *viz.* daughter of *D.*, son of the devisor, enters and aliens in fee, and after hath issue *E.*, who, as heir male of the body of the devisor, enters upon the alienee, who brings trespass. *Optima opinio*, that as the first who entered as heir to the fee-simple was a female, and there was no heir male of the devisor to take when the remainder fell, he who is born after shall not have it.”

‘ *A.* makes a lease to *B.* for life, and after the death of *A.*, to remain to *B.* and his heirs; this remainder is contingent, and cannot vest presently, for if *A.* survives *B.* it is void; because otherwise the operation of livery would be interrupted during the life of *A.*, for he cannot give himself any estate, his livery operating to pass estates from him, not to give any to him who had the whole before; and therefore during his life the operation of the livery must cease, and by consequence no remainder can take effect in virtue of that livery, which *pro tempore* being at an end, all that depended thereon ceases too, and can never after be revived; for the livery must carry out all the estates at once from the feoffor, and if he comes again into the possession before they can all take effect, this breaks the force of the livery, and brings back again to him all that such livery had taken out from him, and then they can never take effect but by a new livery. And this is the reason of the common case, that one cannot give lands to another to begin after his death, because being to make livery presently, if that cannot operate presently, it can never operate at all; for it is a contradiction to give lands to one by a solemn livery, which is an act executed and works presently, and yet by words to restrain that operation to a future time. But in the principal case, where *A.* dies first, there no interruption is of the livery, for *B.* had an estate for life by virtue thereof; and before that determines, the same livery, which carried the remainder in abeyance, for the uncertainty of its taking effect, does upon *A.*’s death direct and settle, or bring down the remainder to *B.* and his heirs.’

‘ If a lease be made to *A.* for life, remainder to the right heirs of *J. S.* and *J. N.*, and after *J. S.* dies, and then tenant for life dies in the life of *J. N.*, the remainder for a moiety vests in the right heirs of *J. S.*, and upon the death of *J. N.* his heirs shall take nothing, because not *in esse* to take when the

1 Br. Abr. 234.
b. pl. 5. Hob.
33.

10 Co. 85.
|| *Sed vide*
Fearn C.R.
(7th ed.) 30,
31.||

1 Br. Abr. 253.
pl. 21.

- 1 Br. Abr. 255.
pl. 21.
- 3 Co. 20.
10 Co. 85.
Co. Lit. 378.
- Co. Lit. 264.
Hob. 35. 2 Co.
51. 10 Co. 51.
Moor, 104.
Roll. R. 254.
2 Buls. 275.
- Challoner v.
Bower,
2 Leon. 70.
||(a) It is not,
however, to
be understood,
that there is
no difference
between a
grant and a
devise as to
the construc-
tion of limita-
tions to the
heirs of per-
sons living;
for in devises these words are often held to create a vested instead of a contingent remainder, where it appears from the expressions of the testator that he intended them to be used as synonymous with "heir apparent;" that is, as a *designatio personæ*, pointing at the particular person whom he intended to take; in such case the devisee takes a vested remainder by purchase. But, in the case in the text, the language of the devise does not shew any such intention on the part of the testator, as must appear in order to controul the rule
- "remainder fell; and the right heirs of *J. S.* cannot take the whole, because that was limited to them and others jointly.
- "If brother and sister are, and lands are let for term of life, remainder to the right heirs of the brother, and after the brother dies, and then tenant for life dies, and the sister enters; she shall retain the land against a son or daughter of the brother born after, because this vested in her by purchase."
- 'If a lease be made to *A.*, *B.*, and *C.* for their lives, and if *B.* survives *C.*, then to remain to *B.* and his heirs, this remainder is in abeyance, because, though the person be certain, yet since it depends on *C.*'s dying before him, till that be known, the remainder cannot vest. So, if a lease be made to *A.* for life, and after the death of *B.*, who is a stranger, to remain to *C.* in fee, or to *A.* in fee, these remainders are in abeyance or contingency, and depend on *B.*'s dying before *C.* or *A.*, for if he survives them, the remainder cannot take effect.
- 'If a lease be made to *A.* for life, remainder to the abbot of *D.* and his successors, though the abbot be then dead, so as there is then no abbot at all, yet the remainder shall be good, if an abbot be made before the death of *A.* So of a remainder to a mayor and commonalty, dean and chapter, prior and convent, &c., though there be then no mayor, or dean, or prior. So of a remainder to the bishop of *D.*, parson of *D.*, or other sole corporation, and his successors; for these remainders not being limited to them by name specially, but to them generally, and so whoever comes within the description before the determination of the particular estate, is capable of taking by virtue thereof, are good remainders in abeyance, &c. But if there be no such corporations at the time of the limitation, then the remainders are totally void; and none created after, though by the same name, can take these remainders, though a patent be then passing to make such corporation.'
- "*A.* having issue two sons and two daughters, devises his lands to his younger son in tail, and for want of such issue to the heirs of the body of his eldest son, and if he die without issue, then to his two daughters in fee, and dies: the younger son dies without issue, living the eldest, who has issue; and if this issue should take the remainder, his father being alive, was the question? It was urged, that though in case of a grant he could not, yet being here in case of a will, the intent of the devisor should prevail to carry it to him. But the Court was strongly against it, and held no difference, as to this, between a grant and a devise (a), and would suffer no witnesses to be heard to prove the testator's intent, but gave judgment for the daughters.

rule that *nemo est hæres viventis*, and to take the case out of the class of contingent remainders. *Vide* Burchett v. Durdant, 2 Vent. 311. Darbison v. Beaumont, 1 P. W. 229. Fearn, C. R. (7th ed.) 210.]]

“ If one covenant, upon proper considerations, to stand seised to the use of *A.* for life, remainder to the right heirs of *B.*, in this case the remainder is not drawn out of the covenantor, and put in abeyance till the death of *B.*, but there is a reversion left in the covenantor, out of which the remainder, when it happens, shall be drawn. And this differs from the remainders before mentioned, which arise out of the estate executed either at common law, or upon a feoffment to uses, as will appear hereafter.”

‘ If a man make a lease to *A.* for life, and that after the death of *A.*, and one day after, the land shall remain to *B.* for life, &c. this is a void remainder, because not to take effect immediately upon the determination of the first estate, and so during that time there would be an interruption of the livery, and no tenant of the freehold, either to do the services, or answer to strangers’ præcipes.

‘ A lease is made to *A.* for life, remainder to the right heirs of *B.*, and after *B.* purchases the estate of *A.*, yet the fee is not executed in *B.*, but the remainder to his right heirs continues distinct; for if *A.* dies first, the remainder will be void; and if *B.* dies first, yet there will be an occupancy during the life of *A.* and the remainder immediately upon *B.*’s death vests as a remainder in his right heirs.

‘ If a lease be made to *A.* for life or in tail, remainder to the heirs male of the body of *B.*, if *B.* hath issue two sons, and the eldest dies leaving a daughter, and then *B.* dies, living *A.*, yet the youngest son shall not take this remainder; for he who takes by purchase and original vesting, must answer the description exactly, which here the youngest son does not, for he ought to be heir as well as male, and this he is not, for the daughter of the eldest son is heir, and she cannot take because she wants part of the description too, not being male, and therefore neither of them can take, but the remainder shall be void. So, if such lease or gift in tail be made to *A.*, remainder to the heirs female of the body of *B.*, and he have issue a son and a daughter, and die, living *A.*, yet the remainder shall be void for the reason before mentioned. Otherwise it is, if a gift be made to one and the heirs male or heirs female of his body, &c., for there, *per formam doni*, they shall take by descent though another be heir, for there the whole estate-tail is in the ancestor; but in the other cases the ancestor takes nothing.’

“ If a lease for life or a gift in tail be made to *A.*, remainder to the right heirs, or heirs male, or heirs female of the body of *J. S.*, who is then or after attainted of treason or felony, and is executed or dies, and then after *A.* die; yet this remainder is become void, and can never take effect; because none can be heir to a person attainted, nor can he have heirs male or heirs female of his body to take by purchase. But, upon a gift to a

Hob. 74.
Barn’s case,
1 Vent. 374.

Plow. 25.
Raym. 144.

2 Leon. 7.

Co. Lit. 24,
25. 164. a.
Hob. 51. Co.
102. Dyer,
374. 2 Roll.
Abr. 416. 1 Br.
Abr. 235. pl. 5.
254. pl. 61.
2 Br. 94. b. pl. 1.
95. pl. 40.
|| *Vide* Mr.
Hargrave’s
learned note,
Co. Lit. 24. b.
n. 3.; *et vide*
contrà Wills
v. Palmer,
5 Burr. 2615.]]

Br. Abr. 255.
pl. 42. 254.
pl. 61. 2 Br.
Abr. 94. b.
pl. 1. 95. pl.
40. 1 Co. 103.
Hob. 51, 52.

1 Lev. 75. St.
Tr. 53. 1 Keb.
349. 615. 745.
Wheatley v.
Thomas.

3 Keb. 351.
Collman v.
Barton, Cro.
Car. 435.
Hob. 334. Co.
Lit. 8. a.

1 Co. 130.
3 Co. 20. a.
Sir T. Raym.
83. Poph. 482.
Co. Lit. 217. a.
Dav. 34.
4 Leon. 21.
4 Mod. 256.
1 Co. 135.
Godb. 319.
contrà.

Moor, 488.
pl. 686. 3 Co.
20. Raym. 144.

“ man and the heirs male or female of his body, if he were at-
“ tainted before the statute of 26 H. 8., and at this day, if he be
“ attainted of felony, such heirs shall take by descent *per formam*
“ *doni*, upon construction of the statute *de donis*, W. 2. But,
“ if a remainder be given by act of parliament to the right heirs
“ of *J. S.*, who is attainted of treason or felony, this remainder
“ is good, because the act takes off the disability, and restores
“ the capacity as to such remainder; especially if the attainer
“ be taken notice of in the act; for then it is in nature of a
“ restitution, and *parliamentum omnia potest*; and though a
“ person attainted can have no heir, yet by such description
“ it is sufficiently known who is meant by it, and then the act
“ supervenes with its absolute power to enable him to take.

“ Three brothers are — the second settles his estate to several
“ persons in tail successively, remainder to his own right heirs:
“ the eldest brother is attainted of treason and executed, leaving
“ several children: the second brother dies without issue: all the
“ estates-tail determine; and the youngest brother being dead,
“ his issue claimed the reversion as heirs to the second brother,
“ and the defendant claimed by escheat, and had a verdict in
“ ejectment. For though the blood of the elder brother be cor-
“ rupted, so that his issue cannot take; yet they, being heirs at
“ law, stand in the way of the youngest brother, so that he or his
“ issue cannot take, and therefore the land must escheat. But
“ this more properly belongs to another head, and therefore
“ I shall here consider it no further.

“ If one makes a lease for years either at common law or by
“ way of use, remainder to the right heirs of *J. S.*, who is then
“ living, or to the wife whom *J. S.* shall marry, these remainders
“ are void; because, till the death or marriage of *J. S.*, there is
“ no person to take the freehold, and that cannot be in abeyance,
“ as has been proved already. But it is said, if such limitation
“ were by way of use before 27 H. 8. it would have been good;
“ because the estate in law continued in the feoffee, and they
“ were tenants to the lord, and all precipes were to be brought
“ against them. And though one book seem *contrà*, yet the
“ reason there given is only, that the remainder ought to be
“ limited to one *in esse*, which seems to carry very little weight
“ in it, when no reason of necessity or convenience requires it;
“ and therefore the other opinion seems to be law.”

‘ So, if one makes a lease to *A.* for twenty-one years, if he or
‘ if *B.* shall so long live, and after the death of *B.*, or after the
‘ death of *A.*, to the first son of the body of *B.* in tail, and so to
‘ the second, &c. in tail, remainder to *C.* in fee; all these re-
‘ mainders are void, because the first estate being but for years,
‘ and the remainder not to take effect immediately after those
‘ years, but at a future time, after the death of *A.* or *B.*, which
‘ may be long after, and so during that time there would be an
‘ interruption of the livery, and no tenant of the freehold, there-
‘ fore these remainders are void; and though it happen that *A.*
‘ or *B.* die within the term, yet till their death the freehold would
‘ be

‘ be carried into abeyance, and could not vest in those in remainder for the uncertainty of the death of *A.* or *B.* within the term; and therefore the happening of that after cannot save the remainder, which was void before. But, if such lease had been made, and then it had been limited, after the determination of that estate, or after the expiration of the said term, to *C.* for life, or in tail, &c., this had been a good remainder executed presently, as if a lease for years had been absolutely to one, remainder to another for life, &c., for here was no interruption of the livery, or want of a tenant of the freehold.

‘ *A.* by indenture makes a lease to *B.* for forty years, if *A.* so long live; and after her death to *C.* || and *D.*, their executors, administrators, and assigns, severally and respectively, || (who were no parties to the deed) for one thousand years, and then *A.* levies a fine to different uses, and dies; and five years pass after her death, and then the plaintiff claiming under *C.* and *D.*, entered, &c. By the arguments and reasons of the case, it seems clear that this is no remainder at all to *C.* and *D.*; for first, presently it cannot vest by reason of the lessor’s life interposing; and therefore it is no remainder vested. Secondly, as a contingent remainder it cannot be good; because then it ought to have a particular estate to support it, and ought to be in abeyance or contingency, to vest or not vest when that determines: but here, the first lease is no such particular estate; because that reaches not to the commencement of the remainder, nor is the remainder limited with any regard to the particular estate; because it is not to commence upon the determination of that, but at a future time, viz. upon the death of the lessor. And there is no contingency at all in the case, for it is to take effect at all events, upon the death of the lessor, be it before or after the end of the term, and therefore it can be no other than a future *interesse termini* to begin after the death of the party that grants it, which being but for years, it may well do; because it enures by way of contract. And though the grantee there was no party to the deed, and therefore, as objected, could take nothing, yet it appears that judgment was given for the plaintiff; which proves, first, that the grantee had an interest; secondly, that this interest was not barred by the fine and five years’ nonclaim after the death of the grantor, not being touched, divested, or turned to a right. Thirdly, that though the grantee was no party to the indenture, yet he might well take by virtue thereof, if he gets the indenture to make out his title, for the grantor cannot derogate from his own grant, or avoid his own acts.’

‘ But, if a man devises lands to *A.* for five years from *Michaelmas* next ensuing, and after to *B.* and his heirs, and dies before *Michaelmas*, yet is the remainder good, because till *Michaelmas* the freehold descends to the heir, and he is tenant to all the purposes, either of doing the services, or answering to strangers’ precepts. For here is no livery to operate presently, and therefore no inconvenience to allow of such future “limit-

Plow. 83.
Vaugh. 46.

Raym. 140.
Corbett v. Stone.
|| *Vide* Fearn’s C. R. 285. (7th edit.) by Butler, where Mr. Fearn’s questions the reasons used by the Court in Raym. 151., but thinks the judgment may be accounted for on the ground of *A.* having the freehold and reversion in herself, on which the fine might operate without tort, and of her being only tenant at will as to the possession to her own trustees of the 40 years’ term.||

Cro. Eliz. 878.
Poph. 4. Sir T. Raym. 83.
Plow. 156.
Co. Lit. 217. a.
Noy, 45.
4 Mod. 259.
283. Swinb.

124. Godolph. 360. " limitations, as it would be, if it were by deed executed with
 " livery. And in *Noy* it was held, that a devise for years,
 " remainder to the right heirs of *J. S.*, was good, if *J. S.* died
 " within the term, because the freehold in the mean time de-
 " scended to the heirs, and was not in abeyance."

Roll. R. 238. ' If a man surrenders copyhold, or makes a feoffment in fee
 317. 438. ' of freehold lands to the use of his wife for life, remainder to
 2 Roll. Abr. ' the heirs of the body of the surrenderor and his wife, this is a
 416. Dyer, 99. ' contingent remainder not executed in the wife, because he who
 Leon. 102. ' will take by it must make himself heir of both their bodies,
 ' which cannot be before the death of both; and then if the wife,
 ' who has the particular estate, dies first, the remainder is be-
 ' come void, because it cannot vest when the particular estate
 ' determines. So, if such feoffment or surrender had been to
 ' the use of the wife and a stranger for life, remainder to the
 ' heirs of the husband and wife, this remainder also is con-
 ' tingent; for though the wife dies, yet it shall not vest till the
 ' death of the husband, and if he survives his wife and the
 ' stranger, the remainder is become void, for the above reason.

Lev. 36. Raym. ' *A.*, in consideration of a marriage intended between him
 36. Sid. 83. ' and *B.*, covenants to stand seised to the use of himself for life,
 Keb. 76. ' remainder to his wife for life, remainder to the heirs male of
 Stephens v. ' their bodies, remainder to *C.* in tail: the marriage takes effect:
 Brittridge. ' the husband and wife join in levying a fine. It was adjudged,
 ' that the estates for life to the husband and wife stood so
 ' distinct, that they were not merged or confounded in the estate-
 ' tail, being limited all in one and the same conveyance, and
 ' that the fine levied by them was not any discontinuance either
 ' of the estate-tail or remainders; for if the estate-tail should
 ' be executed in the husband and wife, then the wife would have
 ' an estate in possession, whereas by the conveyance she was
 ' only to have a remainder: also, the husband would have only
 ' a moiety, whereas he was to have the whole during his life;
 ' but yet the remainder in tail vests in the husband and wife as
 ' a remainder; so that the heirs of their bodies shall take it by
 ' descent, and not by purchase.' "For there is no contingency
 " in the case, but when one dies, the other is tenant in tail
 " executed. So, for the same reason, if a lease be made to *A.*
 " for life, remainder to *B.* for life, remainder to *A.* and *B.*, and
 " their heirs, or to the right heirs of *A.* and *B.*, this remainder
 " continues distinct, and is not executed in possession. And
 " these remainders are so distinct from the possession, that they
 " may be granted as remainders, without affecting the par-
 " ticular estate.

Co. Lit. 182, " But, where an estate is limited to *A.* and *B.*, and to the
 183, 184. " heirs of *A.*, or (which is all one) to *A.* and *B.* for their lives,
 2 Co. 61. Cro. " and after their deaths, to the right heirs of *A.*, or to husband
 Eliz. 470. 481. " and wife, and the heirs of the body of the husband; or to two
 Poph. 52. Dy. " men, and the heirs of their bodies, or to the heirs of the body
 9. pl. 22. Cro. " of one of them; these estates are, to some purposes, executed,
 Car. 320. " and to others not, to continue as remainders. For, as to
 3 Co. 5. Moor, " prevent

“ prevent the survivor from taking the whole, they are not executed ; because the first words gave them a joint estate for their lives, which shall go to the survivor ; and this the limitation after shall not controul. Yet they are so far executed in possession, that he who has the inheritance cannot grant it away as a remainder distinct from the possession. And in the case of the husband and wife, between whom there are no moieties, the inheritance is so executed in the husband, that if he makes a feoffment, this will be a discontinuance to his issue ; but, if he suffers a common recovery with single voucher, this will bind neither the issue nor remainder ; because his wife was seised of the whole jointly with him, and not partly, and there are no moieties between them ; and therefore it cannot be good for any part : but the feoffment deals with the possession, and gives it away by solemn livery ; and therefore to preserve the warranty, this amounts to a discontinuance, and the issue shall be put to his formedon in descender, and those in remainder to their formedon in remainder : and if the husband levies a fine, this will bind the issue by the statute of 4 H. 7. and 32 H. 8. But, whether this will be a discontinuance of the remainder or reversion seems doubtful. But, if the estate were to the husband and wife, and heirs of the body of the wife, there a fine levied by the husband would be no bar or discontinuance to the issue or those in remainder, because he had but an estate for life. But this belongs to another enquiry.

“ Copyhold land was surrendered to the use of the wife for life, remainder to the use of the right heirs of the husband and wife : it was the opinion of the justices, that the fee was executed for a moiety in the wife, and the husband thereof seised in her right ; so that upon her death such moiety should go to her heirs, though the husband was then living. So, if a lease were made to *A.* for life, remainder to the right heirs of *A.* and *B.*, this was executed for a moiety in *A.*, and then for the other moiety, in both cases it must be contingent, and if the wife or *A.* die first, will be void ; for *non est hæres viventis*, and it cannot vest in the heirs of the husband or of *B.* during their lives ; and though there are no moieties between the husband and wife, yet, in this case, the inheritance may well execute in the wife for a moiety, because the wife takes the whole, and the husband nothing at all, and so the point of taking by moieties is out of the case. Also, the heirs of the wife, who are to take a moiety of the inheritance, need not be heirs of the husband too, as they must, where such remainder is limited to the heirs of the body of the husband and wife ; for in that case it cannot be executed for a moiety, because it may happen that the heirs of her body cannot take after her death ; as, if the husband survives, they cannot, because they are to be heirs of the body of the husband as well as of the wife ; but in this case, immediately upon the death of the wife, the inheritance for a moiety may vest in her heirs. But, if an estate be made to the wife

210. Yelv. 131.
1 Lev. 37.
1 Sid. 83.
|| Fearne, C. R.
376. 2 Black.
R. 1211.
4 Barn. & A.
503.||

5 Leon. 4.
2 Roll. Abr.
417. pl. 6.

“ for

" for life, remainder to the husband and wife and their heirs; or
 " to *A.* for life, remainder to *A.* and *B.* and their heirs, these
 " remainders are not executed in the wife or in *A.* for a moiety,
 " but continue distinct as remainders: for otherwise where the
 " remainder is a joint-tenancy in fee, and the survivor shall take
 " the whole, if this should be executed in possession for a moiety,
 " this would be against the intent of the deed, and exclude the
 " benefit of the survivorship.

2 Roll. Abr.
 416. pl. 1, 2.
 6 Co. 17.

" If lands are given to a woman and the heirs of the body of
 " her husband, who is then dead; it is said, that the wife and
 " the issue of the husband are joint-tenants for life, with remainder
 " to the issue in tail. For, since they are named to take in pos-
 " session as the wife, and if they should take only an estate for
 " life, the donor would have again the land, though there were
 " still heirs of the body of the husband in being, which by the
 " words and intent of the gift he ought not to have, since he has
 " given it to the heirs of the body of the husband, and whoever
 " answers that description is comprised within the words of the
 " gift, therefore, they shall also have a remainder in tail."

Vent. 534.
 2 Vent. 311.
 Raym. 330.
 2 Jon. 99.
 2 Lev. 252.
 James v.
 Richardson, or
 Burchett v.
 Durdant, Pol-
 lex. 457. 1 Br.
 P. C. 493.
 || *Vide* 2 Mer.
 R. 232.||

" Where one devised lands to *A.* and his heirs, during the life
 " of *B.*, and after the death of *B.*, to the heirs male of the body
 " of the said *B.* now living; it was adjudged in *B. R.*, and affirmed
 " in parliament against a judgment in the Exchequer Chamber,
 " that *C.*, who was the son and heir-apparent of *B.* at the time of
 " the devise, should take this remainder by purchase, as sufficiently
 " described and intended by the will, and that it was not a con-
 " tingent remainder to be void on the determination of the parti-
 " cular estate before the death of *B.*; and it was held, that the
 " words *now living* should refer to the heirs male, and not to *B.*
 " himself, though that was the next antecedent; because the de-
 " visor took notice before that he was living, and then to refer
 " those words to him would be a vain tautology, and *C.* was then
 " heir apparent, and heir in common parlance." " But, whether
 " he should take for life only, or in tail, seems doubtful upon the
 " whole case."

M. 1715, in
Domo Proce-
rum, Beau-
 mont v. Long.
 1 P. Wms. 229.
 S. C. 1 Eq.
 Ca. Abr. 114.
 S. C. 2 Eq. Ca.
 Abr. 351. S. C.
 1 Br. P. C. 489.
 S. C.
 [(a) *Begotten*
 and to be begot-
 ten generally
 bear the same
 construction.
Vide Co. Lit.
 20. b. 2 Vern.
 545. 711. Pr.
 Ch. 491. 1 P.

A. by his will in writing devised all his lands to *B.* and *C.*, and
 the survivor of them, for the term of twenty-one years, for the
 payment of his debts and legacies, and after payment the term to
 cease, and after the end or sooner determination of that estate he
 devised the premises to the first son of his body, and to the heirs
 male of the body of such first son lawfully issuing, and for default
 of such issue to *B.* for ninety-nine years, if he so long live, with-
 out impeachment of waste, remainder to the first and other sons of
B., and the heirs male of their bodies successively, remainder to
C. for ninety-nine years, if he so long live, remainder to his first
 and other sons in tail male successively, remainder to the heirs male
 of his aunt Mrs. *Elizabeth Long*, wife of *Richard Long* clerk, law-
 fully begotten(a), and for default of such issue, the reversion and
 remainder to his own right heirs, and by his will gave 150*l.* an-
 nuity to *Dorothy Beaumont* his sister, the plaintiff in error, for life,
 and 500*l.* to her children, and to his aunt *Elizabeth Long* 100*l.*,
 and

and to her children 500*l.*, and died without issue. *B.* and *C.* entered by virtue of the devise for twenty-one years, and afterwards both died without issue; and *John Beaumont* and *Dorothy* his wife entered in right of *Dorothy* as heir at law to the testator, the term for twenty-one years being determined, and the debts and legacies paid; and *Thomas Long*, eldest son of *Elizabeth* (she having, at the time of making the said will, three sons, viz. the said *Thomas*, and two others,) entered and brought an ejectment; and in the Exchequer judgment was given by Chief Baron *Ward*, *Price*, and *Lovel*, against Baron *Bury*, for the plaintiff *Thomas Long*. But in *Trinity* term 1713, this judgment was reversed in error in the Exchequer Chamber. And now upon error brought in the House of Lords it was argued, that this reversal should be affirmed. First, because *Dorothy* being heir at law to the testator, her right, as such, was to be favoured; and all devises to disinherit an heir at law were to be taken strictly. Secondly, that to make this devise good to *Thomas Long* it must be construed either a contingent remainder, or the words *heirs male* be taken as a *descriptio personæ* to vest in him. As a contingent remainder it cannot be good for want of a freehold to support it; all the preceding estates being only for years; besides, if it were good as a contingent remainder in its creation, yet *Elizabeth Long*, the mother, being living when the particular estates determined, it cannot vest, because *non est hæres viventis*. As *descriptio personæ* it cannot vest, for that ought to be such a description as is *vice nominis*, which the words *heir male* (being a legal term, and not accompanied with any other words to determine the sense otherwise, as heir apparent, or heir now living, &c.) cannot amount to, and the word *begotten* doth not determine the sense otherwise; nor does any intent appear to confine the devise to the issue male of *Elizabeth Long*, then much less to *Thomas Long* only, as the person described in this devise. But notwithstanding these reasons it was adjudged, that the first judgment should stand, and the judgment of reversal be reversed, though ten of the judges were of opinion that the devise was void, and only the three judges (*Lovel* being dead) before mentioned held it good. (a)

his intention that she should not have all the lands; and the limitation to his own right heirs was expressly in *default of issue male of the body* of his aunt *E. L.*, so that it was plain that he intended the apparent heir male of *E. L.* should take before his own heir general, and that his own heir should not take whilst there was any issue of *E. L.* Mr. Fearnie observes, that in this case the ancestor did not take the legal freehold. Pa. 212. (7th edit. by Butler.)

[A testator after charging the lands with annuities to his wife, and after her decease to four of his five daughters, and another annuity to his fifth daughter *M.* for seventy years, if she and the testator's son *R.* should so long jointly live, to commence at the expiration of the term of two years thereafter given in the premises to the said *M.*, and the death of testator's wife; and after devising the premises to his said daughter *M.* for two years after his decease, with remainder to his son *R.* (if then living) for ninety years, if he so long lived; he devised the premises so subject to *R.*'s heirs male, and to the heirs of his daughter *M.* jointly and

Wms. 427.
2 Id. 35.
Fearnie's C.R.
211. (7th ed.)
[But if the words are "in posterum procreandis," sons born before shall be excluded on account of the peculiar force of *in posterum*. Co. Litt. 20. b. n. 5.; et vide 1 Maule & S. 155.]

(a) The court held, in this case, the word *heir* was used for *heir apparent*: That the testator had taken notice that his aunt *E. L.* was living, and that she had three sons; he could not, therefore, mean that the eldest son should take strictly as heir, but as heir apparent he might. Besides, he took notice of his own heir, and gave her an annuity out of the lands, which shewed

Goodright v. White, 2 Bl. R. 1010.

equally,

equally, and *their heirs and assigns for ever*. And for want of heirs male lawfully begotten of the said *R.* at the time of his decease, he devised the premises to the *heirs and assigns of the said M. lawfully begotten of her body*, to hold to the heirs and assigns of the said *M.* for ever. The son *R.*, at the time of the will, had one son and two daughters; and the daughter *M.* had then one son. On the testator's death *M.* entered, and held the whole of the lands for the two years; when the son *R.* entered and held them till his death, upon which, *M.* entering, the son of *R.* brought his ejectment. Upon the case being argued in the Court of C. B., *De Grey C. J.* said, the question was, Whether there was a sufficient *designation* of the person to make the son of *M.* take as her *heir*, living the mother? That two hundred years ago it might have been thought not sufficient, because the description was not legally and *technically* true. But that, within a century past, a more liberal construction of the words of a testator had prevailed; and they had been generally taken in their *popular* sense, which was most likely to have been his meaning.

||On the three last cases Mr. Fearne observes, that the ancestor of none of them took the legal estate of freehold.||

That in the principal case the intent of the testator was clear, that the same favour should be extended to the heirs of *M.* as to the heirs male of *R.*; he took notice that *M.* was *living* by leaving her a term, and a subsequent annuity; and meant a *present* interest should vest in her heir, that is, her *heir apparent* during *her life*; he therefore did not think the lessor of the plaintiff was entitled to more than one moiety of the premises.—The rest of the justices agreed in the same opinion, and the plaintiff had judgment as to one moiety only.]

Right v. Creber, 5 Barn. & C. 866.; and see Gretton v. Haward, 6 Taunt. 94.

||So where *A. B.* devised land to trustees, to permit his daughter to receive the rents for her life; and from and after her death he devised the same “unto the heirs of the body of his daughter, share and share alike, their heirs and assigns for ever;” and at the time of the testator's death the daughter had one child, and afterwards had eleven others; it was held, that the words “heirs of the body” in this will were not to be construed in their technical sense, but that they meant *children*, and consequently that the daughter's child born before the testator's death took a vested remainder in fee, subject to open and let in those who might be born afterwards.||

Ld. Raym. 185. Preced. Ch. 468. Baker v. Wall.

J. S. having issue two sons, *A.* and *B.*, devises in the words following: “I give to my eldest son *A.* all that my farm called “*Dumsey*, to him and his heirs male for ever; if a female, my “next heir shall allow and pay to her 200*l.* in money, or twelve “pounds a year out of the rents and profits of *Dumsey*, and shall “have all the rest to himself; I mean my next heir, to him and “his heirs male for ever.” Upon the death of the testator, *A.* entered and died, leaving issue a daughter; and it was adjudged, that the lands should go to the second son *B.*, and not to the daughter of the eldest, though she was heir general.

2 Vern. 729. Newcomen v. Barkham, Preced. Ch.

I. S. devised to trustees in trust, after debts and legacies paid, to convey to *A.* his cousin and the heirs male of his body; and for want of such heirs male, then to the heirs male of the body of

of *B.*, his great grandfather; and for want of such heirs male, to his own right heirs for ever, and gave to his sister 2000*l.* to be put out at interest during her life, she to receive the interest, and after her death to her children, and died, and soon after *A.* died without issue; and *C.* being heir male of *B.* the testator's great grandfather, but not heir general, there being a daughter of an elder brother, the question was between him and the testator's sister and heir at law, who had the 2000*l.* devised to her, whether the devise was void or not? And my Lord Chancellor held the devise good, and that *C.* should take as a person sufficiently described and intended by the testator.

But, where one seised in fee devised his lands to his granddaughter (being his heir at law) for her life, remainder to his own right heirs male for ever, and died, leaving his granddaughter his heir at law, and also leaving a deceased brother's son, who was the next of kin in the male line; it was held by Lord *Macclesfield*, that the nephew could not take, that the words *heirs male* must be intended heirs male of the body, and could never extend to an heir male of any collateral line; and it not being said in the will heir male of his body or of his name, the granddaughter, who was his heir at law, might have an heir male, though not of his name. And he said that this case differed from that of *Brown* and *Barkham* (a), that being merely a trust; also that in that case the remainder was limited to the heirs male of the body of Sir *Robert Barkham* the grandfather; whereas here the devise was to the heirs male, without saying of any body.

of Lord *Macclesfield's* order (Vin. Abr. tit. Devise. W. b. pl. 15. n.) and that certificate was afterwards confirmed, and the bill dismissed with costs. Reg. Lib. A. 1741. fol. 646. But in *Wills v. Palmer*, 5 Burr. 2615. on a case sent to the Court of K.B. by the Court of Chancery, the question arose on both a will and a deed, whether *A.* took by purchase under the description of *heirs male of the body of B.* not being heir general, *B.* being in the first case the grantor; the court certified, that *A.* took an estate-tail by descent; but they added in the certificate, that if a third person had been the grantor, they should have thought that *A.* would have taken by purchase as heir male of the body of *B.*; and they also certified, that he did so take under the will. Cox's note, 2 P. Wms. 3.] (a) The case of *Newcomen* and *Barkham*, *supra*. || *Vide* Goodtitle dem. *Weston v. Burtenshaw*, *Fearne*, C.R. (7th edit.) Append. No. I. ||

A. seised of lands in fee by indenture, covenants to stand seised to the use of himself for life, remainder to *Edward* his eldest son for life, remainder to the first son of *Edward* in tail male, remainder to the second, third, and fourth sons of *Edward* in tail male, and so to all and every other the heirs male of the body of *Edward* respectively and successively, and to the heirs male of their bodies according to their seniority of birth; remainder to the lessor of the plaintiff for life, and a proviso, that if *Edward* dies without issue male, that he shall have power to charge the lands with daughters' portions not exceeding 100*l.* a-piece: the covenantor dies, and *Edward* suffers a common recovery, and dies without issue male: and the only question was, If *Edward* took an estate-tail subsequent to the limitation to his four sons in tail, or if he took only an estate for life, with a like remainder to all his other sons in tail male successively, as was limited to the four first? It was adjudged, that he took but an estate for life, and that all his other sons should take by purchase. First, Because otherwise the

461. S.C.
|| *Vide* Mr. Hargrave's learned note as to the doctrine that an heir special to take by purchase must also be heir general. Co. Litt. 246. n. 3. 164. a. n. 2. ||

2 P. Wms. 1. *Dawes v. Ferrers*. [This case was again brought before the court in *Gwynne v. Hooke*, 18th Dec. 1740, when Lord *Hardwicke* directed a case for the opinion of the Court of K. B. (Reg. Lib. A. 1740, fo. 310.) who certified in confirmation

2 Jon. 114.
2 Lev. 223.
Raym. 278.
Lisle v. Gray.

(a) || As to the effect of similar words of reference, *vide* Meredith v. Meredith, 10 East, 503. || (b) Judgment was given for the plaintiff:

upon which a writ of error was brought in the Exchequer Chamber, where, it seems, the judgment was affirmed, as is observed by Judge Tracy, 1 P. Wms. 90., who, it appears, had searched the record, the reports differing in that matter. Fearne, 152. (7th edit.) by Butler. || *Vide* 2 Mer. 294. ||

Co. 66. 2 And. 37. Cro. Eliz. 455. Archer's case cited. Vent. 216. 3 Lev. 435. and in several other cases, which *vide*, under title *Devise*.

6 Co. 17. Wild's case. || *Vide* 2 Bos. & Pull. 485. 4 Taunt. 515. 1 Ball & Bea. 461. ||

2 Roll. Abr. 416. 6 Co. 17.

Hil. 15 G. 2. in *B. R.* Colson v. Colson. 2 Stra. 1125. S. C. 2 Atk. 246. S. C. Fearne, || (7th edit.) 161.; *et vide acc.* Hodgson v. Ambrose, Dougl. 537. ||

Chudleigh's case, 16. 135. 11 Co. 82. Co. Lit. 28. a. 2 Saund. 582. 386, 387. Cro.

the words, *and to the heirs male of their bodies*, would be useless. Secondly, The words *and so* (a), &c. prove the same intent, which being turned into *Latin* are *eodem modo*. Thirdly, *Severally and successively, according to their seniority*, are also a further proof of such intent. Fourthly, The power to provide portions for daughters would be unnecessary if *Edward* took an estate-tail, because then by a common recovery he might bar it, and charge the lands as he thought fit. (b)

' *A.* devises lands to *B.* for life, and after his death to the next heir male of *B.*, and the heirs male of the body of such next heir male; and it was adjudged a good remainder in contingency to the next heir male of *B.* being in the singular number, and so was only a description or designation of the person who should take the remainder after the death of *B.*, and not any limitation of his estate.'

If one devises to *A.* for life, remainder to *B.* and the heirs of his body, remainder to *C.* and his wife for their lives, and after their death to their children, they then having children, *C.* and his wife take only an estate for life, with remainders to their children for life, and no estate-tail; but had there been no children, the devise being immediate, the children could not take in remainder, and therefore it must be an entail in the husband and wife.

If lands are given to a woman and the heirs of the body of her husband who is then dead, it is said that the wife and the issue of the husband are joint-tenants for life, with remainder to the issue in tail; for since they are named to take in possession as the wife, if they should only take an estate for life, the donor would have again the land, though there were still heirs of the body of the husband in being, which by the words and intent of the gift he ought not to have, since he has given it to the heirs of the body of the husband; and whoever answers that description is comprised within the words of the gift.

A. devised lands to *B.* for life, remainder to trustees to preserve contingent remainders during the life of *B.*, remainder to the heirs of the body of *B.* lawfully begotten; and *Verney* doubting whether this was an estate for life in *B.* or tail, sent it as a case to *B. R.*; and notwithstanding the testator's plain intention to pass an estate for life, yet the court held, that where the ancestor takes an estate for life, and in the same instrument a limitation is made to his heirs, or to the heirs of his body, the heir cannot be a purchaser, and that therefore this was a plain estate-tail.

" If *A.* makes a feoffment in fee to the use of himself for life, remainder to the first son of his body begotten, and the heirs male of the body of such first son, and to the second, &c. in like manner; and for want of such issue, remainder to himself and the heirs of his body, with remainder to *B.* in fee; in this case, " till

"till issue, *A.* is tenant in tail general executed, with remainder to *B.* in fee. But, if he had issue a son, then all his estate-tail opens and lets in the remainder to such son, and then he is become again tenant for life, remainder to such first son in tail male, &c., remainder to himself in tail general, remainder to *B.* in fee. And this arises upon the construction of the statute of uses; for before that statute the use being nothing else but the perception of the profits, and no estate in the land itself, was not subject to the same rules of law by which the land itself was governed, nor had the *cestuy que use* any other remedy than by *subpœna* in Chancery, to compel the tenant of the land to let him into the perception of the profits, or convey the possession to him. And though that statute, by carrying the possession to the use, did in effect take away and destroy the use, for so much as was executed in possession, yet it still left in the parties the same power of limiting and appointing the uses as they had before. And when the person who was to take the use came *in esse*, the statute supplied the place of the Chancery, and carried the possession to the use, if nothing were done in the mean time to hinder the rising of the use; and though the estates were before united, yet by an act of parliament they may well be severed again to let in the intermediate use, since the statute executes the possession only according to the uses when they happen, as well as those that are capable of being executed presently. And therefore in that case, though the wife of the tenant in tail hath by the intermarriage title of dower, yet it is defeated again by the birth of a son, which turns the estate-tail to an estate for life by the terms of the settlement under which only the title of dower accrued, and therefore must be subject to be defeated by the terms of the same settlement."

¶ In *Chudleigh's* case the contingent remainders to the sons were estates-tail, and therefore the subsequent remainder to the heirs of the body of the ancestor was not prevented from vesting. But where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested. As a devise to *A.* for life without impeachment of waste; and if he have issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to *B.* and his heirs for ever. In that case the court held that the remainder to *B.* and his heirs was not vested, because the precedent limitation to the issue of *A.* was resolved to be a contingent fee; and they took the distinction above stated, that where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person *in esse*, vest, but that no remainder after a limitation in fee can be vested. But although the limitation (*a*) to *B.* and his heirs was not vested, yet it was a good remainder, notwithstanding that the preceding limitation was of a contingent fee; for although a fee cannot in conveyances at common law be mounted on a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives one for the other, and not to interfere, but so that one only

Eliz. 345. *contr.*
 ¶ *Vide* Gilbert U. & T. by Sugden, p. 127. Lewis dem. Ormond v. Walters, 6 East, 336.; and for an abstract of a translation of Anderson's report of Chudleigh's case, see Gilb. U. & T. by Sugden, Appendix. 521. (3d ed.)

Loddington v. Kime, 1 Salk. 224. 1 Ld. Raym. 203. Goodright v. Dunham, Doug. 251. Doe dem. Comberbach v. Perryn, 3 Term R. 484. Ives v. Legge, *id.* 488. *in nota.* Doe d. Gilman v. Elsey, 4 East, 313.; *et vide* Lethieullier v. Tracy, 3 Atk. R. 774. (*a*) Fearn, C.R. 373. (7th ed.); *et vide* Doe v. Holme, 3 Wils. 237.

Doe v. Scudamore, 2 Bos. & P. 289. Crump v. Norwood, 7 Taunt. 362.; *vide* Doe v. Fonnereau, Doug. 487. and note.

take effect, and every subsequent limitation be a disposition substituted in the room of the former if the former should fail of effect; and this sort of alternative limitation is quaintly termed a contingency with a double aspect.||

Poph. 5. Moor, 104. Perk. sect. 56. Dav. 55.

‘ If one makes a lease to *A.* for life, remainder to him who first comes to *St. Paul’s* church, &c. this is a good remainder in abeyance or contingency, but can vest in none till he qualifies himself to take it by coming to *St. Paul’s* church; nor can any one grant it away, though he should happen after to come there first.’

Cro. Car. 102. Yelv. 85. Poph. 5. 10 Co. 51. Cro: Eliz. 580. 1 Leon. 245. Co. Lit. 378. b.

“ If one makes a feoffment in fee to the use of himself and his wife, and to the heirs of the survivor of them, or to the heirs of such as die first; this is in the nature of a contingent remainder to the survivor, or who dies first, and after the contingency happened, the heirs shall be in by descent; but by a feoffment before it takes place, the remainder will be destroyed. But these contingent remainders cannot be granted over, because they are in no person to grant; therefore, where a lease was made to the husband and wife for 21 years, remainder to the survivor of them for 40 years, and the husband granted away this remainder; it was holden a void grant, though he survived, because till the contingency happened, he had nothing in him to grant, release, or surrender. So, if a lease be made for life, remainder to the right heir of *J. S.* who is then living, if the eldest son of *J. S.* grants this remainder, and then *J. S.* dies; yet upon the determination of the particular estate the grantor may enter, because his grant was void, having nothing in him to grant. And in the case of the husband and wife, if lands are given to them, and to the heirs of the body of the survivor of them, and they both join in a lease for 21 years, observing all the circumstances requisite by 32 H. 8., yet this lease shall not bind the issue for the above reason.

10 Co. 51.

Clerk v. Sydenham. Yelv. 85. Plowd. 288. *Vide supra.*

|| Where a copyhold was limited to the use of husband and wife, for their natural lives, and the life of the longest liver of them, and from and

“ A lease was made to *A.*, *B.*, and *C.* for their lives, remainder to the assigns of the survivor of them for 99 years. *B.* was the survivor. It was holden, that the 99 years was an interest vested in him, which he might well dispose of, as he thought fit, and not a bare power only of nominating one to take it. For *assigns* is a word proper for the limitation of a further interest to the same party, in case of a chattel, as heirs is for the inheritance, and yet both vest in the party himself; for assigns are either in fact or in law, as executors, &c.; and it appears before, that a remainder to his executors in such manner vests in the party himself; and so it does in case of such a limitation to his assigns, who, for want of an actual assignee, will be his executors.”

after the decease of the survivor, to the right heirs of the survivor for ever; it was held, that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor. Doe v. Wilson, 4 Barn. & A. 303.||

‘ One levies a fine to the use of himself for life, and after his death to the use of his two daughters till his son *B.* should return from beyond sea, and should come to the age of twenty-one years, or die; and after such return and age of twenty-one years, or death, which should first happen, to the use of the said *B.*, and the heirs of his body begotten: *B.* returns from beyond sea: it was adjudged, that this was a good remainder, and should vest in him immediately upon his return, though he was not then twenty-one; for the last disjunctive *or* is to be applied to the whole sentence, and makes it disjunctive in all, and though his coming from beyond sea, or to twenty-one years, are uncertain, yet his death is certain; and therefore this remainder does not depend altogether upon uncertainties. And in this case it seems the heirs of his body shall not take by purchase, though his death had happened first, and so the remainder could not vest in himself; for the limitation being to him and the heirs of his body, whoever takes by virtue thereof must take as from him, and consequently will be in by descent (*a*), and not by purchase.

Cro. Eliz. 269.
Leon. 245. Co.
Lit. 225. Ld.
Vouxe's, or
Vaux's, case
Fearne's C.R.
19. (7th edit.)
Butler.

‘ So, if one devises lands to *A.* for life, *si tam diu sola vixerit*, and after her death or marriage, remainder over to another, this is a good remainder, because it is certain one of the two contingencies will happen. But, if one gives lands to *A.* till *B.* comes to twenty-one years of age, and when *B.* comes to such age, then to remain over, this remainder is contingent, and uncertain whether it will ever vest; for if *B.* dies before such age, the remainder is become void. So, where land is given to a woman so long as she shall remain sole, or to *A.* till *B.* comes from *Rome* to *England*, and after her marriage, or *B.*'s coming to *England*, then to remain to *C.* in fee, these remainders are contingent, and uncertain whether they shall ever vest or not; for if the woman never marries, nor *B.* comes to *England*, these remainders will not vest, but are become void. So, if lands are devised to one for life, and if the devisee be disturbed, that then the land shall remain over to another in fee, this creates no remainder till such disturbance; and if that never happens, the remainder fails likewise; for these remainders are not to arise but upon such acts done; and therefore if they fail, so does the remainder.

(a) 1 Co. 99.
Shelley's case.
2 Leon. 82.
3 Leon. 182.
5 Co. 20.
Dyer, 142.

‘ One levies a fine to the use of *A.* and the heirs male of his body, till he or the heirs male of his body attempt to alien or sell, and then to the use of *B.*, &c.: *A.* dies without issue, and without any attempt, &c.: *B.* will have no estate, for his remainder was not to begin but upon such attempt precedent, and that not happening, the remainder never takes place.’
‘ And *vide infra*, that a remainder to commence after such attempt is repugnant and against law.”

Acton v. Hare,
Poph. 97.
10 Co. 85.

‘ A lease is made to *A.* for life, remainder to *B.* for life, and if *B.* dies before *A.*, that then the land shall remain to *C.* for life, this is a good remainder, if the contingency happens, otherwise not; and in the mean time the estate continues in the lessor, and is not in abeyance, being expressly limited to go over, if such

Plow. 25. 5 Co.
20. Raym. 144.
Co. Lit. 378.

‘ contingency happens ; therefore, till it does happen, nothing is
‘ divested out of the lessor.’

Holcroft’s
case, Moor,
486. Sir T.
Raym. 429.
S. C. cited.
|| See Fearnce,
C. R. 241,
242. ||

“ *A.*, by indenture, covenants to levy a fine to the use of him-
“ self for life, and after his decease to the use of *B.* his son, so
“ long and until he attempt to alien, and then to the use of *C.*,
“ and the heirs male of his body during the life of *B.*, and im-
“ mediately after his decease, to the use of the first and other sons
“ of *B.* in tail male successively, remainder to *C.* in tail. It was
“ objected, that no use vested in *C.* till *B.* attempted to alien, for
“ the use to *C.*, and all the limitations after, depend on *B.*’s
“ attempt to alien. But it seemed to the court, that it should
“ be intended in the limitation of the use, that after *B.*’s death
“ without issue male, *C.* should have the land, be there any
“ attempt to alien or not, by reason of the words, *and im-*
“ *mediately after his decease to the first son, &c.*; for the use
“ which was to arise upon the attempt to alien, is only re-
“ strained to the use for the life of *B.*

Hob. 30, 31.
1 Br. Abr. 155.
pl. 85. Plowd.
25. a.

“ If one devise land to *A.* and the heirs of his body, provided
“ that if *A.* happen to die without heirs of his body, that then it
“ shall remain to *B.*, this is a good remainder vested presently,
“ and no contingency at all, but the ordinary limitation of a
“ remainder upon an estate-tail. So, in a lease for life, upon
“ condition that if the lessee die, then it shall remain, &c., this
“ is a good remainder executed presently.”

Luxford v.
Cheeke, 3 Lev.
125. Sir T.
Raym. 427.
S. C. by the
name of Brown
v. Cutter,
3 Leon. 182:
[In Lady Anne
Fry’s case,
1 Ventr. 203.

‘ One devises lands to his wife during her natural life, if she
‘ does not marry; but if she marries, then presently after my son
‘ *A.* to enter and enjoy, to him and the heirs male of his body:
‘ it was adjudged, first, That by this will, the wife had an estate
‘ for her widowhood only; secondly, That this was a remainder
‘ vested in *A.* presently to take effect in possession upon the
‘ death or marriage of the wife, which should first happen, and
‘ not a contingent remainder to take effect only in case the wife
‘ married.

Hale expressed a similar opinion ; where, he said, it is all one as if the estate had been devised to her for life, *and if she marries then to remain*, which had been but an estate *quam diu sola viverit*. — In a case where a testator devised lands to his wife *during her widowhood*, and *if she should marry again*, that then his daughter should enter; provided that if his wife married and survived his daughter, the estate should return to her; Lord *Hardwicke* took a distinction between the devise of an estate during widowhood, with remainder over, and a devise during widowhood with remainder over on her marrying again within a *limited time*. *Jordan v. Holkham*, Ambl. 209. Where there was a devise to a wife provided she remained a widow; but in case she married a second husband, then to testator’s nephew when he should attain the age of twenty-three years; it was held, that the widow had an estate *till* the nephew attained the age of twenty-three years, though she married before. *Doe v. Freeman*, 1 Term R. 389.] || A devise over, in the event of a widow or daughter’s marrying a Scotchman, has been held valid. *Perrin v. Lyon*, 9 East, R. 170.; and see *Fearnce’s C. R. 7. in nota*, (7th ed.) ||

Foy v. Hinde,
Cro. Jac. 696.
Jon. 57. Raym.
429.
|| Fearnce, C. R.
(7th ed.) 255. ||

‘ One devises lands in this manner : My will is, to entail all
‘ my lands to my nephew *A.*, and the heirs male of his body, and
‘ for default of such issue, to his brother, and the heirs male of
‘ his body, &c. *habendum* to them severally, and to the heirs male
‘ of their bodies, to the only intent and true meaning of this my
‘ will, and so long as they and every of them do perform and
‘ keep the true meaning thereof touching the entailing all my
‘ said

' said lands to *A.*, and the heirs male of his body begotten, until
 ' he or they make any acts to alter or discontinue the estate-tail,
 ' and then to *B.*, and the heirs male of his body, with other re-
 ' mainders over, and dies: *A.* enters; *B.* dies, leaving issue *C.*,
 ' and then *A.* levies a fine; and it was objected that *C.* could
 ' not enter, because the remainder devised to his father was con-
 ' tingent, and not to arise but upon *A.*'s alteration of the estate,
 ' and not before or otherwise, and then *B.* dying before that con-
 ' tingency happened, the remainder could not vest. But it was
 ' adjudged, that the remainder to *B.* was not contingent, but an
 ' immediate devise, and that otherwise the intent of the devisor,
 ' which was to give to every one in remainder successively, would
 ' be destroyed, though it was holden that the limitation over upon
 ' his alienation did not so defeat the operation of the fine, as to
 ' prevent the discontinuance wrought thereby, and give him in
 ' remainder immediate title of entry thereby; for that such clause
 ' tended to a perpetuity, and was condemned in law upon the
 ' reason of other cases there cited.'

|| *Vide*, as to
 the repug-
 nancy and in-
 validity of re-
 straints on
 alienation by
 tenants in tail,
 Litt. s. 720.
 Fearn's C. R.
 257. note 4.
 and *infra*.||

" *A.*, in consideration of a marriage intended between *B.* his
 " nephew, and *C.* the daughter of *D.*, and of 200 marks paid by
 " *D.*, makes a feoffment to the use of *B.* and *C.* for their lives,
 " and after carnal copulation to the use of the issues of their
 " bodies, remainder to *B.* and the heirs of his body begotten,
 " &c. The marriage never takes effect, but *B.* marries another
 " woman, and hath issue by her; and *A.* married also, and had
 " issue; and after the death of *A.* and *B.* the question between
 " their children was, 1st, If the use should arise to *B.* and *C.* for
 " their lives by reason of the money paid, though no marriage
 " was had? 2d, If the remainders which were limited after the
 " marriage are not now prevented from rising, by reason no mar-
 " riage was had? As to the first, the justices thought, the use
 " would well arise, though no marriage was had; because it was
 " limited out of the estate of the feoffees, which was an estate
 " executed, and needed no consideration to raise the use. But if
 " it had been by way of covenant to stand seised, they held, no
 " use would arise; because the marriage was the principal con-
 " sideration, and that failing, the consideration to raise the use
 " fails likewise, and the money would not be sufficient. As to
 " the second point, they thought the consideration of name and
 " blood sufficient to raise a use to *B.* who was *A.*'s nephew, and
 " that it might be independent on the other limitations, which
 " were not to arise but upon the marriage had. But no judg-
 " ment was given."

Moor, 101. pl.
 247. Dy. 354.
 b. Calthrop's
 case.

' Lands were settled to the use of the husband and wife for
 ' their joint lives, and after the death of either of them, to the
 ' heirs of the body of the wife by the husband to be begotten, and
 ' for default of such issue, the wife surviving the husband, to the
 ' use of the wife for life, and after her death to the heirs of her
 ' body begotten; the husband dies leaving issue by the wife, and
 ' she marries again, and suffers a common recovery; and the
 ' principal question was, Whether this was an estate-tail exe-

Sid. 247.
 Raym. 126.
 Keb. 888. Mer-

rell v. Rumsey; *et vide*
Perk. s. 337.
5 Co. 9. 2 Roll.
Abr. 418.

Perk. s. 337.

cuted in the wife, or that the remainder was contingent? It was argued, that the remainder depending on their joint lives, and being limited to the heirs of the body of one of them, so that it may be frustrate, if the wife survives, must needs be contingent; because by the death of the husband the joint estate for life is determined, and yet the remainder to the heirs of the body of the wife by the husband cannot take effect, for *non est hæres viventis*. But *per cur.* clearly, and with some displeasure at the argument, the words *heirs, &c.* are not words of purchase, but of limitation to the wife, and the estate vests in her presently, and is not in contingency; as if an estate be limited to a woman *durante viduitate*, remainder to her heirs or the heirs of her body, this is a fee-simple or fee-tail executed in her presently; and though she afterwards marries, yet that shall not destroy the estate that was well vested and settled in her before; and here the remainder closes with the particular estate to all purposes but dividing the joint-tenancy, and is no more than an estate to the husband and wife, and the heirs of the body of the wife. “And they seemed to rely upon the case in *Perkins*, where lands were leased to *A.* and *B.* for the life of *C.*, remainder to the right heirs of *A.*; then *C.* died, living *A.* and *B.*, and after *A.* takes wife and died, living *B.* It is there said, that the wife of *A.* shall be endowed, because *C.* died, living *A.* the husband, so that the freehold and inheritance were united in the husband during the coverture. Which case, if it be law, may give some colour to the principal case. But it seems to me not to be law; for the rule is, that where by possibility the particular estate may determine before the remainder can take effect, there such remainder is contingent; and by the death of *C.* the particular estate is absolutely determined, for the remainder cannot then take effect, because *A.* cannot have heirs during his life. And this is no infringement of the other rule, that wherever the ancestor takes an estate for life, and after in the same conveyance a limitation is made to his right heirs, or the heirs of his body mediately or immediately, that in such case the remainder vests in the ancestor himself, and by consequence the heirs shall be in by descent, and not by purchase; for here, *A.* took no estate for his own life; and though it was an estate of freehold, yet it was so limited, that without any act or default of his it might determine during his life; and since the life of *C.* was made the measure of the continuance of the estate of *A.* and *B.*, it is more reasonable to give it *A.* after *C.*’s death, than it is to give it *B.* likewise: but both their estates are to be bounded and circumscribed by the life of *C.*, and when he dies, living *A.*, who can then have no heir to take the remainder, it seems in reason, the remainder is destroyed. So, in the principal case, when the estate is limited to the husband and wife during *their joint lives*, this is no absolute estate for their lives so as to go to the survivor, but the death of either of them determines that estate, and the remainder being limited to the heirs of the body of the wife who

“survived,

5 Co. 9.

“survived, and can have no heir during her life, seems to be defeated thereby. And note, they seemed to agree, that if an estate were made to the husband and wife *during coverture*, remainder to the heirs, or heirs of the body of the husband, that this was a contingent remainder. And there seems no difference in reason between such a limitation, and where it is *durante viduitate*, or to two for their joint lives, or to two during the life of a third person, with such remainder over; because in all those cases the particular estate determines before the remainder can take effect. And the case in *2 Ro. Abr.* 418. *supra*, seems expressly to contradict the principal case, and the reason of it. So the case *supra*. But in the principal case, if the wife had died first, there had been no doubt but the heirs of her body had taken by descent, she having had the whole during her life. And this seems to differ much from a limitation to baron and feme, and the heirs of the body of the feme; for there, whichever of them dies first, yet the survivor shall hold during life. *Ideo quære* of these matters. As to the second point of the case, if the second limitation to the wife should take effect, because it was upon the dying without such issue, whereas there was issue so begotten living at the death of the husband; the court said there was no colour for it, for such heir and such issue is all one, for unless in the heir, it is not such issue. Note, this objection seems to make the second remainder to the wife conditional upon the husband's not leaving issue at the time of his death, which here he did. But the limitation is not confined to his leaving issue at the time of his death, but is general, *and for default of such issue* or heir, and seems not to differ from the common limitation of remainders after estates-tail, and therefore may well vest as a remainder in the wife immediately upon the husband's death.

1 Sid. 247.

Quære.

|| See Fearn's C. R. 32. (7th edit.) Butler, where the doctrine of the principal case (Perkins, 337.) is vindicated, and Rolle's distinctions are controverted; and Mr. Fearnie thinks it the better conclusion, that the possibility of the freehold determining in

the life of the ancestor who takes it, does not keep the subsequent limitation to heirs from attaching in the ancestor himself.||

“One makes a feoffment in fee to the use of himself for life, and after to the use of such person and persons to whom he shall demise any part of the premises for life or years, and after for the performance of his last will, and to the use of such person and persons to whom he shall by his last will devise any estate or estates, and after to the use of *B.* in tail, with other remainders over. These remainders are contingent, and not executed in *B.* and the others till the death of the feoffor, because the feoffor hath such power that by his will he may give away the whole fee-simple, and therefore, till his death it being uncertain whether they will ever vest or not, they must needs be contingent, and then the use of the fee in the mean time vests again in the feoffor. But *quære* in this case, if he afterwards makes a feoffment in fee, or commits a forfeiture, if those in remainder may not enter presently: for such feoffment is not in pursuance of his power; and if it be not warranted by that, it cannot be good at all. For if it should, he might then derogate from his own grant, and avoid

10 Co. 85.

Leonard Lovie's case.

|| Walpole v. Conway, Barnard. C.R. 155. acc.||

“ it in what manner he pleased. And if it be so, that those in
 “ remainder may enter in such case, then their remainder must
 “ be vested in them before, and cannot be contingent; for the
 “ feoffment which gives away the whole estate to another, can
 “ never operate to as to vest in them at the same time too.
 “ Besides, the account given of these remainders is inconsistent
 “ with their being in contingency; for all contingent remainders
 “ pass out of the feoffor at the same time with the particular
 “ estate, and are carried into abeyance till the contingency
 “ happens; but here it is said the use of the fee is vested in the
 “ feoffor till his death, which cannot be; therefore, it seems
 “ more reasonable to construe these remainders to be vested
 “ presently, though subject to be divested and taken out of them
 “ by the feoffor, if he pursues his power in devising away the
 “ whole. But if he makes such feoffment, it should seem he
 “ can never after execute his power, for that was inclusively
 “ given away and extinguished in the feoffment, whether those
 “ in remainder may enter for the forfeiture or not; and if they
 “ cannot, then their estates are absolutely in the power of the
 “ feoffor, and his reserving to himself a power to defeat them in
 “ such a particular manner was altogether idle, which seems
 “ not reasonable.”

Cunningham
 v. Moody,
 1 Ves. sen. 174.
 Doe dem.
 Willis v. Mar-
 tin, 4 Term R.
 39. Maundrell
 v. Maundrell,
 7 Ves. 567.
 10 Ves. 246.
 Sugden on

|| The cases above in the margin are now overruled, and the law is settled according to the doctrine suggested in the *quere* by C. B. Gilbert; viz. that where there is a limitation for life to the ancestor, remainder to such uses as he shall appoint, and in default of appointment remainders over, the power of appointment does not suspend the vesting of the subsequent remainder; but the estates vest, subject only to be divested, in part or in whole, by the exercise of the power of appointment; if the appointment is not made, they remain undisturbed.||

Powers, c. 2. and 4.; *et vide* Fearn, C. R. 226. (7th edit.) where this doctrine is learnedly shewn not to be inconsistent with the doctrine of Loddington v. Kime, *supra*, p. 673.

(D) Of Remainders in Abeyance or Contingency; what Estate is sufficient to support them; when they are to take Effect; and by what Means they may be destroyed or prevented from coming *in esse*; and therein, of Remainders by way of executory Devise or future Interest.

“ **A** CONTINGENT remainder must vest during the particular estate, because if remote contingencies should be allowed to hang over titles, no man would know when he was safe in his purchases. The law, therefore, has appointed how long such contingencies are to expect, which is only during the continuance of the particular estate, and then the remainder must come in being; since remainder *ex vi termini* signifies a remaining part of a particular estate preceding. Whether such particular estate determine by effluxion of time, or by merger of the particular estate in a greater, it is all one; for if the contingent remainder do not vest before such merger, it
 “ can

“ can have no being afterwards; since the particular estate is the sole limitation on which the remainder is to take place.

“ Contingent remainders arise either at common law, or by way of use, and are also to be destroyed two ways: first, by the merger of the particular estate which supports them; for the particular estate being, as hath been said, the sole time of limitation in which these contingencies are to take place, the merger of that estate is the destruction of the remainders; and this, whether such remainders be limited at common law or by way of use. But then every particular estate upon which such remainders depend must be taken away; for the remainder is the remaining part of each particular estate, when there are more than one in the limitation; and each particular estate is the time appointed by law when such contingent remainders are to take place; and therefore the destroying of one of these particular estates is no destruction of the remainder. Hence it is, that if an estate be limited to *A.* for life, remainder to *B.* for life, with contingent remainders over; if *A.* makes a feoffment, this does not destroy the contingent remainder, because *B.* hath a right to enter and re-continue his estate, which therefore in judgment of law subsists in him; and therefore that estate is not gone within the compass of which the contingent remainder is to vest. So it is, if *B.* had only a right of action (*a*); as if a descent had been cast upon the heir of the feoffee of *A.*, and put *B.* to his real action; because he who hath the right to the estate, hath, by the better opinion, in judgment of law, the estate in him.

“ sufficient to support a contingent remainder, although a right of entry is so; for the estate is determined when it is turned to a mere right of action.]]

2 Roll. Abr.
796. Wegg v.
Villers.
1 Vent. 188.
[(a) But in
Thomson v.
Leach, 12 Mod.
173. and
Ferne, C. R.
287. (7th ed.)
it is expressly
laid down that
a right of action
is not suffi-

“ Secondly, such contingent remainder arising by way of use, may be also destroyed by taking away the seisin out of which the use ariseth. For the statute of the 27 H. 8. hath executed the seisin of the feoffee to the uses limited; so that if there be no seisin at the time when the use is to take place, such use must be destroyed, because no seisin or possession can be executed to it; and therefore, if the person in whom the legal seisin is made a feoffment for value without notice, such feoffee comes into a good title at law, and there is no reason in equity to take it from him; and by consequence, in such cases, the seisin out of which the use ariseth is destroyed. And therefore, if a man covenants to stand seised to the use of himself and his heirs, till an intended marriage of his son takes effect; and after the marriage, to the use of his son for his life, remainder to his wife for her life, with contingent remainders to the issue of the marriage, the father makes a feoffment in fee for value, without notice of the uses before such marriage, such uses are destroyed; and though the marriage takes effect, they can never arise, because the seisin out of which the uses were to arise is destroyed. Otherwise it is, if the feoffment had been without value, or with notice; because such feoffees had only acquired a seisin, which equity would make liable to the uses as a mere substitute of the feoffor. The same law of a

“ lease

2 Roll. Abr.
796. Wegg v.
Villers. || *Vide*
Ferne's C. R.
(7th edit.) 287.
296.||

“ lease for years, reserving rent for the time of the continuance
“ of such lease; because such lease is valuable. Otherwise, of a
“ lease for years, reserving no rent, because for no valuable
“ consideration.

“ If a man makes a feoffment to *J. S.*, to the use of himself for
“ life, remainder to his daughter on her marriage for her life, re-
“ mainder to her first son, remainder to his own right heirs; if
“ he makes a feoffment in fee, or grants the reversion without
“ value, that will not displace the contingent remainders, because
“ the feoffee comes in as a volunteer, and therefore shall not
“ disturb a valuable settlement. But, if such feoffor and *J. S.*
“ join in a feoffment for value without notice, it will destroy the
“ remainders for the former reason. But, if he himself makes
“ a feoffment for value without *J. S.*, such contingent remainders,
“ by the better opinion, will arise out of the first livery to *J. S.* if
“ they happen within the life of the daughter, which is called the
“ *scintilla juris* in *J. S.*, to be executed to the contingent uses.
“ The reason of which is, that since there is a particular estate
“ still continuing in the daughter, within the compass of which
“ the contingent remainders may still vest; and since before the
“ statute there was a seisin continuing in the feoffee; and the
“ intention of the statute was to preserve and not to destroy the
“ estate; therefore, in support of the statute, the law rather will
“ suppose a seisin in feoffees to be executed to the contingent
“ uses, if they happen within time, than suffer such contingent
“ uses to be destroyed by limitations subsequent to them.

Co. 154. 138.
Poph. 82.

“ Let us in the next place see by what means these contingent
“ remainders may be destroyed or prevented from ever arising.”
“ And here the rule is, that if the contingent remainder can-
“ not vest either during the particular estate, or at the instant
“ of the determination thereof, such remainder is for ever de-
“ stroyed. The reason whereof seems to be, to prevent the
“ inconvenience and danger that might otherwise ensue to pur-
“ chasers by allowing such remainders to take place wherever
“ they happened; for if but the latitude of a day were given to
“ their vesting, after the particular estate ended, they might as
“ well arise one hundred years after, the reason of such allow-
“ ance being the same; and since by the limitation they ought
“ to vest when the particular estate determines, if they cannot so
“ do they shall never after take effect, be they limited either at
“ common law or by way of use.

2 Leon. 178.

“ Therefore, where one made a feoffment in fee to the use of
“ himself for life, and after to the use of his first son and his
“ heirs; the father and feoffees, before any issue, infeoffed *I. S.* and
“ his heirs for a valuable consideration without notice, and then
“ the father died leaving issue a son who enters; by the better
“ opinion, the contingent use to the son was destroyed; because by
“ the feoffment the particular estate was determined, and the son
“ not being *in esse* to take advantage of the forfeiture and wrong
“ done to his remainder, shall never after set it up against the
“ purchaser; and the feoffees, by their joining in the feoffment,
“ have

' have excluded themselves of any entry to revive the remainder, (a) 2 Roll. Abr. 797.
' if that were necessary, as a release by them after the feoffment
' of the father would likewise have done.' (a)

" One made a feoffment in fee to the use of himself for life, 2 Leon. 224.
" remainder to the use of his eldest son in tail, remainder to his
" own right heirs, and before issue, suffered a recovery, and died
" leaving a son. It was holden, that in this case the son should
" not avoid the recovery by 32 H. 8.; because the remainder was
" not in him at the time of the recovery, as by the words of the
" statute it ought to be. But, it was holden, that he might avoid
" the recovery by the common law; because, says the book, the
" recompence could not extend to such remainder as was not
" *in esse* at that time. But this is against the express resolution
" of the cases after mentioned; for a common recovery is now
" but a common assurance, and therefore if tenant in tail, re-
" mainder to the right heirs of *J. S.*, suffers a common recovery,
" living *J. S.*, yet the remainder is barred, though it was then
" in abeyance, and the recompence in value could not extend
" to it."

' *A.* had issue *B.* and *C.* his sons, and made a feoffment in fee
' to the use of himself for life, and after to the use of the feoffees
' and their heirs during the life of *B.*, remainder to the use of the
' first, second, and other sons of *B.* in tail male, remainder to the
' use of *C.* and the heirs of his body, remainder to his own right
' heirs, and dies; the feoffees infeoffed *B.* in fee, without consider-
' ation, and with notice of the first uses, and after *B.* hath issue a
' son, and if he was barred by the feoffment of the feoffees, was
' the question? It was adjudged, upon solemn argument in the
' Exchequer Chamber, that he was barred; for the feoffment of the
' feoffees divested all the estates and future uses, and though *B.*
' had notice this was not material, the estate out of which the
' uses were to arise being divested and gone; and the new estate
' given by the second feoffment shall not be subject to the uses
' limited by the first feoffment; and there being no son of *B.* to
' enter when the particular estate determined, as in this case it
' did by the feoffment, which was a forfeiture thereof, he shall
' never enter after; for the statute 27 H. 8. c. 10. executes no
' uses but when the estate continues in the feoffees to serve them,
' and not when that is divested, and the use itself turned to a
' right. Also it was held in the same case, that if there had been
' no alteration of the possession, but that *B.* had died before the
' birth of his son, he should never after have the estate, the re-
' mainder to *C.* being then executed, and the son of *B.* born out
' of due time. (b) And they agreed that the preserving such contin-
' gent uses would create perpetuities, and tend to the destruction
' of families, who, upon no occasion whatever, could dispose of
' their estates.

' *A.* tenant for life, remainder to his first, second, and other
' sons in tail male successively, remainder to *B.* for life, and so to
' his first, second, and other sons in tail male; then *B.* having issue
' a son, and *A.* no son, *A.* cuts timber trees; the son of *B.* who is
' then

1 Co. 136. a.
6 Co. 42. a.
2 Roll. R. 217.
Poph. 139.
Copwood's
case. 1 Leon.
260. *contra per*
Wray.

Co. 120. Poph.
70. Chud-
leigh's case.
|| See various
observations
on and argu-
ments drawn
from Chud-
leigh's case, in
Fearne, 300,
301. (7th ed.)
where Mr.
Fearne con-
troverts the
notion of the
necessity of an
actual entry to
revest contin-
gent uses,
which have
been divested;
et vide Butler's
note, *ibid.* 291.
et infra. ||
(b) *Vide* stat.
10 & 11 W. 3.
c. 16. *post*,
693.

Roll. Abr. 119.
Uvedal v.
Uvedal.

(a) It is proper to observe, that Chancery will not admit of waste by collusion between tenant for life and the person entitled to the first vested estate of inheritance, to the prejudice of sons not *in esse*. See the case of Garth and Sir John Hind Cotton, 1 Ves. 524. 546.

Cro. Car. 152. Biggot v. Smith, 3 Mod. 309. S.C. cited. Ld. Raym. 316. S.C. cited. Vent. 189.; *¶* *et vide* Corbet v. Tichbourne, 2 Salk. 576., which is, however, distinguishable. *¶* (a) In this case the particular estate was not subsisting at the husband's death, when the fee should have vested, for his second feoffment had destroyed it during the coverture; and though the wife's right of entry took effect at the instant the remainder should have vested, yet it was insufficient, for it should have been then actually existing. Fearne, 289. (7th edit.)

Cro. Car. 364. Boreton v. Nicholls. ' So, where one hath issue two sons *B.* and *C.*, and makes a feoffment in fee to the use of himself for life, remainder to the use of *C.* for life, remainder to the first son of *C.* who should have issue of his body, and to his heirs for ever; and, for default of such issue, to the use of the first daughter of *C.* who should have issue of her body, and to her heirs for ever; and so to the second, &c. remainder to the right heirs of *C.* for ever, and dies; *C.* enters, and hath issue a son, who dies without issue; then after *C.* levies a fine with proclamation, and *B.* enters as for a forfeiture of his estate for life; it was adjudged against *B.*, for the fee vested presently in *C.*, and the other limitations were but contingent, and so barred and destroyed by the fine, there being then none *in esse* to take them, and then the fee was immediate to his estate for life, and so the fine good, and no forfeiture.

Cro. Jac. 168. Bell's case cited. ' If one make a feoffment in fee, or covenant to stand seised to the use of himself for life, and after to the use of his first son in tail male, &c., and, before the birth of any son, make a feoffment in fee, this destroys the contingent remainder to the son, so that it can never after arise.

Cro. Eliz. 650. Moor, pl. 726. Smith v. Belay. Lit. R. 291. like case. ' One made a feoffment in fee to the use of himself for life, remainder to the use of his wife for life, remainder to *A.* his eldest son for life, remainder to the eldest issue of *A.* which should be at the time of his death, remainder to *C.* in fee; *A.* hath issue *B.* his eldest son; the feoffor dies; his wife releases to *A.* for years, and he makes a feoffment in fee to *D.*, to whom *C.* levies

' *C.* levies a fine; the wife dies, then *A.* dies: it was adjudged that, by this feoffment, the remainder to the eldest son of *A.* which should be at the time of his death was destroyed, though he had then a son actually born; because it was contingent and uncertain whether that son would continue to be his eldest at the time of his death; for he might die, and another be his eldest; and therefore the remainder could not vest in him in his father's life, and by consequence being in contingency was destroyed by the feoffment, which determined the particular estate before the remainder could take place. But note, if the wife had entered, this had revived the contingent remainder, for her right of entry was sufficient for that purpose; or if she had survived *A.* then, though she had died before entry, yet might the feoffees, after her death, enter and revive the contingent remainder.

2 Roll. Abr.
794.

' *A.* makes a lease for life by indenture, with livery to *B.*, and if it fortune *B.* to marry any wife who shall survive him, then the land shall remain to such wife for her life; *proviso* if *B.* does not in writing, or last will, declare his mind that she shall have it, then it shall not remain to her; *B.* before marriage makes a feoffment to *C.*, to whom *A.* levies a fine, and suffers a recovery, and after *B.* marries, and makes a declaration that his wife shall have the remainder, &c.; then he and his wife levy a fine to *C.*, and after he makes another like declaration and dies; and his wife enters. And by certificate of two judges to the Chancellor, her remainder was destroyed by the feoffment, because the freehold was thereby determined before the remainder could take effect; also the possibility of the wife was inclusively given away in the fine, and then the declaration was to no purpose. And so it seems it would have been if he had made such declaration, and after had made the feoffment, for that declaration had only made the remainder absolute to the wife who should survive him, which being contingent, and uncertain who that would be, would be barred and destroyed by the feoffment.'

Moor, pl. 750.
Powle v. Veer.

' *A cestuy que use* in fee 1 H. 8. devises, that his feoffees shall be seised to the use of *B.* his son for life, remainder to the next heir of the body of *B.* and *C.* his wife for life, remainder to the next heir of the said heir begotten, and for default of such issue to the use of the heirs of the body of *B.* and *C.* his wife for the life and lives of every such heir or heirs, and for default of such heirs, to the use of the heirs of the body of *B.* remainder to the right heirs of *B.*; and if any one of the said heirs shall let, set, alien, or mortgage his right, title, or interest, or suffer any recovery to be had against him by his consent, &c. that then the use limited to such heir shall be void during his life, and the feoffees shall thenceforth be seised to the use of the heir apparent of such offender, as if he were dead. *A.* dies; *B.* hath issue by *C.* a son named *D.* and dies, in 31 H. 8. *C.* dies; *D.* enters, and hath issue two sons, *E.* and *F.*; then *D.* 4 Eliz. by indenture and fine conveys to

1 Leon. 256.
Manning v. Andrews.
Vide 1 Co. 138.
Mo. 371. that such limitations of perpetual freehold are against law and void; because thereby lords would lose their wardships, escheats, &c.
Ideo quære.
|| *Et vide* Litt. s. 720. Fearn, C.R. 257. note iv. ||

" the

“ the defendant with warranty, and afterwards, 6 Eliz., *E.* levies
 “ a fine to him with warranty likewise. Afterwards *E.* hath two
 “ sons, who are now living. The heir of the survivor of the
 “ feoffees within five years after the full age of *F.*, and seven
 “ years after the fine levied, enters to revive the use limited to
 “ *F.* who enters, and lets to the plaintiff. And by *Geoffries J. B.*
 “ had an estate-tail, because the estates are limited to go in a
 “ course of descent from heir to heir of his body. But by
 “ *Garwdy* and *Southcote J.* every issue of *B.* and *C.* hath estate
 “ for life successively, with a remainder in tail expectant, as
 “ heirs of the body of *B.*, and such remainder in tail shall not
 “ be executed in possession by reason of the mesne remainders
 “ for life limited to the heirs of the body of *B.* and *C.* for their
 “ lives, which, though they are but contingent, shall hinder the
 “ closing of the estate for life, with the remainder in tail in
 “ possession. But by *Wray C. J.* and, as it seems, the better
 “ opinion, *B.* and *C.* have but estates for life by express limit-
 “ ation; but the remainder to the heirs of the body of *B.* which
 “ is an estate-tail, closes with their estates for life, and gives
 “ them an estate-tail in possession, subject to open and let in
 “ the contingent remainders to the heirs of the body of *B.* and *C.*
 “ for their lives respectively; then *D.* by his fine severs his two
 “ estates, forfeits his estate for life, and lets in *E.* his heir
 “ apparent for his life, and *E.* by his fine lets in *F.* his then heir
 “ apparent by purchase, which the sons of *E.* born after shall
 “ not divest. But by *Geoffries J.*, *E.* being in by forfeiture of
 “ *D.* his father, his estate shall not be again subject to the for-
 “ feiture by his alienation; or, if it be, yet *F.* can have no more
 “ than *E.* had at the time of the forfeiture, which was but
 “ during the life of *D.* his father, and not the inheritance in tail,
 “ for that continued in *D.* subject to no forfeiture. As to the
 “ regress of the feoffees, *Geoffries J.* held, that *F.* taking in his
 “ turn as heir of the body of *B.* and *C.* which was contingent,
 “ they ought to enter to revive the use to him, but that their
 “ entry by fine and nonclaim was barred. *Southcote J.* thought
 “ they could not enter at all, because the statute takes out all
 “ the right from them, but that *F.* might enter, and was not
 “ bound to the five years, having no right at the time of the fine
 “ levied, his right coming by the fine of *E.* as the *causa causans.*
 “ But *Wray* was clear, that no estate was left in the feoffees to
 “ warrant their entry; but that the contingent uses, when they
 “ happen, should vest without such entry: then, when *D.* levied
 “ a fine, he gave an estate of inheritance to the defendant,
 “ having the entail and fee annexed to his estate for life, and *E.*
 “ by his entry could gain only an estate for life as next heir
 “ apparent according to the will, and by his fine he could give
 “ only that estate for life, and so by the fine of *D.* the right of
 “ the entail and fee were clearly barred and gone; and by the
 “ fine of *E.* his estate for life was gone; and so *F.*, to whom no
 “ estate was specially limited, but who was to take only as heir
 “ apparent to *E.*, had no cause to enter. *Quære* of this case.”

|| *Vide acc.*
 Fearn, C. R.
 300, 301. (7th
 ed.)||

‘ One devised lands to *A.* for life, and after to the next heir male of *A.* and the heirs male of the body of such next heir ;
 ‘ *A.* having issue *B.* his son, made a feoffment in fee to *C.* upon whom *B.* entered : it was adjudged, first, that this was good
 ‘ as a contingent remainder ; secondly, that by this feoffment of *A.*, who was but tenant for life, the contingent remainder
 ‘ was destroyed, for every remainder ought to vest either during the particular estate, or at least *eo instanti* that the particular
 ‘ estate determines ; and here by the feoffment the estate for life of *A.* was determined by forfeiture ; and since the remainder could not then take effect, for *non est hæres viventis*, it
 ‘ can never after rise.’

“ So it is, if a lease be made to *A.* for life, remainder to the right heirs of *J. S.*, if *A.* makes a feoffment living *J. S.* the remainder is gone. But in these cases, if *A.* had been disseised, yet the remainder might have taken place ; for, as the right of the particular estate was subsisting, so the right of the remainders which depended upon it was in the same condition, and *A.* by his re-entry shall restore not only his own estate, but the contingent remainders likewise. But in that case, if *J. S.* dies, and then *A.* dies, before any re-entry, then the feoffees must enter to revive the use to his right heirs ; because, until such entry, the disseisin continues, and the use to draw after it the possession, until that possession be restored, it cannot be carried to the use, and none have right to the possession but the feoffees.”

‘ If one makes a gift in tail to *A.* remainder to the right heirs of *J. S.*, and *A.* makes a feoffment in fee, and then *J. S.* dies, and after *A.* dies without issue, yet the right heirs of *J. S.* shall never have the remainder ; for by the feoffment of *A.* the estate-tail, and all remainders, were discontinued and vested in the feoffee, and there was not any particular estate in fact, or in right, to support the remainder when it should happen ; and upon the death of *J. S.* this remainder was as capable of vesting as a remainder as ever it could be after, his right heir being then certainly known ; but since by the feoffment of *A.* the whole estate-tail, and the right of it, as to himself, was determined, and yet the remainder could not then take effect, it shall never afterwards. Otherwise it would be, if *A.* had only been disseised, for then the right of the estate-tail had preserved the right of the remainder. And so it seems the law is at this day upon a feoffment to the use of *A.* in tail, remainder to the right heirs of *J. S.*

‘ *A.* tenant for life, remainder to his first son in tail, remainder to *B.* for life, remainder to his first son in tail ; *A.* having a son accepts a fine from *B.* and then makes a feoffment in fee, and then *B.* has issue a son born : the remainder to him is not destroyed ; for the acceptance of the fine displaced nothing ; and though the feoffment displaced all the estates, yet the right left in the first son of *A.* shall support the right of the contingent remainders. For though the feoffment of
 ‘ *A.* was

Co. 66. Cro. Eliz. 455.
 Hob. 338. ; et vide 2 Leon. 219. Moor, 104. 2 Sid. 67.
 || Vide Blackburn v. Stables, 2 Ves. & B. 371.||

1 Co. 130. b.
 134. b. 135. b.
 129. a. 2 Sid. 67.

Co. 135. b. ; et vide 2 Roll. Abr. 796.
 2 Sid. 64. 129. Vent. 188.

Vent. 188.
 2 Lev. 35.
 2 Keb. 872.
 Lloyd v. Brooking.

(a) 3 Lev. 437.
Duncombe v.
Duncombe,
S. P. 1 Saund.
151. and

2 Vern. 755.
[allowed to be
good law by
Ld. Hardwicke
in Hooker v.
Hooker, Ca.
temp. Hard. 13.
Elie v. Os-
borne, 2 P.
Wms. 610.
Mansel v.
Mansel, Ca.
temp. Talb.
252.]

|| *Et vide*
Fearne, (7th
edit.) 347. n.||

Wegg v. Vil-
lers, 1 Roll.
Abr. 796.
1 Ventr. 188.
S. C. cited.

3 Mod. 310.

2 Sid. 159.
[Mr. Fearne,
after explain-
ing very fully
this doctrine

‘ *A.* was a forfeiture of his estate for life, yet his son, who was
‘ next in remainder, and had a right thereto, was not bound to
‘ take advantage thereof, but might stay till the death of *A.*; and
‘ as he might then have entered, so, if he dies, whereby the
‘ remainder and right of entry go over to another, they may
‘ likewise enter, after the death of *A.* or before, as they think
‘ fit. And it is there said, the way to preserve such contingent
‘ remainders is to limit the use to the husband for life, or more
‘ modernly to him for years, then to the use of the feoffees for
‘ the life of the husband, and then to limit the contingent re-
‘ mainders; or, if it were to the husband for life, remainder to
‘ trustees and their heirs during the life of the husband, re-
‘ mainder to the heirs or heirs male of the body of the husband,
‘ yet is not the fee or fee-tail executed in the husband other-
‘ wise than as a remainder (*a*), by reason of the interposing
‘ limitation to the trustees, and therefore in such case the wife
‘ of the husband shall not be endowed.’

“ *A.* covenants to stand seised to the use of himself for life,
“ remainder to his wife for life, remainder to *B.* his daughter for
“ life, remainder to the first son to be begotten of the body of
“ *B.* and after to divers other sons of *B.* in like manner, re-
“ mainder to his own right heirs; and after, for disturbing the
“ rising of the contingent estate, grants his reversion in fee with-
“ out consideration, and with express notice of the first uses;
“ and afterwards makes a feoffment in fee, and dies; his wife
“ enters: *B.* dies, and then the wife dies. It was adjudged,
“ first, That this grant of the reversion, which was in himself,
“ and out of which the contingent remainder was to arise (being
“ by way of covenant to stand seised), could not prevent the
“ contingent remainder from rising, because the grantee had
“ express notice of the settlement, and therefore took it subject
“ to the uses limited thereby. Second, That this feoffment did
“ not destroy the contingent estate; for this was a forfeiture of
“ his estate for life, and of the estate for life of the wife in
“ remainder during the coverture, so that the daughter might
“ have entered for the forfeiture during the coverture, which
“ right of entry was sufficient to support the contingent re-
“ mainder. But it is there said, it would have been more
“ doubtful if the daughter had not had an estate for life, but that
“ the contingent remainder had depended immediately upon the
“ estate for life of the wife, because the feoffment of the husband
“ passed his estate and the estate of the wife too during the
“ coverture, and then neither of their estates were *in esse* to
“ support the contingent remainders, and that in such case the
“ contingent remainder should be destroyed. — This was upon a
“ conveyance made by Sir *Edward Coke*.

“ Note, it was held by *Glyn C. J.* in the above case, that if
“ the feoffment of the Lord *Coke* had preceded the grant of the
“ reversion, this had for ever destroyed the contingent re-
“ mainders, and that no entry by those in remainder could have
“ revived

“revived them. And therefore there seems a difference between such contingent remainders as are to arise out of the estate of the person who makes the feoffment, and such as arise out of the estate of a third person. Where they are to arise out of the estate of the person who makes the feoffment, they are thereby for ever destroyed, because there can be no *scintilla juris* left in him, against his own feoffment to serve them, when they come *in esse*. But, where the *scintilla juris* is in a third person, there, if the first estates are reduced in possession before the happening of the contingency, the *scintilla juris* is likewise restored to such third person sufficient to serve them, when they come *in esse*; and therefore, in the above case, he having granted his reversion out of which the contingent uses were to arise, though he himself after made a feoffment by disseisin, yet, upon the entry of the wife after his death, the *scintilla juris* in the grantees of the reversion revived to serve the future use. But if after such feoffment they had released all their right, &c., or if they themselves, being lawfully in possession, had made such feoffment, the contingent remainders could never afterwards have arisen. But, where such feoffees to uses enter and disseise the tenant in possession, and make a feoffment in fee, there, by the entry of those in remainder in whom an estate certain was settled, the disseisin is purged, and by consequence their *scintilla juris* restored to serve the contingent uses.

as to the necessity of an actual entry to restore or reduce contingent uses after they have been divested, adds, —“But we ought to be very cautious how we at this day admit such a doctrine in practice; a doctrine which would lead us to conclude, that in common cases of strict settlement upon marriage, where the conveyance is by way of use, if the father, the first tenant for life, were by feoffment, &c. to divest the estates, leaving them a right of entry, the contingent remainders to the sons, &c. could not take effect; unless the mother, supposing her to take a remainder for life and to survive the father, or else the trustees to whom the remainder for preserving contingent uses was limited, or else the general grantees or releasees to whom the lands were conveyed to the uses expressed, should actually make an entry into the lands; an opinion which, with all due deference to what was delivered by the Court of K. B. in their arguments upon the case of *Wegg v. Villers*, I cannot persuade myself would hold at this day; for, first, as to what was resolved in the case of *Wegg v. Villers*, we are to observe, that as there was, besides the right of entry in the daughter, an actual entry made by the mother in that case; the point, whether the mere right of entry in the daughter would have been sufficient, without any entry by her or by the mother, or by the grantee, was not the question which came before the court; nor, of consequence, did the judgment of the court in that case depend upon or decide the doctrine in regard to that point. And as to the other cases put and agreed to by the court in their debate of the principal case, the opinions upon them were really extra-judicial; and, indeed, so far as they respected the supposed necessity of an entry to restore or reduce contingent uses, they appear to have been founded on an artificial strain of reasoning, much too subtle and metaphysical to bear any great stress. If we are to infer (as is said in the arguments in *Chudleigh's case*) a *scintilla juris* in the feoffees, that may enable them to enter and restore their possibility of a seisin (or, if the contingency has happened, their actual seisin,) to serve the contingent uses, what is it that confines us to such narrow and insufficient limits in regard to the measure of this *scintilla juris*? Why not extend the inference one degree further, and suppose such a *scintilla juris* as may be competent to serve the contingent uses, without the unnecessary circuity of an actual entry? The latter inference is certainly more adequate, and better adapted to the end proposed; and what is there discoverable in the statute of uses which excludes this and admits the former? Nay, how does it appear that any thing contained in that statute puts us to the necessity of recurring to any *scintilla juris* at all in the feoffees, or any entry to be made either by them or by the *cestui que use* under any preceding vested use, in order to restore and reduce a contingent use to the capacity of taking effect, whilst a right of entry subsists in any preceding *cestui que use*? On the contrary, does not the statute expressly enact, that where any person, &c. is seised to the use of others, such other persons, *i. e.* the *cestui que use*, shall be deemed and adjudged in lawful seisin, estate, and possession, &c. to all intents, constructions, and purposes in the law, of and in such like estates

as they had in the use, &c. (a)? And must not these words, to *all intents, constructions, and purposes in the law*, be referred to the *legal* properties, qualities, and capacities of estates of the like degree or measure at common law? If so, the *cestui que use* become entitled to, and take by virtue of this statute, estates possessing and bearing in themselves all the qualities, properties, and capacities of estates at common law, of the like degree or measure: now one of the *legal* qualities or capacities of an estate at common law, of the degree or measure of freehold, is, that after it is divested and turned to a *right of entry*, such right of entry will support a contingent remainder; and one of the qualities or capacities of a *contingent remainder* at common law is, a capacity of being supported by such right of entry: why then do not a preceding *vested use*, of the degree or measure of freehold, and a subsequent *contingent use*, respectively acquire these *legal* qualities, properties, or capacities, amongst other qualities or properties of estates of like nature and degree at common law? If they do, it is obvious there can be no necessity for any *actual entry* by any body to restore a contingent use, where there subsists a *right of entry* in a *cestui que use* of a preceding vested freehold to support it; but such right of entry alone will preserve its capacity of vesting and taking effect. If we deny this, we at the same time deny that the *cestui que use* have lawful seisin, estate, and possession, &c. to *all intents, constructions, and purposes in the law*, of such estate as they have in the use. I think that a little attention to the apparent operation of the statute of uses, in relation to this point, will be sufficient to prevent our too hastily admitting a doctrine, which, without the aid of metaphysical subtleties, seems hardly reconcilable to the *express force* of that statute." Fearn, C. R. (7th edit.) 300, 301.]

Heyns v. Villars, 2 Sid. 64.
98, 129, 157.

" This case upon the same conveyance with that of *Wegg v. Villars*: but the case, as there put, is, that after such covenant to stand seised, Sir *Edward Coke* made a lease for years, and then granted the reversion without any consideration, and the lessee attorned, and after Sir *Edward* entered, and made a feoffment in fee before the birth of any son, and then died, and his wife entered; and then it was agreed, that by the lease for years and the grant of the reversion, the whole estate of Sir *Edward*, out of which the contingent uses were to arise, is transferred, and that the lease for years should be good against the contingent remainders, but not against the remainders that were actually vested, as shall appear hereafter: but, as to the reversion, that being granted without consideration, was liable to serve the contingent uses when they came *in esse*, in the same manner as if it had not been granted over at all; then, by such lease and grant of the reversion, the whole estate being out of Sir *Edward*, his feoffment after was a disseisin, and divested all the estates *in esse*, and turned them and the contingent remainders to a right, which right was restored again to possession by the entry of the wife after his death. — But there it was clear, that when the wife entered she revived the estate to herself for life, and the contingent remainders also. And it is said in *Ventris*, 189. that it had been a question, whether a right of action would support a contingent remainder; but that a right of entry would, was never doubted. And there it was agreed, that if *A.* makes a feoffment in fee to the use of himself for life, remainder to *B.* for life, remainder to the first son of *B.* in tail, &c., remainder to his own right heirs, that in this case a feoffment by *A.* will not destroy the contingent remainders, because the right of entry in *B.* for the forfeiture preserves them, and if he does so enter,

|| *Et vide*
12 Mod. 175.
Fearn, 287.
(7th edit.)||

1 Co. 130.

" all the estates in remainder are revested, so that his son after his death may enter without any re-entry by the feoffees. But if after such feoffment *B.* dies before entry, leaving a son, he cannot enter, though his contingent estate be not destroyed; but in such case the feoffees must enter by the *scintilla juris* left in them for such purpose to revive the contingent uses for the reason before given.

" If one makes a feoffment to divers others with several contingent remainders, and no estate is left in the feoffees, and after they enter and disseise the tenant in possession, and make a feoffment in fee, yet if the tenant in possession, or any of those in remainder in whom an estate certain was settled before the feoffment, re-enter, by this all the contingent remainders are reduced *in statu quo*, &c., and may be executed by the statute of uses; for the feoffees are but conduits to convey the estate, and have no power to destroy any contingent estate. But, upon such settlement, if the estates *in esse* are divested by disseisin, feoffment, &c. before the contingencies happen, and afterwards they happen, and then the estates *in esse* determine before any re-entry; if the feoffees release all their right in the land, or make a feoffment, or any other way bar their right of entry; in this case the contingent uses can never be revived to be executed by the statute, because the feoffees have barred their *scintilla juris*, and none *in esse* can enter.

" If one on marriage of his son, &c. covenant to stand seised to the use of the son for life or for ninety-nine years, if he so long live, remainder to two strangers during the life of the son, upon trust to support contingent remainders, with remainder to the first and other sons in tail; this remainder to the two strangers is void, because there is no consideration; and then, by consequence, there is no estate to support the contingent remainder to the sons."

" If tenant for life, with contingent remainders to his first and other sons, before the birth of any son, make a feoffment in fee, with condition of re-entry, the contingent remainders shall never arise, though the condition be broken, and a re-entry made before the birth of any son; because the feoffment, though upon condition, was a forfeiture and determination of the particular estate, and the remainder not being capable of taking place is gone for ever, for the recovery does not purge the forfeiture.

trine; since the report does not put the case of a re-entry before the contingency happens: and according to an opinion of Lord Holt, 2 Salk. 577. 1 Lord Raym. 314. if the tenant for life enter for the condition broken before the contingency happens, the contingent remainder, it seems, may vest. But in that case, if the reversioner enter for the forfeiture before the contingency happens, then is the contingent remainder destroyed. Fearne, C. R. 549. (7th edit.)

" *A.* tenant for life, remainder to his first and other sons in tail male successively, remainder to *B.* in tail, remainder over; *A.* before the birth of any son surrenders to *B.*, and then a son was born. In this case it was held, that by the surrender the contingent remainder was gone and destroyed; but the principal ques-

1 Roll. Abr.
797. pl. 15, 16

2 Lev. 52. 54.
3 Keb. 110.

Show. P. C.
151.
|| Mr. Fearne notices this passage, and observes, that the case referred to does not seem to warrant C. R. Gilbert's doc-

Ld. Raym. 313.
Carth. 211.
Show. P. C.
150. 3 Lev.
284. 2 Salk.
427. pl. 2. 576.

618. Comyn,
45. pl. 30.
3 Salk. 300.
pl. 10.
2 Vent. 198.
3 Mod. 301.
Comb. 438.
Thompson v.
Leech.

tion in this case was, if the surrender was effectual? because *B.* knew nothing of it till five years after the birth of the son, and then he agreed to it; and this in *C. B.* and *B. R.* was adjudged to be no such surrender as should destroy the contingent remainder; but the judgment, as to this point, was reversed in the House of Lords against the sense of all the judges except two. But it afterwards appearing, that at the time of the surrender *A.* was *non compos*, this was held a void surrender, and not only voidable; and, therefore, no estate passed by it, and then, by consequence, the contingent remainders were not touched.

2 Saund. 380.
2 Lev. 39.
5 Keb. 11.
Purefoy v.
Rogers.
4 Mod. 284.
3 Mod. 310.
S.C. cited, and
in several other
books.

A. tenant for life, remainder to her first and other sons in tail male successively; *A.* takes a husband, and before the birth of any son, the reversioner in fee grants and conveys his reversion to the husband and wife by fine, and then *A.* hath issue a son, and dies. And *per cur.* though if *A.* had survived her husband, she might have avoided and waived the estate taken by the fine, yet the contingent remainder to the son is utterly destroyed, there being none then *in esse* when the particular estate determined, for the husband and wife take by entireties, and therefore the estate for life of the wife was merged before the contingency happened, and the possibility which the wife had of avoiding the inheritance given by the fine, and thereby reviving her estate for life, will not preserve it; for if the contingent remainder cannot take effect when the particular estate determines, be it by surrender, merger, feoffment, or otherwise, it can never after arise.

2 Saund. 386.
5 Keb. 12.

A. tenant for life, remainder to his first and other sons in tail successively, remainder to *B.* in fee: *A.* and *B.*, before the birth of any son, levy a fine of their estate to a third person. This makes no discontinuance or divesting of any estates, because each gives only his own estate. Yet by *Hale* and other good opinions, the contingent remainder is destroyed; because though the estates pass divided from them, yet they are united in the grantee, and so no particular estate in being to support the contingent remainder."

4 Mod. 259.
5 Lev. 408.
Salk. 227. pl. 6.
Carth. 309.
Reeve v. Long.
|| *Vide* Co. Litt.
298. a. n. 3.||

A. seised in fee devises his lands to *B.* eldest son of his brother *C.* for life, remainder to the first son of *B.* in tail, and so to all his other sons in the same manner successively, remainder to *D.* second son of *C.* for life, remainder to his first and other sons in tail successively, and dies; *B.* enters and dies, leaving his wife *enccinte* with a son, then *D.* enters as in his remainder, and six months after the son is born; and all this matter being found specially, it was adjudged in *C. B.* for *D.* against the son: first, because this being a contingent remainder to the son, and he not being born at the time when the particular estate determined, this became void; secondly, *D.* being the next in remainder, and having entered before the birth of the son, was in by purchase, and therefore shall not lose his estate by a son born after. And this judgment was affirmed in *B. R.*, for they held it plainly to be a contingent remainder,

‘ remainder, and not an executory devise or a springing remainder, for that would introduce a perpetuity not to be barred by a common recovery, because it would be the same to all the other sons; but here it being a contingent remainder, and not happening in time, it is gone for ever; and they relied on *Archer’s* case. But, upon a writ of error brought into parliament, the judgment was reversed by almost all the lords; because being in a will, they thought that by the meaning and equity thereof they ought not to disinherit the heir for such a nicety, and that a will was otherwise to be expounded than a deed; and therefore they construed it an executory devise or springing remainder to the first and other sons, and that the freehold should vest in *D.* till the son was born. But all the judges were much dissatisfied with it, and did not change their opinions, but blamed the judge who permitted it to be found specially where the law was so certain and clear.

‘ *Note, That now by the 10 & 11 W. 3. cap. 16. provision is made, that after-born sons and daughters, to whom remainders are limited in contingency, shall take in the same manner as if they had been born in the father’s lifetime, though no estate be limited to trustees to preserve and support such contingent remainders, which act was made by reason of this case, and of the strictness of the law herein.*’

|| *Vide* 1 Term R. 634. *Doe* dem. *Clarke* v. *Clarke*, 2 H. Bl. 599.||

“ One having three sons, *A.*, *B.*, and *C.*, devises lands to them severally without limitation of any estate, and that *if any of them die, the other surviving shall be his heir.* *A.* the eldest dies leaving issue; and if this part should go to his son, or to *B.* and *C.*, was the question. It was adjudged by three justices against *Fleming* C. J. for the son of *A.*, because nothing but a freehold passed by the devise, and the reversion in fee descending upon *A.* his eldest son, had merged his estate for life, and that after his death this could not be revived to vest the remainder in *B.* and *C.* But *Fleming* C. J. was of opinion, that this might well vest in *B.* and *C.* by way of remainder, and then the words implied that every one should have it after the other; and therefore, though the freehold of *A.* was merged by the descent of the fee, yet, to support the intent of the will, this ought to vest in the surviving sons for their lives.

Cro. Jac. 260.
1 Bulstr. 61.
Wood v. *Ingersole*, *Swinb* 118.

“ One having three sons, *A.*, *B.*, and *C.*, devises lands to them severally without limitation of any estate, and if any of them die, his part to remain to the others, equally to be divided between them. *A.* dies, having first granted the land for 1000 years to the defendant. It was adjudged, that though by the descent of the fee upon *A.* the eldest son, his estate for life was merged, and so the contingent remainders to the other sons were destroyed (for in these cases the remainder must be in contingency, and cannot vest presently, because it is uncertain which of the sons will survive) yet that it should be good to them by way of executory devise, according to the opinion of *Fleming* in the case next before, (for so must his opinion be un-

2 Lev. 202.
Sir T. Jon. 79.
5 Keb. 789.
924. *Fortescue* v. *Abbott*, *Pollexf.* 481.
|| It is to be observed, that this case as stated is wrongly reported by *Levinz*, who says he heard that the court held

it good as an executory devise. But both Pollexfen and Sir Thomas Jones, who argued the case, report the decision of the court that this was not a contingent but a vested remainder, and that every child took a particular estate in his or her house (land) for life,

with remainder to the others for their lives, vested. *Vide Fearné, 244. (7th edit.) (a) Vide Fearné C. R. 342. (7th edit.) Butler.*||

1 Lev. 11. Sir T. Raym. 28.
1 Sid. 47.
1 Keb. 29. 119.
MSS. Plunkett v. Holmes.

derstood, though it is there said, by way of *remainder*,) and that this was the most reasonable construction to support the intent of the will. And they said, the case of *Wood v. Ingersole* (a) was best put in *Bulstrode*; for upon inspection of the record the words appear to be, *if any of my sons die, the one to be the other's heirs*, which words import no certainty, which of the survivors, or whether both shall have the part of the son who dies first, and therefore that part of the devise was void, and by consequence would not carry over the estate from the son of *A.* or defeat the lease made by *A.* And *Jones* says, it was resolved in this case by the court, that to support the intent of the will it should be construed, that he devised for life to *A.*, remainder to *B.* and *C.*, equally to be divided between them; and so in the other devises; and that by this construction an actual cross remainder for each one's part should be executed in the other. *Sed quære* of this construction.

“ One devised lands to *A.* his eldest son for life, and if he should die without issue living at the time of his death, then to *B.* his second son, and his heirs; but if *A.* had issue living at the time of his death, then the lands should remain to *A.* and his heirs, and died. *A.* entered, and suffered a common recovery, and died without issue, having by his will devised the lands to the defendant. *B.* entered, and let to the plaintiff; and the question was, if *A.* had by the will an estate for life only, with a contingent remainder to *B.*? or, if the fee was vested in *A.* with an executory devise to *B.*? and, admitting it to be an executory devise to *B.*, if the common recovery barred it? It was argued for the plaintiff, that *A.* had the fee; for though an estate for life only is devised to him, yet by descent of the reversion the whole fee was executed in him, which merges his estate for life, and then the estate to *B.* can be no other than an executory devise. For when all the fee is given to or vested in one person with a limitation of a fee to another person upon a contingency, this cannot be a remainder; for a fee cannot be limited upon a fee, as appears before, but of necessity this must take effect as an executory devise. But when only part of the estate, as for life or in tail, is given to one, and the residue to another upon a contingency, as to the right heirs of *J. S.*, who is then living, or to such person as shall be living in such house at such a time, this remainder is contingent. But here the whole fee is in *A.*, either by the devise, by a transposition of the words, or by descent of the fee, and then the devise to *B.* can be no other than an executory devise, which being to happen within the compass of one life, hath been allowed good. (*Cro. Ja. 590. Pet v. Brown.*) As to the second point, they relied upon the same case, that this cannot be barred by the common recovery. *Sed per totam curiam* it was adjudged, that *A.* had but an estate for life by the will, and the remainder to his heir was not executed; for both the remainders to *A.* and

“ to

“ to *B.* are upon a contingency, not a contingency upon a contingency, which the law will not allow, (for then by the same reason it might allow a hundred contingencies one after another, and so quite elude the statute of *quia emptores*,) but upon one and the same contingency, which looks several ways, *viz.* if *A.* hath issue living at the time of his decease, then to him and his heirs; but if not, then to *B.* and his heirs. And the case was thus considered, as if *A.* had been a stranger, and not heir at law. But then considering him as heir at law, and that the reversion descended to him, yet, *per curiam*, not so absolutely as to merge and confound the estate for life given by the will against the express words and intent thereof; but there shall be an hiatus or opening to let in the remainders when they happen; and though *A.* happens to be heir at law, yet this being matter *dehors* the will, no use shall be made of it in expounding the will; and *Archer's* case is express in the point, where, though *Robert* the devisee for life was heir, yet the remainder to his next heir male was a good contingent remainder, and the estate for life, not merged in the fee, should descend on him. And it cannot be supposed that this consideration escaped a quick-sighted reporter, but was omitted as a thing of no value. As to the second point, if the remainder to *B.* be contingent, there is no doubt but it is barred or destroyed by the recovery, and so it would be by a bare surrender of the estate for life. And they all agreed, that if, by any construction, it could be made a contingent remainder, it should be so taken, rather than an executory devise, which could not be barred by a common recovery, and so would tend to a perpetuity. And note, they all seemed to agree, that the fee was not in abeyance, but descended to *A.*, subject to such hiatus, and that *quoad B.*, the devisee in remainder, *A.* had but an estate for life. *Quære* if the construction in this case does not thwart the second of the two preceding cases (*a*), where the court, allowing the remainders to be in contingency, held them destroyed by the descent of the fee upon the eldest son, which merged his estate for life, and therefore they were.”

Cro. Car. 158.
360. 1 Co. 66.

||(a) *Sed vide* note, *supra*, 693. according to which the case alluded to (*Fortescue v. Abbott*) is not at variance with the present.||

[*A.* devised lands to his sister, who was his heir at law, and her assigns for her life, and if she should marry, and have issue male of her body living at the time of her death, then to such issue male and his heirs male for ever; but if she should leave no issue male at her death, then to *G.* and his heirs for ever. The question respected the title of the testator's sister's husband to be tenant by the curtesy of the lands so devised to her; and the court held, that the inheritance was never executed in possession in the sister during her life (notwithstanding the inheritance descended on her), and therefore her husband could not be tenant by the curtesy; it follows, that the descent of the fee did not merge her estate for life, or destroy the contingency.]

Boothby v. Vernon,
9 Mod. 147.

‘ Father and son are, the father conveys land to the use of himself for life, remainder to the use of the son for life, remainder to the first and other sons of the son in tail male successively,

Vent. 506.
2 Jon. 76.
3 Keb. 731.

820. Hartpool
v. Kent.

(a) For this
vide Co. Lit.
28. a. 11 Co.
80. Lev. 11.
Raym. 28. Sid.
47. Plunkett
v. Holmes.
2 Lev. 202.
2 Jon. 79. For-
tescue v. Ab-
bott.

(b) Cro. Jac.
260.

Hooker v.
Hooker, Ca.
temp. Hardw.
15. Fearn's
C. R. 342.
(7th edit.) by
Butler.

[[The above
cases as to the
subsequent
descent of the
inheritance
merging the

particular estate, and thereby destroying the contingent remainders, at first appear irreconcilable with each other. But Mr. Fearnie suggests a distinction by which they may be reconciled; viz. between the cases where the inheritance descends *immediately* from the person by whose will the particular estate and remainders are created (like the cases of Plunkett v. Holmes, and Boothby v. Vernon), and those cases where either the descent is *mediate* from the deviser of the particular estate and remainders, or where the descending inheritance is not derived at all from such deviser (as in the cases of Crump v. Norwood, Hartpool v. Kent, and Hooker v. Hooker). — In the first class of cases the descent of the inheritance seems not to merge the particular estate, while in the last class the merger takes place; and Mr. Fearnie assigns satisfactory reasons for the difference. Fearnie, C. R. 343, 344. (7th edit.) Butler.]]

Crump v. Nor-
wood, 7 Taunt.
362.; *et vide*
Doe dem.
Davy v. Burn-
sall, 6 Term R.
30. Doe dem.
Herbert v.
Selby, 2 Barn.
& C. 929.

cessively, remainder to the heirs of the body of the father, or to his right heirs, and dies before the birth of any son of his son; and if by the descent of the fee or tail upon the son the contingent remainders were destroyed, was the question? It was *argued*, that they were not, because the inheritance came to the son by descent, which was an act in law, and not by his own act; and therefore the law, which does no wrong, shall not destroy these contingent remainders, but that upon the birth of the sons the estate shall open again to let in the remainders. But it was *adjudged*, that the contingent remainders were destroyed by the descent of the inheritance upon the son (a); and they relied on the case of *Wood v. Ingersoles* (b), and held, that this case differed from the cases cited, where the estates were united at first upon making the conveyance, and if they should not afterwards open, so as to let in the remainders, the conveyance would destroy itself; but here, this descent was an act subsequent to the conveyance, and made an alteration in the estates limited thereby, and therefore had destroyed the contingent remainders.'

[Lands were conveyed to the use of *A.* and his wife for life, remainder to the use of *B.* the son of *A.* for his life, remainder to the first and other sons of *B.* in tail, remainder to *A.* in fee. *A.* and his wife died in the lifetime of *B.*, who afterwards died without issue, leaving a wife. The question was, Whether the wife of *B.* was entitled to dower in the lands? It was decreed she was: and Lord Chancellor, with one of the judges, was of opinion, that the estate for life in *B.* was merged by the descent of the inheritance upon him, and the contingent remainder destroyed.]

[[So also where there was a devise of gavelkind land to the testator's three nephews, *William, John, and Robert*, for their lives in common, and, after their respective deceases, the share of him or them dying to the heirs lawfully issuing of his and their body and bodies respectively, if more than one, equally to be divided as tenants in common; and if but one, to such only one, his or her heirs and assigns, for ever: and if any of his nephews should die without issue, or leaving such they should die without attaining twenty-one, then the share or shares of him or them so dying unto the survivor and survivors of his said nephews and the heirs of the body of such survivor equally, as tenants in common, and to hold the same as he had therein-before directed as to the original part and share. And for want or in default of such issue of his said nephews, he devised the premises unto his own

own right heirs. On the testator's decease one moiety of this remainder to his right heirs descended to his brother *John*, the father of the three nephews, being one of the testator's two heirs in gavelkind; and on the brother's decease it descended to his sons the three nephews. The court held this to be a contingent remainder with a double aspect, and not an executory devise, and consequently that by the descent of the portion of the ultimate remainder in fee on the nephews, the particular estate in that portion was merged, and the contingent remainders in that portion were destroyed.||

' *A.* and *B.* joint-tenants for their lives, remainder to the first son of *A.* in tail, and so to the second, &c. remainder to the right heirs of *B.* Before any issue *A.* releases to *B.* and his heirs, and after hath issue a son; and if by this release, before the birth of a son, the contingent remainders were destroyed, was the question? It was argued, upon the diversity in the above case, that this uniting of the estate for life with the remainder in fee, being by conveyance and act subsequent to the limitation of the contingent remainders, and before they came in being, had destroyed them; for now the estate for life upon which they depended is gone, and the whole fee executed in *B.*, and therefore they can never after arise. But by three justices, *dissentiente Dolben*, it was adjudged that these contingent remainders were not destroyed; for to some purposes the whole fee was executed in *B.* immediately upon the first conveyance, and this release of *A.* gave him no greater estate, nor in any other degree than he had before; for after such release he is in of the whole estate by the lessor, as he was before, and as he would have been, if it had come to him by survivorship: and his estate being at first given, subject to these contingent remainders, must open to let them in, when they happen, as it would have done had no such release been made; and though they were limited immediately after the estate for life to *A.* and *B.*, yet till they came *in esse* they did not prevent the closing of the fee in *B.*, and therefore did not depend absolutely upon the estate for life, and have now no other impediment to hinder their rising than they had at first.' "Note, *Ventris* reports the same case to be adjudged, that they were destroyed, but gives no reason for the judgment; and the other two reporters were two of the judges that gave the judgment, and therefore are more to be relied upon."

' *A.* copyholder in fee surrenders to the use of his wife and of *B.* for their lives, remainder to the use of the heirs of the body of the surrenderor and his wife; *B.* and the wife are admitted accordingly; after *B.* surrenders his part to the use of the husband, and then the husband surrenders the whole to the use of *C.* and his heirs, who is admitted accordingly; then the wife dies, leaving issue, who brings ejectment for the moiety of the wife; and adjudged not maintainable; for when *B.* surrenders his moiety to the use of the husband, this makes a severance of the jointure; and when the husband after surrenders the whole

Vent. 345.
2 Jon. 136.
Raym. 413.
Harrison v. Belsey.
||From this and the following case Mr. Fearne draws the conclusion, that the alteration in the particular estate, which will destroy a contingent remainder, must be an alteration in its *quantity*, and not merely in its *quality*.
C. R. 338. (7th edit.)||

Roll. R. 258.
317. 438. Lane v. Pannell.
[Vide Watk. Gilb. Ten. 266. and notes; and Fearne's C. R. 458.]

' to

‘ to *C.*, he by this hath an estate for the life of *B.* in the one
‘ moiety, and for the life of the wife in the other moiety; and
‘ though, if she had survived her husband, she might have de-
‘ feated the surrender of her own moiety, yet now, she dying
‘ first, the estate of *C.* as to that moiety is determined; and
‘ since he who would claim it must make himself heir of
‘ both their bodies, which during the life of the husband he can-
‘ not do, and yet the particular estate as to that moiety is de-
‘ termined; therefore the remainder as to that moiety which was
‘ contingent is destroyed, and the husband’s death can never set
‘ it up again; but for the other moiety, if the husband dies,
‘ living *B.*, it will take place, else not, being contingent, and
‘ not capable of vesting during the life of the husband. And as
‘ to the husband’s surrender to the use of *C.* and his heirs, this
‘ was no such forfeiture or determination of the estate for life as
‘ to give an entry to those in remainder, for then that had de-
‘ stroyed the contingent remainder of the whole; and though
‘ the wife had survived and defeated such surrender as to her
‘ own moiety, yet it appears before, that that would not have
‘ revived the contingent remainder, being not capable of vesting
‘ when the particular estate ended; but such surrender of the
‘ husband works only by way of grant for what he might law-
‘ fully pass, and not so strongly as livery of seisin.’

2 Roll. Abr.
 794. (6). Paw-
 sey v. Lowdall.
 [So, in the
 above case of
 Lane v. Pan-
 nell, it is ob-
 servable, that
 the surrender
 of the baron
 to *B.* in fee
 did not de-
 stroy the con-
 tingent re-
 mainder; for
 the legal free-
 hold being in
 the lord, the
 surrender of

“ A copyholder in fee surrenders to the use of his will, and
 “ after by his will devises the estate to *B.* for life, remainder to
 “ the heir of his body begotten, for ever, and dies. *B.* is ad-
 “ mitted, and after surrenders to the lord of the manor to do
 “ with it as he pleases, and dies, leaving a son. Now, admitting
 “ the remainder to the heir of the body of *B.* to be a good re-
 “ mainder, and that such heir should take it by purchase, this
 “ surrender of *B.* hath not destroyed it; for this operates only
 “ as a grant to the lord of his estate for life, and is no forfeiture
 “ to give an entry to a remainder-man; and by consequence
 “ continues in the lord to support the contingent remainder,
 “ in the same manner as it did in *B.*, there being only a change
 “ of the person, but no alteration made in the estate; for it is
 “ still determinable upon the death of *B.* as it was before, and
 “ not sooner.

the baron passed no more than he lawfully might. Fearne’s C. R. 470. (4th edit.) So, where copyhold lands were devised to *A.* for life, remainder to his first and other sons in tail, &c., remainder to *B.* in fee, and *A.*, before he had any sons born, bought the reversion of *B.*, and had it surrendered to his (*A.*’s) own use, thinking by that means to merge his estate for life, and so destroy the contingent remainder to his first son; it was agreed, that this surrender of the reversion would not bar the son, because the freehold and inheritance were in the lord; for there is not the like inconvenience as in freehold estates at common law, in respect of contingent remainders, where there is nobody against whom to bring the *præcipe*. Mildmay v. Hungerford, 2 Vern. 453. || But if the lord’s freehold becomes vested in the owner of the customary estate by enfranchisement before the contingency happens, the contingent remainders are destroyed. Roe dem. Clewett v. Briggs, 16 East, 406.]

3 Keb. 759.

MSS. Hales v.
 Risley.

“ *A.* tenant for life, remainder to *B.* for life, remainder to the
 “ first, second, and other sons of *B.* in tail male successively;
 “ *A.* and *B.* join in an indenture tripartite between *A.* of the first
 “ part, and *B.* of the second part, and *C.* and *D.* of the third
 “ part,

“ part, whereby *A.* covenants with *C.* and *D.* to levy a fine to
 “ other uses: *B.* seals the deed; and it was argued by the seal-
 “ ing it should be said that *B.* joined in the fine, and by the fine
 “ all the estates are divested and put to a right, and the contin-
 “ gent estates disturbed; and *B.* is estopped from entering to
 “ revive them; and though he hath a son after, yet he cannot
 “ enter till the contingent use be revived by entry; which, as
 “ this case is, no person has power to do. But *per cur.* clearly
 “ — *B.*’s sealing the deed, only shews his consent that *A.* may
 “ levy the fine; for he does not covenant, or transfer over his
 “ estate in remainder: and admitting that *B.* should be estopped,
 “ yet his sons, who claim not under him, are not estopped to
 “ say, that there was a sufficient estate continuing to support the
 “ contingent remainders; and then, if they are preserved, every
 “ one, who hath right, may enter in his turn. And after it was
 “ adjudged accordingly; and said, there was nothing in the case
 “ worth an argument.

“ *A.* covenants upon proper considerations to stand seised to
 “ the use of himself for life, remainder to *B.* his son for life, re-
 “ mainder to the first and other sons of *B.* in tail successively;
 “ remainder to the right heirs of *A.*; after *A.* is attainted of trea-
 “ son, and executed before the birth of any son of *B.* It was
 “ adjudged, that by such attainder the king had the fee-simple,
 “ discharged of all the remainders to the sons not then born, and
 “ that they were utterly barred. The reason seems to be, be-
 “ cause they were to arise by way of use out of the estates of the
 “ covenantor, which by such attainder are come to the king;
 “ and he cannot be seised to the use of any person. (a) But it
 “ seems, if they were to arise out of an estate executed in feoffees,
 “ then the attainder of *A.*, which could only forfeit his own
 “ estate for life, and remainder in fee, would not prevent them
 “ from rising. But the greater doubt in such case would be, if
 “ the feoffees themselves were attainted of treason before the
 “ birth of any son; for all the books agree, they have no estate
 “ left in them, but a *scintilla juris* to serve the contingent uses
 “ when they happen, and how far that *scintilla juris* is forfeitable,
 “ or their entry requisite to serve the contingent uses, when no
 “ actual disturbance is made of the possession, seems doubtful.
 “ For in other cases, unless the possession be disturbed by dis-
 “ seisin, feoffment, &c. no entry of the feoffees is requisite to
 “ raise the contingent uses when they happen, as appears before.
 “ *Ideo quære* of this.

Mo. 8. 15.

Sir Thomas
 Palmer’s case.
 Pop. 22.

[(a) But here the question arises, how we are to reconcile this resolution with the principle that any preceding vested freehold estate will support a contingent remainder; for here, whatever effect the forfeiture of *A.*’s estate for life and remainder in fee might otherwise have had, yet as *B.* had a vested freehold, why was not that capable of supporting the contingent remainder to

his sons? If, indeed, there had been an office found antecedent to the birth of a son of *B.*, that *A.* was seised in fee, it might have accounted for the resolution in the above case, by taking away the *right of entry* of *B.*, according to the distinction I shall notice after the next cited case. But, abstracted from a circumstance of that nature, which does not appear in the report of Sir Thomas Palmer’s case, that of *Corbet v. Tichborn*, 2 Salk. 576. of much later date, seems to claim our better attention. It was a case where *J.S.* being tenant for life, remainder to his wife for life, remainder to his first and other sons, &c. in tail, remainder to himself in fee, committed treason, and afterwards had a son, and then was attainted; and upon a trial at bar in K. B. the court held, that whether the son was born before or after the attainder, the contingent remainder to him was not discharged by the lands vesting in the crown during the life of *J.S.*, because of the wife’s estate, *viz.* a vested estate of freehold in remainder,

remainder, which was sufficient to support it. For this estate of the wife, it seems, was not turned to a right, or affected by the forfeiture of the husband, nor the crown thereby in possession of any other estate than what *J. S.* was entitled to at the time; as appears by another case of *Linch v. Coote*, 2 Salk. 469., where tenant for life, remainder to his first son in tail, remainder to *J. S.* in fee, was attained of high treason, and died without issue. And upon its being urged, that the whole estate vesting in the king by 35 H. 8. c. 8. without any office finding the special matter, he in remainder could not enter, any more than if a general office had been found, which would have supposed a fee; it was held, that no other estate vested in the king by the said act than the party attainted had; just as if a *special* office had been found; and therefore the remainder-man might enter on the king, the king's estate being determined. For the statute saved the right of others; though it was otherwise where an office found an estate in fee in the party attainted. *Fearne's C. R.* 282, 283. (7th edit.) 2 Jo. 773. *Keb.* 752. 3 Mo. 196. 374. 589. 391.

Dyer, 339—
342. 198, 199.
2 Leon. 14.
Pop. 76. Co. 1.
156. *Brent's*
case.

[*Vide Fearne's*
C. R. 290—
301. (7th ed.)]

Cro. Eliz. 277.
Mason v.
Nevill.

“ *A.* seised in fee of lands, after 27 H. 8., makes a feoffment in fee to the use of *D.* his wife, for her life; and if he survives his said wife, then to the use of himself, and of such woman as he shall happen to marry, for their lives, for the jointure of such wife, remainder to *B.* in fee. Afterwards, *B.* and the feoffees by consent of *A.* join in a feoffment in fee to the use of *A.* and his wife for their lives, remainder to *C.* in tail, remainder to *A.* in fee; and this was by deed and letter of attorney to make livery. Afterwards *B.* levies a fine with proclamation to other uses; and then *D.* his wife dies, and he marries a second wife, and dies; and she, by the assent and command of the first feoffees, and after the five years after the fine, enters to raise the use to herself. And by the better opinion her entry was not lawful; for by the second feoffment all the estates were divested and put to a right. And whether such feoffment were only the disseisin of the attorney, who made the livery, and the confirmation of him in remainder, and of the feoffees; or the disseisin of all; yet by such joining in the deed of feoffment, the feoffees have barred their *scintilla juris*, and cannot enter to revive the future use to the second wife. And *A.*, by his fine, hath barred himself to enter in right of his wife to reverse the first estates; and his first wife could not enter, being covert; and therefore, there being none to enter to revive such future use, it is by the feoffment destroyed, and the second wife's entry unlawful.

“ *A.* seised of lands, makes a feoffment in fee to the use of himself and his wife for lives; and after their deaths, to the use of *B.* their son for life; and after his death, that the feoffees should be seised *ut in eorum pristino statu*, upon condition that they should receive the profits, and pay to *C.*, wife of *B.*, 20*l.* per annum during her life; and after that they should be seised to the use of the heirs male of the body of *B.* The feoffor and his wife die; *B.* enters, and makes a feoffment to *D.*, and dies; and after *C.* dies; and then the heir male of the body of *B.* enters. It was adjudged lawful; and that the feoffment of *B.* was no discontinuance, nor barred the heir of his entry. But this was without any great argument, and no reason given for the judgment. However, it seems well given; for by reason of the intermediate remainder to the feoffees, *B.* was not seised by force of the entail when he entered and made the feoffment:

“ feoffment; and then, by *Littleton's* rule, his feoffment makes no
 “ discontinuance; and, by consequence, as the feoffees might have
 “ entered presently for the forfeiture, they being next in remain-
 “ der, so, after the death of *C.*, the heir of the body of *B.* may
 “ likewise enter, because then the preceding estates are deter-
 “ mined. And if the feoffment of *B.* made no discontinuance,
 “ there is nothing to hinder their entry, though they are in of
 “ the entail, by descent from their father, after such entry.

Co. Lit. 347.
 (a). Raym. 57.

“ *A.* seized of lands in fee by indenture, covenants with *B.*, in
 “ consideration of a marriage intended between *A.* and *C.* daugh-
 “ ter of *B.*, to stand seized to the use of himself and his heirs till
 “ marriage, and after to the use of himself and *C.* and the heirs
 “ of his body, remainder to his own right heirs; and then before
 “ the marriage he makes a lease for thirty-one years, reserving
 “ rent, to begin after the end of a former lease, then *in esse*.
 “ The marriage takes effect: and in ejectment after the death of
 “ *A.* it was held, that this lease should bind the future use to
 “ the wife, as a lease upon good consideration by the feoffees at
 “ common law should bind *cestuy que use*; but that subject to
 “ that lease the use to the wife should arise, because the same
 “ seisin and freehold continues; and therefore the use to the
 “ wife should arise out of the residue of the estate, and she shall
 “ have the reversion and rent reserved upon the lease; for
 “ wherever the statute finds a seisin to uses, there it carries the
 “ possession to them; and notwithstanding such lease for years,
 “ yet the seisin to the uses continued.

Cro. Eliz. 764.
 854. 2 Roll.
 Abr. 611. 792.
 794. (4).
 Wood v.
 Reingold.

“ And yet we have another case in our books where it was
 “ held the wife was not at all bound by such lease. The case
 “ was this:—*A.* covenanted, in consideration of love as to his son,
 “ to stand seized to the use of his son for life, remainder to the
 “ use of such woman as he should after marry, for her life; re-
 “ mainder to the first and other sons in that marriage, in tail, &c.
 “ And after, the son proving extravagant and being in gaol, *A.* the
 “ father, to disturb the rising of the use to the future wife, makes
 “ a lease for 1000 years, and then the son marries the gaoler's
 “ daughter. And yet it was held, that she was not bound by
 “ this lease, but should have the land discharged of it. And the
 “ reason given is, because there being a good estate by the first
 “ limitation to arise when the wife is known, if this be not de-
 “ stroyed, this cannot be charged or encumbered, because it hath
 “ relation to the covenant, and therefore the lease shall be con-
 “ strued to arise out of the reversion which the covenantor had
 “ in him, and might lawfully charge. But to difference this case
 “ from the former, it is to be observed, that here the covenantor
 “ had nothing but a reversion in him; he had no estate for life,
 “ as he had in the case preceding: besides, this lease was made
 “ without any consideration, and for no other purpose but to de-
 “ feat the rising of the use to the wife. And if it should be good
 “ in possession, being for 1000 years, and no rent reserved upon
 “ it, it would defeat the whole settlement; and therefore it is
 “ more reasonable to construe such lease to arise out of the rever-

Cro. Jac. 168.
 2 Roll. Abr.
 293. (1). Bold
 v. Sir Hen.
 Winston.

“ sion

- Co. 5. Twyne's case.
 2 Roll. Abr. 794. (5).
 Cro. Eliz. 826. Mo. 634. Wells v. Fenton.
 Poph. 5.
- sion which the covenantor had, and might lawfully charge, than to allow it good against the wife who came in upon so valuable a consideration as marriage. But, if such lease had been made for money, or, if a rent had been reserved upon it, then though the lessor had not any estate for his own life, yet such lease had been good against the settlement: because, though it was made in consideration of marriage, yet not being with any woman in particular, nor in consideration of any marriage portion, it would be fraudulent and voluntary, as to any subsequent purchaser for a more valuable consideration, as money or rent is.
- A.* gives lands to the use of *B.* for life, remainder to his eldest son in tail, remainder to the right heirs of *B.*; and before the birth of any son, *B.* makes a lease for years, and then a son is born: he shall avoid this lease after the death of *B.*, for the freehold not being altered, so that the contingent remainder may well take place, this lease for years shall not affect it, but shall be construed to arise out of the estates which *B.* had, and might lawfully charge, and shall be subject as they would have been, to open and let in the remainder, when it happens. But, if such lease had been made for a valuable consideration of money or rent, then it would come within the rules before mentioned, as I conceive.
- A.* seised in fee, levies a fine to the use of himself for life, remainder to the use of such woman as he should after marry, and should survive him; remainder to *B.* in tail: then *A.* marries *C.*, and after, by fine, reciting that he was tenant for life, remainder to said *C.* for life, he and *C.* grant the said lands to a stranger for forty years, if he and his wife, or either of them, should so long live; *A.* dies; and if *C.* was barred was the question? And *per totam cur.* she was barred by estoppel. Yet they agreed, that if a lease be made to one for life, remainder to the right heirs of *J. S.* who is living, and after his eldest son grants or levies a fine of such remainder, yet after the death of *J. S.* he shall enter, because he had nothing in him at the time of the grant or fine, and therefore such grant or fine were merely void. And there, two judges against two, held, that the fine had extinguished this future use by way of prevention. But a *quære* is made of it, because it was but a grant by tenant for life, which ends with his death. This is the case, as it is reported by *Moore*. But in *Croke*, the case is reported to be, that after such settlement the husband and wife levied a fine to a stranger in fee, who granted and rendered the land to the husband for life, remainder to the defendant for sixty years, remainder to the right heirs of the husband; and that the husband died, and *B.*, who had the remainder in tail by the first settlement, entered and let to the defendant; and that after *C.* married again, and she and her husband let to the plaintiff; and upon special verdict found, it was adjudged for the plaintiff. Which proves, that the wife was not bound even by estoppel, for then it could never have
- " been

“ been adjudged for her lessee the plaintiff; and that the joining of the wife in the fine signified nothing. But, then, as it seems, this must prove too, that the fine was not levied in fee as it is reported; for then clearly the contingent remainder to the wife would have been destroyed; because by such fine the estate for life of the husband was determined, and an entry given to him in the remainder for the forfeiture, before the contingent remainder could take place; and then, by all the cases before mentioned, it appears to be for ever destroyed. And therefore taking it to be only a grant by fine for years, and not for any valuable consideration, then it determined by the death of the tenant for life who granted it; and though it had been for a valuable consideration, then it determined by the death of the tenant for life who granted it. And indeed, admitting it had been for a valuable consideration, yet I cannot see how it could have continued longer than his life, or bound the contingent use; for such lease by *cestuy que use* in possession differs from a lease by feoffees to uses at common law, or by covenantor to stand seised to uses; for there, in both cases, the use takes effect out of the estate which shall serve and supply the uses; and therefore shall bind or not bind as it happens to be made for a valuable consideration, or voluntarily, as appears before. But, where such lease is made by *cestuy que use* in possession, this takes its effect out of his estate only, and by consequence can continue no longer than that does; and then, when the freehold is not destroyed, the contingent remainder may well vest, nothing being done to disturb or displace its rising. *Quære* therefore of this case.

“ *A.* covenants upon proper considerations to stand seised or make a feoffment in fee to the use of himself for life, and after of part to the use of *B.* his wife for life, for her jointure, without waste, and after to the right heirs of *A.*, provided that if the heir of *A.* disturbs *B.*, that then the use to the right heirs of *A.* shall cease, and that then *A.* and his heirs, or the feoffees, &c. and all others shall stand seised to the use of *B.* and her heirs. Afterwards *A.* makes a lease for 100 years, to begin after the death of *B.*, rendering 12*l.* rent, and dies. The heir disturbs *B.* and breaks the condition; yet by the two chief justices it was held, that the future use to *B.* in fee was checked by this lease, though the lease was but an *interesse termini* till *B.*'s death. *Et quia non potuit surgere tempore mortis B.*, by reason of the lease for years, *it is destroyed for ever.* But *quære* of this case, for by the other cases preceding it appears, that at most, such contingent uses are only bound by the lease for years, and not that neither, except where they are made for a valuable consideration. But here, the reason given why this contingent limitation to the wife is destroyed by making such lease for years, is the same that is given where contingent remainders are destroyed by making a feoffment in fee, whereas the reasons and operations of the one and the other are very different. *Ideo quære* of this case. Note — *Croke* cites the

Quære.

Mo. 743. Barton's case.
Cro. Eliz. 765.
||Mr. Fearne says, the reason of this case seems doubtful and obscure. C. R. 278. (7th ed.)||

Quære.

“ resolution

Cro. Eliz. 765.

“ resolution of this case, and says, the reason thereof seems to be, because the use limited to the right heirs was the ancient reversion, and no new estate, and then there could not be a condition annexed thereto. But this seems no good reason; for an executory use may as well be limited to arise upon a condition precedent as an executory devise, and then the statute carries the possession after it; and why it may be created by original limitation, and not out of the reversion, after other estates, will be difficult to reconcile, since the reversion is as much the owner's, as such, as the possession was before any limitation at all made; because the first had a fee, though it was but a base and determinable fee. But yet in a will, such limitation has sometimes been held to be good, not as a direct remainder, but as an executory devise. But this is not law, because it is the affectation of a perpetuity, since such contingencies cannot fall till after the entail is spent, which is too distant to expect.

Plow. 255. a.
339. b. 248,
249. 2 Inst.
336. Vaugh. 56.

“ So, a gift at common law, before the statute of *Westm. 2.* to one, and the heirs of his body, and if he died without heirs of his body, to go over to another, this was a void remainder, because the first donee had a conditional fee, which, after issue, he may dispose of for ever, and bar the donor of his possibility of reverter; and therefore such possibility could not be good as a remainder, nor did any formedon in remainder lie at common law, when all inheritances were fees absolute, or conditional.

Dyer, 33. a.
pl. 12. Finch,
46. Swinb. 122.
1 Brook. 234.
(2). Cont.
Vaugh. 277.

“ So, where one devised lands in *London* to the prior and convent of *B.*, *ita quod reddant annuatim decano et capitulo Sancti Pauli* 14 marks; and if they fail of payment, that their estate shall cease, and that the said dean and chapter and their successors shall have it: it was held by *Baldwin* and *Fitzherbert*, the greatest lawyers of the age, as my Lord *Vaughan* says, that this remainder was void; because the first devise carrying a fee, nothing remained after to be disposed of; and executory devises, after a fee-simple, were in former ages unknown, which is the reason that this case is denied by some to be law. And it was held, that, for the condition broken, the heir of the devisor should enter; of which more hereafter.

3 Chan. Cases,
19. 22. 31. 36.
49.

“ But this rule, that a fee cannot be limited after a fee, hath been long since exploded, in case of devises, and of uses, where the first estate, though in fee, is limited to determine upon a contingency that may happen within the compass of a life or lives in being, or some reasonable time after. And the reason of giving way to it at first seems to have been, to let men into a means of providing for the several branches and exigencies of their own family.

2 Leon. 11.
3 Leon. 64. 70.
Dyer, 124.
Hynd v. Lyon,
Cro. Eliz. 205.
2 Roll. Abr.

“ The first case we meet with to this purpose, is this. In debt against *A.* as son and heir of *B.*, he pleads *riens per descent*, but of the third part of the manor of *D.* the plaintiff replies, that he had the whole manor of *D.* by descent; and upon issue it was found, that the said manor was held by knight's service,

“ service, and that *B.*, father of the defendant, by his will in
 “ writing devised it to his wife, till the defendant his son should
 “ come to the age of 24 years, and when he came to the said
 “ age of 24 years, that he should have the whole to him and his
 “ heirs for ever, his wife having a third part thereof during her
 “ life; and if her said son should die before the age of 24 years
 “ without issue, then the whole should be to the wife for life;
 “ and after her death to *C.* in tail, remainder to the right heirs
 “ of the devisor. It was found that the wife was dead, and that
 “ the son had attained his age of 24 years; and it was adjudged
 “ that he had the fee by descent, and so assets; for the entail
 “ with the remainders over not being to arise to *A.* unless he
 “ died before 24; and so that part of the devise being become
 “ void by his attaining 24, then it rested wholly upon the first
 “ part, which being a devise to his son and heir apparent in fee,
 “ is void, and he shall take by descent, notwithstanding such
 “ devise. And he could not have an estate-tail in the interim
 “ till he attained 24, and then to have the fee as a remainder,
 “ because the entail was only to arise to him upon his dying
 “ before 24, as a condition precedent; so that neither the tail
 “ nor the fee could vest in him presently, by force of the devise;
 “ but it was as if he had left the fee to descend to him and
 “ his heirs, and only said, if my son die without issue before
 “ 24, then I give the lands to my wife for life, and after to
 “ *C.* in tail, &c. which is a good executory devise upon the hap-
 “ pening of the contingency, and the fee, in the mean time, de-
 “ scends as it would have done if there had been no will. And
 “ whether by the words, *if his son died without issue before 24*,
 “ an estate-tail should vest upon such death, or, that they should
 “ be only the terms and conditions upon which the executory
 “ devise was to take place, and after no estate at all, seems
 “ doubtful; though the case of *Gardiner and Sheldon*, after
 “ mentioned, seems to make for the latter: for, if he died before
 “ 24, leaving issue, and that being made the condition upon
 “ which the remainder limited after were to arise, could be no
 “ condition to vest an entail in himself; because he and his issue,
 “ that is, all who could take the entail, were to be dead before
 “ the entail could vest, and then it could not vest for want of
 “ persons to take it, which would make the devise idle and re-
 “ pugnant as to that part: therefore, these words seem to make
 “ no alteration of the estate the law would cast upon the son by
 “ descent, but to be wholly relative to the limitations after, as the
 “ modus upon which they were to take effect, and not to control
 “ the operation of the law in the mean time, in giving him the
 “ fee by descent. And to construe the case otherwise, would
 “ make it wholly useless to the purpose for which it is cited by
 “ my Lord Chancellor *Nottingham* in the *Duke of Norfolk's*
 “ case; for there, either it must create an entail to begin when
 “ all the issue who were to enjoy it were dead; or, it must
 “ make an entail at large with the remainders over; and then
 “ there is no great mystery in the case. The first is impos-

626. (3). 839.
 (1). 2 Mod.
 291. [Vide
Scott v. Scott,
Ambl. 383.
contra. But
quære of that
 case, and whe-
 ther it can be
 supported
 either by prin-
 ciple or autho-
 rity.]

But *vide infra*.

“sible, and the latter cannot be, because it is confined to his dying before 24; for, if he survives that age, it is not to take place.

Dyer, 530.
1 Vent. 212.
2 Roll. Abr.
829. (5).
Vaugh. 267.
Clache's case.

“One seised of lands in fee by his will in writing devises *Blackacre* to *A.* his daughter, and her heirs, and *Whiteacre* to his daughter *B.* and her heirs, and if she die before the age of 16 years, living *A.*, then *A.* shall have *Whiteacre* to her and her heirs; and if *A.* die having no issue, living *B.*, then *B.* shall have the part of *A.* to her and her heirs; and if both die, having no issue, then to *J. S.* and his heirs, and dies. *B.* attains her age of sixteen years, and then dies without issue in the life of *A.* And first, it was held, by three justices against *Dyer*, that the daughters had an estate-tail upon the whole will, and not a fee determinable upon a contingency subsequent. Secondly, that by the words, *if both die without issue*, no cross remainders in tail were created by implication; but that upon *B.*'s death without issue after sixteen, *J. S.* should have her part presently, without staying till the death of *A.* without issue.

Cro. Jac. 376.
Godb. 264.
2 Roll. R. 119.
137. 253.
2 Bulst. 27.
2 Roll. Abr.
791. 794.

Sympton v. Southern.
Note. — Several books put this case of an infant in *ventre sa mère*, and turn the defect of this conveyance in the remainder on the want of a person in being to take immediately. [Mr. Fearn, referring to this case of Sympton v.

“A copyholder in fee surrenders to the use of *B.* an infant and his heirs, and if he dies or marries before the age of twenty-one years, then he surrenders to the use of *C.* and his heirs; this was held a good surrender to the use of *C.* upon such contingency, though *B.* had a fee before; because the contingency was to happen within the compass of a life, or upon the death of one then in being. But it is said by *Rolle*, that the surrenderor died before the contingency happened, in which case the use could not rise to *C.*, though it happened after; because, upon the happening of the contingency, as this case is, the surrender is to operate as a new original surrender to the use of *C.*; and this cannot be when the person who should make it is dead before, any more than an attornment after the death of the grantor shall avail the grantee of the reversion. But, if he had surrendered to the use of his will, and then had, by his will, devised such estates, they would be good, because the surrender was made to supply and serve all the contingencies and limitations of the will, and the use in the mean time vested in the surrenderor and his heirs; whereas the surrender in the other case would, according to the wording of such instrument, operate double as to original surrenders. *Quære.*

Southern, in his Essay on Remainders, says, that according to *Croke* it was resolved; that the surrender to the use of *C.* was void, for that a man could not make such a conditional surrender to operate in *futuro*. On the other hand, Mr. Fearn says, the same case, as reported by *Rolle*, is cited in *Lex Custumaria* (121.) as an authority that such future uses are good, and that a fee may be limited on a fee upon a contingency in copyhold estates. And this, he says, the case in *Rolle*'s Abridgment seems to leave undecided. But, he adds, in *Gilbert's Tenures* (260, 261.) it is said, that such a resolution seems not to be grounded on so good reason as the contrary resolution in *Croke*; for the use upon a surrender of a copyhold is not like a use or trust at common law: but he who is admitted upon a surrender is admitted to the legal customary estate, and is not seised to a use; therefore uses upon surrenders are, in general, governed entirely by the same rules as conveyances at common law, in which such limitations were not allowable; and that upon this principle it seems a fee upon a fee in case of a surrender of copyhold is not good, any more than in a conveyance at common law. But the above opinion of *Gilbert* is, says Mr. Fearn, I think, excluded by decided cases; for the validity of conditional limitations in surrenders of copyholds appears to have been admitted

in the case of *Stocker v. Edwards*, or *Edwards v. Hammond* (2 Show. 398. and 3 Lev. 132., where the same case seems to be somewhat differently reported. *Fearne's C.R.* (7th edit.) 277., and *vide Welcock v. Hammond*, cited in 3 Co. 20. b. *Brian v. Cawson*, 3 Leon. 115.) And the decision in the case of *Sympson v. Southern* may be referred to the point of the *habendum* after the death of the surrenderor being void, taking that as the *conditional future operation*, which was denied to the surrender. And in the case of *Paulter v. Cornhill*, Cro. Eliz. 361., *Beaumont* Justice conceived the limitation of a fee upon a fee as good in surrenders of copyholds as in uses of land upon a feoffment. So, says he, in the case of a surrender of copyholds, to the intent the lord should admit A., whom the surrenderor intended to marry, after marriage; until marriage to the use of himself and his heirs, and after marriage to the use of himself and A. in tail; the whole Court of C. B. held (*Bentley v. Delamore*, 1 Freem. 267., 268., and *vide Calth. Reading*, 31, 32. for the same point; and *vide Taylor v. Taylor*, 1 Atk. 386.), that it was good enough to limit a remainder upon a contingent fee in copyholds; as in case of mortgages of copyholds a surrender *in futuro* is good, for the freehold remains in the lord. Thus far Mr. *Fearne*; *vide Fearne's C.R.* 277. (7th edit.) But, if we carefully examine the different reports of the case of *Sympson v. Southern*, and the other authorities to which Mr. *Fearne* refers, it will be found, perhaps, that they will not support the position they are brought to establish, and that the above doctrine of our author, advanced in his *Tenures*, remains unimpeached, and must be admitted to be sound law.—As the case of *Sympson v. Southern* is reported by Rolle (1 Roll. R. 109. 137. 253.), judgment is said to have been given for the party who claimed the ulterior fee. But the report is very obscure, if not contradictory in many places. The court are there said to have been of opinion with Coke; but Coke's argument, both in Rolle and Bulstrode, seems incompatible with such an opinion. In Croke (Cro. Jac. 376.) the judgment is said to have been given for the party claiming under the heir at law, and so it is said in Godbolt and Bulstrode (Godb. 264. 2 Bulstr. 272.). In Rolle's Abridgment it is first noticed with a *dubitatur* (2 Roll. Abr. 791. Uses (P.), pl. 2.); and afterwards, when it is mentioned as adjudged, it is declared that the ulterior fee never arose, as the contingency did not happen in the life of the surrenderor. *Id.* 794. (S. 3.) pl. 8. In *Lex Customaria* (120. c. 15.) the ulterior limitation is said to have been good; but the author rests himself on the first statement in 2 Rolle's Abridgment without asserting the *dubitatur*. Indeed he only translates from that of Rolle, and with Rolle calls the *ulterior fee* a remainder. As, therefore, it is only in Rolle's Reports that the judgment of the court is said to have been given in favour of the person claiming the ulterior fee; and as Croke, Godbolt, Bulstrode, and even Rolle himself in another and better considered work, declare that the judgment was given against him; and as the author of *Lex Customaria* is no authority himself, but depends only upon a quotation from Rolle, without noticing the *dubitatur* inserted by that writer, this case of *Sympson v. Southern* can surely not be regarded as establishing the doctrine that a fee may be limited upon a fee in a surrender of copyholds.—To proceed, then, to an examination of the *decided* cases mentioned by Mr. *Fearne* as supporting that doctrine. In the case of *Stocker v. Edwards*, as reported by Shower, a conditional limitation was said to have been good in a surrender. But, if the case of *Stocker v. Edwards* be the same with that of *Edwards v. Hammond* as reported by Levinz, and Mr. *Fearne* seems to consider it so, it is indeed "somewhat differently reported" by the latter writer. In *Shower*, the surrender was "to the use of the surrenderor for life, and after to the use of John his youngest son, and the heirs of his body, if he attained the age of eighteen years; and if he died before he attained that age without issue male, then to his right heirs." Whereas in *Levinz*, the limitation was, "to the use of the surrenderor for life, and afterwards to the use of his eldest son and his heirs if he lived to the age of twenty-one years; provided, and upon condition, that if he died before twenty-one, that then it should remain to the surrenderor and his heirs." But what puts an end to the application of the case in *Levinz* is, that in that case the surrender was to the use of a will; though that important circumstance is omitted in the translation of Levinz. The words in the original are, that the copyholder surrendered *a son volunt, et devise al use luy mesme pur vie, et apres al use son eigné filz et ses heyres, s'il vivra al age de 21 ans*, provided, &c. as above. The case of *Welcock v. Hammond*, cited by Lord Coke, was also on a surrender to a will, as was the case of *Brian v. Cawson* in Leonard, and that of *Taylor v. Taylor* in Atkins. In the case of *Paulter v. Cornhill*, indeed, *Beaumont* Justice conceived a fee limited upon a fee by a surrender to be good enough; for, said he, it shall be as a use limited upon a feoffment, and these uses shall rise out of the first surrender. But as to the point, whether a fee might be so limited on a fee, it is observable, that we are informed by the reporter, that "the court spake not much thereto, but willed to have it specially found." The case of *Bentley v. Delamore*, in Freeman, indeed, so far as it goes, countenances the doctrine, that a fee may be limited on a fee by surrender. But that case is very loosely given; and it is there said, that "a surrender *in futuro* is good; and the mischief" [here seems an omission in the report] "for the freehold remains in the lord." Now, the validity of a sur-

render *in futuro* has already been denied by Mr. Fearné himself. — The only authority which remains is the passage referred to in Calthorpe; and that, to be sure, supports Mr. Fearné's position. The words are these: — "If a copyhold be surrendered to the use of *J. S.* and his heirs, until he shall marry *A. G.*, and after the said marriage, then to the use of them two in tail special; if after they do marry, then is the surrender to them in tail, and till then to him in fee."

Upon the whole, therefore, we find that the case of *Sympton v. Southern* militates against rather than supports the doctrine, that a fee may be limited upon a fee of copyholds by surrender; that the passage in *Lex Custumaria* cannot be a better authority than the book it rests upon; and in truth, that the extract it gives is not faithfully given, as it delivers that *absolutely* which was originally accompanied with a *dubitatur*; that the case of *Stock v. Edwards*, in *Show*, is shaken by the report of what Mr. Fearné himself considers as the same case in *Levinz*; and that the case in *Levinz* was on a surrender to the use of a will; that the cases of *Welcock v. Hammond*, *Brian v. Cawson*, and *Taylor v. Taylor*, were on surrenders to will also; that in the case of *Paulter v. Cornhill*, the opinion of *Beaumont* was not acceded to by the court, but was itself founded upon a principle which has been repeatedly denied; namely, that the limitation should be considered as a use limited on a feoffment. 1 Brownl. 127. 1 P. Wms. 17. 1 Lord Raym. 627. 1 Ves. 257. That the case of *Bentley v. Delamore* is very loosely given, and filled with absurdity; that if it asserts that a surrender *in futuro* is good, it might easily admit the other position; that if it is erroneous in the one instance, it has no great claim to authority in the other; that the doctrine, therefore, rests on the solitary passage in Calthorpe: is it then too much to say, that the main foundations upon which Mr. Fearné has professed to establish his doctrine fail him, and that, therefore, notwithstanding the great authority of his name, we shall not be justified in pronouncing that a fee may be limited on a fee by a surrender of copyholds? Besides, a surrender of copyholds is to be construed as a common law conveyance (*a*): — if then, as is universally acknowledged, a fee cannot be limited on a fee by common law conveyance, it follows, as an inevitable consequence, that a fee cannot be limited on a fee by a surrender; for if it may, then a surrender is not to be construed as a common law conveyance, which is contrary to our position. ||See on this subject *Sanders on Surrenders of Copyhold Property*, &c. 1819. *Watkins on Copyh.* (4th edit.) 262. and note (1) by Mr. Coventry. *Scriven on Copyh.* 184, (2d edit.) *Cru. Dig.* vol. 5. p. 590. *Prest. Abst.* v. 2. 34. ||

Cro. Jac. 592.

Palm. 135.

2 *Roll. R.* 218.

425. *Dy.* 53. a. in margin.

Fulmerton v. Steward, and

Cro. Eliz. 359;

the same case

by the name

of *Cleer v.*

Peacock.

Swinb. 106.

120.

Dyer, 127. a.

in margin.

2 *Roll. Abr.*

793. (2). *Purs-*

low v. Parker.

2 *Roll. R.* 219.

Palm. 156.

"One having issue *A.*, his only daughter and heir, by will devises lands in *D.* to her and her husband, and her heirs, upon condition that they should assure lands in *F.* to his executors, and their heirs, to perform his will; and, if they failed, then he devised the said lands in *D.* to his executors and their heirs, and died. It was adjudged to be no condition; for that by the descent to the daughter, being heir, it would be destroyed: but it was held a limitation, or executory devise, to his executors, in case the assurance was not made; and that they might, for breach thereof, enter and sell; for though a fee cannot be limited upon a fee absolute, yet upon a fee determinable it may; and in this case it enures as a new original devise to take effect, when the first devisees failed to make the assurance.

"One by his will devised lands to his mother for life, and after her death to his brother in fee; provided, that if his wife (being then *enceinte*) be delivered of a son, that then the land should remain to him in fee, and dies. The son is born; and it was held, that the fee of the brother should cease, and vest in the son, by way of executory devise, upon the happening of the contingency.

"One by his will devises several rent-charges or annuities out of his lands to his younger children; and devises, that if his heir paid the said annuities to his children, that then he should have the said land to him and his heirs; and if he failed of

"payment,

“ payment, then his executors should have the lands; and if they failed to pay them, then his children should have the lands to them, and the survivor of them, and dies. The heir makes a feoffment in fee of the lands, and then the annuities were not paid. It was adjudged, the feoffment has not destroyed the contingent limitations, but that for non-payment they could vest according to the will; and there a difference was taken between contingent remainders, which depend upon a direct limitation, and are to persons unknown, or not *in esse*, and contingent uses, or devise to persons *in esse*, and known, which are to take effect upon a collateral condition or contingency; for these cannot be destroyed or given away by feoffment, as the others may; but the land is charged with them into whose hands soever it comes.

Cro. Jac. 144.
Mesme case
per nosme of
Molineux v.
Molineux.

“ One devised lands to his wife till his son came to the age of twenty-one years, and then that his said son should have the lands to him and his heirs: and if he died without issue before his said age, then his daughter should have the said lands to her heirs. This is a good contingent or executory devise to the daughter, if the contingency happens; and, in the mean time, the fee descends to the son and heir; and if he lives till twenty-one, though he after die without issue, or leave issue, though he die before twenty-one, yet the daughter is not to have the lands; because he is to die without issue, and before twenty-one, else the daughter cannot take.

2 Roll. R. 217.
297. Palm.
132. Boulton's
case, cited to
be reported by
Lord Chancel-
lor Egerton,
6 & 7 Eliz.

“ One having issue three sons, *A.*, *B.*, and *C.*, devises his lands to his son *A.*, after the death of his wife, to him and the heirs of his body lawfully begotten, in fee simple; and if he die in the lifetime of his wife, that then his son *C.* should be his heir, and dies. *A.* hath issue, and dies in the lifetime of the wife. It was adjudged, that the issue should have the land after the death of the wife, and not *C.*; for it is in effect a devise to the wife for life, remainder to *A.* in tail, remainder to *C.* in fee, upon the contingency of *A.*'s dying in the life of the wife, and does not abridge the estate-tail expressly given to *A.* by his dying in the life of the wife.

Swinb. 116.

Qu. If the wife
has an estate
for life by this
implication?
[It should
seem she
clearly hath.]

“ *Cestui que use*, 12 Ed. 4., by will devises lands to *B.* his son and his heirs for ever, provided, that if he die without issue, living his executors, that the land should be sold by his executors, and dies; then the executors die; and after, the devisee being dead likewise, the heir of his body brought a formedon, supposing it to be an entail: the tenant pleads *ne dona pas*; and upon the issue joined, the court was of opinion that it was no entail, &c.; and upon this, and some of the foregoing cases, was the following judgment given.

Dyer, 354. a.
pl. 33.

“ One having issue three sons, *A.*, *B.*, and *C.*, by his will in writing devises lands to *B.*, his second son, and his heirs for ever; and if *B.* die without issue, living *A.*, then *A.* to have those lands to him and his heirs for ever. *B.* enters, and suffers a common recovery to the use of himself and his heirs, and then devises those lands to the plaintiff and his heirs, and dies without issue, living *A.* It was adjudged, first, that *B.*

Cro. Jac. 590.
Palm. 131.
2 Roll. R. 216.
1 Roll. Abr.
611. (9). 835.
pl. (2). 2 Roll.
R. 426. Vaugh.
272. Pells v.
Brown. 4 Mod.

283. Swinb.

124. 2 Leon.

111.

|| *Vide* Fearn, C. R. (7th ed.)

Tenny v. Agar,

12 East, 255.

Doe v. Wetton,

2 Bos. & P.

324.||

“ had a fee-simple by the devise to him and his heirs for ever ;
 “ and that the other words did not so correct or qualify it, as to
 “ make it an estate-tail, not being, *if he die without issue generally*,
 “ but upon the contingency of his dying without issue, living *A.* ;
 “ so that if he survived *A.*, or died in the life of *A.*, leaving
 “ issue, *A.* was to have nothing : and this being a contingency
 “ to happen within the compass of lives then in being, though
 “ the first devise was a fee, yet the limitation over, upon such con-
 “ tingency, was good, and not within the danger of a perpetuity ;
 “ for the limitation to *A.* is not a remainder directly, which can-
 “ not be after a fee, but it takes effect by executory devise, and
 “ upon determination of the first estate, by the happening of the
 “ contingency, carries over the land to the other. Secondly, it
 “ was adjudged, that this, being a mere collateral possibility, was
 “ not bound by the recovery, unless he to whom it was limited
 “ had been party by way of voucher ; for it had no existence at
 “ all when the recovery was suffered, and therefore the recom-
 “ pence in value could not extend to it, any more than to a re-
 “ mainder limited to the right heirs of *J. S.* who is then living ;
 “ for though that remainder be carved out of the estate of the
 “ donor or lessor, yet it cannot then vest for want of a person
 “ capable to take it : or it is rather to be resembled to an estate
 “ to *A.* and his heirs, so long as *B.* hath heirs of his body, in
 “ which case a recovery suffered by *A.* shall not bar the possi-
 “ bility of the reverter to the donor, it not having any real ex-
 “ istence as a reversion or a remainder, but only as a mere possi-
 “ bility : and, therefore, whoever comes into the land, takes it
 “ subject to such possibility, which, like an infection, sticks to it,
 “ and can no ways be drawn out without the concurrence of him
 “ who is to have the benefit thereof. And the reason why a reco-
 “ very will not bar these contingent interests is, because the reco-
 “ very will not bar any persons but such as are in being to make
 “ defence, because such persons are presumed to call in the war-
 “ ranty, and to receive a recompence from the warrantor.

Dyer, 4. in
margin.

“ So, where a man devised to *A.* for life, remainder to *B.* and his
 “ heirs, and if *B.* die without heirs, then to *A.* and his heirs ; it is
 “ said to be ruled by *Fleming* Ch. J. that if *B.* die without heirs,
 “ *A.* shall have the land. But this case seems to be no law, and
 “ is contradicted by another case which was stronger, and yet ad-
 “ judged otherwise, where one devised lands to *A.* and his heirs,
 “ and if he died before twenty-one years of age, then he devised
 “ the said lands to *B.*, and died. *A.* entered, and hath issue a
 “ daughter, and died before twenty-one : it was adjudged, that
 “ the daughter should have the land. So, where one limited an
 “ estate to a man and his heirs, and if he died without heirs in
 “ the life of *J. S.*, then to *J. D.* and his heirs ; this was held a
 “ void limitation, though it was brought within the compass of
 “ a life in being : and that the lord should have it by escheat,
 “ *per North* Ch. J. ; for in this last case it was a direct limitation
 “ after a fee, and was not to abridge the fee at all, but only a
 “ provision, that if the fee were out in such a time, another should
 “ have the land, which would elude the statute of *quia emptores*,
 “ &c.

3 Chan. Cas. 22.

“ &c. and defeat the lords paramount of their seignories; and so
 “ for the first case, which is a direct perpetuity. But for the
 “ second case, it seems now to be law, and is within the reason
 “ of other cases, where such executory limitations in wills have
 “ been allowed good: therefore, where one devised lands to his
 “ wife for life, remainder to his son and his heirs; and if he died
 “ before his age of twenty-one years, then to remain to *J. S.* in
 “ fee; the son entered, levied a fine, and died before twenty-one;
 “ it was adjudged, that *J. S.* should have the land; because, say
 “ the books, it was a plain limitation.

Cro. Eliz. 142.
 Mills v.
 Snowball.

“ But, where one devised lands to his son and heir, and if he
 “ died before his age of twenty-one years and without issue of his
 “ body then living, then to remain over; he survived twenty-one
 “ years, and then sold the land, and died; it was adjudged a good
 “ sale, because he had the fee presently; for the estate-tail was
 “ limited to commence upon a contingency subsequent, which did
 “ not happen.

1 Sid. 148.
 1 Keb. 531.
 Collinson v.
 Wright. Cro.
 Jac. 695.

“ One having issue four sons, devises lands to *B.* (one of them)
 “ and his heirs for ever; and if he dies within the age of twenty-
 “ one years, or without issue, that then the land shall be equally
 “ divided between his three other sons: *B.* hath issue, the defend-
 “ ant *C.*, and dies within age; the three sons enter, and let to
 “ the plaintiff. It was adjudged *per totam curiam*, that this re-
 “ mainder, upon the contingency of his dying before the age of
 “ twenty-one years, was utterly void, having before given him a
 “ fee simple; and then it is, as if the limitation were single, that
 “ if he died without issue, which explains the former limitation
 “ to him and his heirs, and shews what heirs the testator meant,
 “ and so makes it an entail. And two justices held, that if the
 “ remainder might begin upon the first limitation, yet, by
 “ the words and intent of the devisor, this cannot begin till the
 “ other part of the limitation be also performed, *viz.* that he die
 “ without issue; and that *or* shall be taken for *and*; for the words
 “ being *if he died without issue, or died within age, then, &c.* This
 “ word *then* shews the beginning of the remainder, *viz.* that
 “ it shall be, *when* he dies without issue, and not before; and so all
 “ one, whether it be taken as a copulative or a disjunctive. But
 “ this case seems not law now; for by the other cases it appears,
 “ that in case of a will such limitation, even upon the first part, is
 “ good by way of executory devise. And there is a case cited in
 “ *Rolle* which seems to be the same case, and is reported only
 “ upon the first part of the disjunctive; and adjudged good, not
 “ as a condition, but as an executory devise. And as to the other
 “ part of the disjunctive, it is not taken notice of, because on the
 “ making an entail there could be no question of the remainder.
 “ And another case of one *Oclie*, 9 *Eliz.* is there cited, where
 “ a man devised lands to his grandchild and his heirs, with a
 “ proviso, that if he died before payment of such a sum, or be-
 “ fore he came to the age of thirty years, that then another should
 “ have the lands; and adjudged, that upon the happening of the
 “ contingency the other should have the land.

Soulle v. Ger-
 rard, Cro. Eliz.
 525. Moore,
 422. S. C. by
 the name of
 Sowill v. Gar-
 ret. [Walsh v.
 Paterson,
 3 Atk. 194.
 S. C. cited.]

2 Roll. R. 220.
 Hoe v. Garrell,
 Palm. 156.
 Swinb. 116.

2 Roll. R. 220.

1 Roll. Abr.
835. Hanbury
v. Cockrell.
Hardr. 150.
S.C. cited *et*
que fuit Con-
tingent Re-
mainder.
Quære?
||Ferne, C. R.
393. (7th ed.)
Butler.||

Vide the case.

1 Roll. R. 137.
2 Bulstr. 273.
Lady Russell's
case.

Mo. pl. 201.

9 H. 6. 74.
20 Roll. R. 217.
Palm. 134.

Mo. pl. 959.
Millinder v.
Robinson,
Swinb. 112,
113. 1 Roll.
Abr. 837. (12).
4 Mod. 258.

“ One having issue two sons, *B.* and *C.*, by divers venters, de-
vises *Blackacre* to *B.* and his heirs, and *Whiteacre* to *C.* and
his heirs, provided that if either of his said sons die before
marriage, or twenty-one, and without issue, then he gives his
said lands, so given to such son who shall so die before mar-
riage, or before twenty-one, and without issue, to such of his
said two sons as shall survive the other, and dies; *B.* marries,
and hath issue a daughter, and dies; and after *C.* attains his
full age, and dies, without issue, before marriage. In this case
it was adjudged, that *B.* and *C.* had no estate-tail, but a fee
determinable upon the contingency of death before marriage
at any time, or after marriage, and before twenty-one, and
without issue; so that if they were married under age, or
attained full age, though not married, or had issue upon mar-
riage at any time, the limitation over was not to take place,
and then to the survivor for life only.

“ One makes a feoffment in fee to the use of himself and his
heirs, and when *J. S.* pays such a sum of money, then to the
use of him and his heirs; or when he marries such a woman,
or when he comes to full age, then to the use of him in fee.
This was adjudged a good remainder in fee upon the happen-
ing of the contingency, though in the mean time the feoffor
had the whole fee simple in him; or, rather, this takes effect
by way of springing use, as appears in the case of *Lloyd* and
Carew hereafter mentioned.

“ One devised lands to his eldest son in tail, remainder to his
youngest son in tail, remainder to his daughter in tail, and if
they all died without issue, that the land should be sold by his
executors. The eldest died without issue; then the youngest
entered, and suffered a common recovery, and died without
issue; and the daughter likewise died without issue. It was
held clearly, that the executors were barred, and could not
make sale according to the will; for this was only a plain
limitation or power to them to sell after the former estates-tail
spent, and no contingency or executory devise; and therefore
was subject to be barred as other remainders expectant upon
estates-tail are.

“ One devised lands to *A.* for life, and if he died without issue,
then *B.* should have the lands. In this case, *A.* hath but an
estate for life by express words, and therefore shall have no
greater estate by implication against the express words; but
those words, *if he die without issue*, are only a condition, upon
the happening or not happening whereof the remainder to *B.* is
to vest or not vest; and, being used only for that purpose, seem
to be confined to his having no issue at the time of his death;
and then in the mean time the fee descends to the heir at law.

“ So, where one devised lands to his brother *B.*, and if he died,
having no son, that the land should remain to *C.* for life; and
if he died without issue, having no son, that it should remain
to the right heirs of the devisor: by this will *B.* hath an estate-
tail, and *C.* only for life, or at most but to him and the heirs
female

“ female of his body. And the words, *having no son*, are a kind
 “ of condition precedent, upon the fulfilling or failing whereof
 “ the remainder limited to his own right heirs is to take effect by
 “ the will; for, if he had a son, he cannot die without issue;
 “ and therefore it must be intended such issue as he may die with-
 “ out, though he hath a son, *viz.* issue female; and if the words,
 “ *having no son*, make the contingency, the other words, *if he die*
 “ *without issue*, may well create an entail female; since there is
 “ no devise expressly for life, as in the other case, but only by
 “ construction of law. And if the words, *die without issue*, be
 “ not so construed, they are useless and idle. But one book
 “ says, that the son hath an estate-tail to the heirs male of his
 “ body. But *quære* of this.

1 Roll. Abr.
 837. pl. 12.
 The same is
 also said in
 Moore's
 Report.

“ Copyhold land is surrendered to the use of *A.* and *B.*, and
 “ of the longer liver of them, and for want of issue of *B.* of his
 “ body lawfully begotten, to remain to *C.*; adjudged, that *B.* had
 “ but an estate for life by the words of the surrender, and then
 “ he shall not have a greater estate by implication in a surrender
 “ or conveyance, though in a will it would, perhaps, be other-
 “ wise; therefore the words, *for want of issue*, are the condition
 “ upon which the remainder to *C.* is to arise or not arise. And
 “ so it is, if a lease be made to *A.* for life, and if he die without
 “ issue, that it shall remain to *B.* &c.

Cro. Car. 366.
 1 Roll. Abr.
 839. (7).
 Vaugh. 261.
 Scagood v.
 Hone. *Vide*
 Allen v. Nash,
 1 Brownl. 127.
 1 Mod. 52.

“ One devises lands to his son *A.* and his heirs, and devises
 “ other lands to his son *B.* and his heirs, and that the survivor
 “ of them shall be heir to the other, if either of them die with-
 “ out issue. This makes an estate-tail, and not a fee determin-
 “ able upon their respective deaths without issue; because such
 “ dying without issue is not confined to any time. And though
 “ it was objected that these words are useless, because if one died
 “ without issue, the other would be his heir of course, and then
 “ the fee given by the first words should stand, yet it was ad-
 “ judged *ut supra*, because *non constat*, but that he might have
 “ other children who might be heirs to them. Note; the book
 “ says the other children by other venters. But *quære* of that,
 “ for they could not be heirs to them.

Cro. Jac. 695.
 Chadock v.
 Cowley.
 ||Ferne, 243.
 (7th edit.)||

“ One having a wife, a son, and three daughters, devises lands
 “ to the son after the death of the wife, and if the three daughters
 “ survive the wife, and the son, and his heirs, then to them for
 “ their lives. This is a good remainder to the daughters, and
 “ the son hath but an estate-tail; for if he should have a fee
 “ then the remainder would be void and idle, for they cannot
 “ survive him and his heirs, unless it be meant heirs of his
 “ body, for they themselves would be his heirs, and consequently
 “ cannot survive themselves; therefore it must be, such heirs as
 “ they may survive, that is, heirs of his body, which in a will
 “ gives him an estate-tail by implication. So, if a man hath issue
 “ two sons, and devises to the youngest and his heirs, and if he
 “ die without heirs, to the eldest in fee; this makes an estate-tail
 “ in the youngest, because otherwise the remainder would be
 “ void, the eldest being heir to him. And the diversity is, when
 “ such

Cro. Jac. 415.
 1 Roll. R. 398.
 436. 3 Bulstr.
 192. Webb v.
 Herring. Cro.
 Car. 58. Swinb.
 122. accord.
per Cro. and
 Yelverton v.
 Richardson,
 who held it a
 fee; but
 Vaugh. 270.
 holds with the
 other opinion.
 2 Roll. R. 423.
 Swinb. 111.
 120.

- ||*Acc. Doe v. Bluck*,
 6 Taunt. 485.||
- 3 Bulstr. 195.
 1 Roll. R. 436.
- Cro. Eliz. 576.
 Baldwin v. Wiseman.
 [Owen, 112.
 S. C. Gouldsb.
 152, pl. 90.
 S. C.]
- 1 Roll. Abr.
 411, pl. 5.
- Cro. Eliz. 361.
 Paulter v. Cornhill.
 ||*Vide supra*,
 706, and note;
 and Fearné,
 277. (7th
 edit.)||
- Cro. Car. 575.
 1 Jo. 452.
 Mayor and Commonalty
 of London v. Alfred. ||*Vide*
 Fearné's C. R.
 251. (7th ed.)||
- “ such remainder is limited to him who will be heir, there, by
 “ a necessary implication, by the word *heirs* in the first part of
 “ the devise must be meant *heirs of his body*, and where such de-
 “ vise is over to a stranger, which carries no such necessary im-
 “ plication in the first part of the devise, it makes the remainder
 “ void and against law.
 “ If an alien be made denizen, and lands be given to him and
 “ his heirs, remainder over to another; or to a bastard and his
 “ heirs, with such remainder over; these are good remainders,
 “ and the denizen or bastard have only an estate-tail to them and
 “ the heirs of their body, because they can have no other heirs
 “ inheritable.
 “ One having issue two sons, *B. and C.*, and two daughters,
 “ devises lands to *C.* in tail, if he should live to his age of twenty-
 “ four years, upon condition that he should pay 100*l.* to his two
 “ daughters; and if *C.* died without heirs, then if *B.* did not pay
 “ the said 100*l.* that it should remain to his daughters and their
 “ heirs. And whether this was a condition for breach whereof
 “ the heirs should enter, or a limitation, that for nonpayment
 “ would carry the lands to the daughters, was the question?
 “ And it was adjudged a condition, and that for breach thereof
 “ *B.* the heir should enter. But this judgment being in *C. B.*,
 “ was after reversed in error in *B. R.*, as appears in *Rolle*,
 “ where the case is put somewhat different; for there, after the
 “ devise to *C.*, &c. it goes on, *and if C. dies before twenty-four*,
 “ (not saying without heirs, which, in this case, would give him
 “ an entail, the limitation over being to *B.* his brother, who
 “ would be his heir for want of issue,) *then I will that B. my*
 “ *son and heir shall have the said lands to him and his heirs, he*
 “ *paying as C. should have done; and if C. and B. do not pay, then*
 “ *to the daughter*, &c.: it was held, that for nonpayment by *C.*,
 “ *B.* should be in by limitation, and not by the condition, for
 “ then it would defeat the portions to the daughters, and the
 “ future devise to them too; and therefore the judgment which
 “ was given was reversed.
 “ Copyholder surrenders to the use of *A.* and his heirs, upon
 “ condition to pay 100*l.* to *B.*, and if he fails, that it shall be to
 “ the use of *B.*: if this was a good limitation to *B.*, so as there
 “ should be a fee upon a fee, was the question? And *Beaumont*
 “ thought that it was good enough, and should be as a use limited
 “ upon a feoffment; so these executory uses arise out of the first
 “ surrender, and executory uses may carry a fee after a fee as
 “ well as executory devises.
 “ *A.* seised of lands in *London*, where by custom they may
 “ devise in mortmain, erects an alms-house, &c., and then de-
 “ vises the said lands to six persons and their heirs and assigns,
 “ upon condition and to the intent to pay out of the issues and
 “ profits thereof certain annual sums to the poor there, &c.: and
 “ if any part of the said purposes remain unperformed, then he
 “ devises the said lands to *B.* and the heirs male of his body,
 “ upon condition and to the intent to perform all the said trusts;
 “ and

“ and if he fails for two months, then he devises the said lands to the mayor and commonalty of *London* upon the same conditions; and if they fail, that then his heirs should enter and perform the same; and dies. The devisees enter, and for breach of the condition, the heir enters, and then one *C.* enters, and gets a bargain and sale from the first devisees of their parts, and levies a fine with proclamations, and long after the mayor and commonalty, having notice of the will, entered, upon whom *C.* re-entered, &c.; and the court held clearly that, admitting these limitations good, they were barred by the fine and proclamations; but they inclined, the mayor, &c. could take nothing by the will, the devise to *B.* being but a possibility; and if the devise over to the mayor, &c. should be good, it would be a possibility upon a possibility, which the law will not allow. But *quære*, if there were twenty possibilities one after another, yet, if they were limited to take effect within the compass of lives then in being, or a reasonable time after, if they might not be allowed, since then there could be no inconvenience urged therefrom, which is the great argument upon which they have been condemned. 3 Mod. 29.

“ One having issue two sons, *A.* and *B.*, by his will devises *Blackacre* to *C.* his wife for life, and after her death to *B.* and his heirs in fee, under the conditions after declared, and devises *Whiteacre* likewise to his said wife for life, and after her death to *A.* and his heirs under the condition after limited; and if *C.* his wife died before the legacies paid, then he willed that they should be paid by *A.* and *B.* out of the lands given them, and if either of my sons die before they enter, or before the legacies paid, then I will that the longer liver shall enjoy both parts to him and his heirs; and if both die before they enter, then my executors, or one of them, to take the profits till they be paid. A year after the testator dies, *C.* enters. *A.* by deed releases to *B.* all his right, &c. with warranty; *B.* devises *Blackacre* to *D.* his wife, and dies in the life of *C.*, and before the legacies paid; then *C.* dies, and *A.* enters into *Blackacre*; and if this entry was lawful, was the question? One point was, if this limitation of a fee after a fee were good; and *Pell* and *Brown's* case was cited to shew that it was, and that it should operate as a future executory devise; as, when one devises, that if his son and heir die before marriage, or twenty-one, that then *J. S.* shall have the land, this is good as an executory devise. But this point was not adjudged; because they all agreed, that be it a condition or not, the release of *A.* has discharged it, as in *Lampett's* case, and that this was without question an interest in *A.*, though not executed; and this release with warranty bars *A.*. And the devise of *Blackacre* to *B.* is upon condition, and this descending upon *A.* is without question barred by his release. Note; these limitations seem to be all good for the reasons mentioned in the preceding case: but *quære*. Hutton, 60. Howell v. Anger.

“ One having three sons, *A.*, *B.*, and *C.*, and being seized of copyhold lands which he had surrendered to the use of his will, “ devises Co. 1048. Lampett's case. Cro. Eliz. 805. Brome v. Car. 2 Leon. 68. 5 Leon. 115. Brian and Cawsen.

||Fearne, 277.
(7th edit.)||

“ devises *Blackacre* to *A.*, *Whiteacre* to *B.*, and *Greenacre* to *C.* ;
 “ and if the said *A.*, *B.*, or *C.* live till they be of lawful age, and
 “ have issue of their bodies lawfully begotten, then I give the said
 “ premises to them and their heirs in manner aforesaid, to give and
 “ sell at their pleasure ; but if it fortune one of them to die with-
 “ out issue of his body lawfully begotten, then I will that the other
 “ brother or brothers have all the said premises in manner aforesaid ;
 “ and if it fortune the third to die without issue in the like manner,
 “ then I will that the said premises be sold by my executors, and
 “ the money given to the poor. The testator dies : *A.*, *B.*, and *C.*
 “ are admitted to their parts : *A.* attains full age, and hath issue :
 “ *A.* surrenders his part of the whole to the use of *B.* and his
 “ heirs, who is admitted accordingly : *B.* attains full age : then
 “ *A.* dies, and *B.* dies without issue. It was adjudged, that no
 “ estate-tail was created by his will, but the fee-simple vested
 “ and settled in them when they came to their lawful age and had
 “ issue ; and that the words, *if they live till*, &c. are words of
 “ condition, and no implication to make an estate-tail, and then
 “ the disposition over upon such condition, &c. viz. *if the third*
 “ *died without issue*, is void, being not confined to any time cer-
 “ tain ; and therefore as to *C.*’s part, he dying within age, and
 “ without issue, this came to *A.* and *B.* ; then *A.* living to full
 “ age and having issue, his surrender of *Blackacre* and the
 “ moiety of *Greenacre* to *B.* was good ; and when *B.* after died
 “ without issue, though of full age, yet, as to his own part,
 “ which was *Whiteacre* and the moiety of *Greenacre*, this be-
 “ longed to the heir at law of the devisor (the executors who
 “ should sell being dead before). But, as to *Blackacre* and the
 “ other moiety of *Greenacre*, these belonged to the heirs of *B.*,
 “ as being *A.*’s part, who lived to twenty-one, and had issue,
 “ and therefore had the fee, and by his surrender to the use of
 “ *B.* made *B.* a good title thereto, which belonged to his own
 “ heirs, and not to the heirs of the devisor.

Cro. Eliz. 497.
Mo. pl. 656.
Bacon v. Hill.

“ One having three sons, *A.*, *B.*, and *C.*, and also three daugh-
 “ ters, and being seised of *Blackacre*, *Whiteacre*, and *Greenacre*,
 “ devises all to his wife for life, and after her death that *Black-*
 “ *acre* be to *A.*, *Whiteacre* to *B.*, and *Greenacre* to *C.* ; and if
 “ one or two of his sons die, that then his or their parts should
 “ be to the survivors ; and devises to his three daughters 10l.
 “ each, to be paid out of his lands by every of his sons, as soon
 “ as they should enter their parts, after the death of the mo-
 “ ther, provided that *if it fortune any of my said sons to marry*
 “ *and have issue before he enters his part, then I will, that his part*
 “ *shall remain to the heir of his body, and not to remain to his*
 “ *other brothers as aforesaid*. The testator dies ; then the wife
 “ dies, and the sons enter, and after *B.* dies having issue the
 “ defendant ; and then *A.* dies, having issue the plaintiff. It
 “ was adjudged for the plaintiffs, for the first words gave them
 “ but an estate for life, and the last clause gives no estate-tail,
 “ unless they had issue and died before entry, which is a con-
 “ dition precedent to the vesting of the tail ; and though 10l. a
 “ piece

Suprà.

“ piece be devised to be paid out of their parts, yet that shall
 “ not enlarge their estates by implication, against the express
 “ words.

“ *A.* seised of lands in fee, having a brother named *B.*, who
 “ had issue *C.* and *D.* his sons, and *E.* his daughter, by will de-
 “ vises to *B.* his brother, if he were living at the time of his de-
 “ cease, and his heirs; and if *C.* were living at the time of his
 “ death, and *B.* then dead, then he devises to *C.* and his heirs;
 “ and after devises to *D.* in the same form; and if no issue male
 “ be left from *B.*, and that *E.* daughter of *B.* survive, and out-
 “ live *B.*, *C.*, and *D.*, and it should happen she only should be
 “ alive at the time of his death, then he gave to her and her
 “ heirs; and if *B.*, *C.*, *D.*, and *E.* die, so as no issue remain to
 “ *B.*, then I will that *F.* (a stranger) shall inherit as aforesaid,
 “ be it that it happen my said brother *B.* to die without issue,
 “ either before my death, or at any time after, and dies. *B.* sur-
 “ vived him, then *C.* died, leaving issue two daughters, the
 “ plaintiffs, and after *B.* died; and if *D.* or the daughters of *C.*
 “ should have the land, was the question? and the better opi-
 “ nion seems for the daughters; for when it was devised to *B.*
 “ and his heirs, if he were living at the time of the death of *A.*
 “ the devisor, and he was so living, though these words give him
 “ a fee upon the happening of the contingency, viz. his surviving
 “ *A.*, and so to the others; yet, by the words after, if *B.*, *C.*, *D.*,
 “ and *E.* die without issue, either before his death or after, gene-
 “ rally, without confining such dying without issue to any time
 “ certain, these words, in a will, plainly shew what heirs of *B.*,
 “ and so of the rest, the testator meant, viz. the issue of their
 “ bodies generally, and so make an estate in tail general to *B.*,
 “ and by consequence it must go to the daughters of *C.*, his son
 “ and heir, before it can go to *D.* or *E.*, the youngest son and
 “ daughter of *B.*, or to *F.* And the words, if no issue male be
 “ left of *B.*, do not give an estate in tail male so as to go to *D.*
 “ the youngest son, upon the death of *C.* without issue male
 “ of *B.*, and to be fulfilled in the life of *A.* the testator before
 “ the devise to any of them can take effect; and, by conse-
 “ quence, cannot operate to qualify any estate before given, be-
 “ cause no estate is before given that can take place till after the
 “ death of *A.* the testator, though they operate to make the vest-
 “ ing of the remainder to *E.* contingent, and to take only upon
 “ failure of issue male of *B.* in the life of *A.* the testator; and
 “ then the first devise to *B.* and his heirs, if he be living at the
 “ time of the death of *A.*, can be restrained and qualified only by
 “ the last clause, which gives it to *K.* in case *B.*, *C.*, *D.*, and *E.*
 “ die, so as no issue be left to *B.*, be it that *B.* die without issue,
 “ either before or after, which words give an estate in tail gene-
 “ ral to *B.* by implication, and, by consequence, the daughters
 “ of his eldest son are to be preferred, and *D.* and *E.* can only
 “ come in after either, by virtue of the limitation made to them
 “ immediately, or as the next branch of the issue of the body of
 “ *B.* And if it had not been for the last clause, which governs
 “ and

2 Keb. 189.
 192. 261.
 Wright v.
 Hiccocks.

“ and goes through all the preceding limitations, then by the first
 “ clause, which gives it to *B.* and his heirs, if he were living at
 “ the death of *A.*, the whole fee would have vested in *B.* upon
 “ the happening of that contingency, and, by consequence, all
 “ the limitations after which were to arise, but upon failure of
 “ the first, would have been prevented and destroyed : and it is,
 “ in effect, no more now than a devise to *B.* and his heirs, if
 “ he survive the testator ; and if he die without issue, either in
 “ the life of the testator, or after his death, then to *F.*, &c.,
 “ which is a plain entail, and the remainders are all good, for all
 “ the contingency that is in the case is precedent to the vesting
 “ of any estate at all ; and had it not been for the last words, *be*
 “ *it that B. die without issue*, the limitation over to *F.* had been
 “ totally void, and whichsoever of the devisees had been living
 “ on *A.*’s death had taken the whole fee. And if the words, *if*
 “ *no male issue be left of B.*, should create an estate in tail male
 “ to *B.*, then the words after, *be it that it happen B. to die with-*
 “ *out issue, either before or after my death*, would not enlarge the
 “ estate in tail male before given, and make it an estate in
 “ tail general to give it by way of remainder to the issue female
 “ of *B.*, as has been adjudged ; and so the issue female would be
 “ quite excluded, which would be against the intent of the will,
 “ which was, that *F.* should not take till the failure of issue
 “ of *B.*

Dyer, 171. Mo.
 15. Frencham’s
 case.

Hutt. 118.
 Napper v.
 Saunders.
 Earl of Derby’s
 case. [So, it
 was said by
Hale C. J. in
 the case of
 Weale v.
 Lower, (Pol-
 lex. 67.) that
 if a feoffment
 be made to the
 use of *A.* for
 99 years, if he
 shall so long
 live, and after
 his death to
 the use of *B.*
 in fee, this shall
 not be contin-
 gent, but it
 shall be pre-
 sumed his life
 will not exceed
 99 years ; but
 that it had
 been other-
 wise, if it had
 been made but
 for 21 years.—
 In a case of
 this nature in

“ *A.*, seised in fee, makes a feoffment in fee to the use of him-
 “ self for life, remainder to the feoffees for 80 years, if *B.* and
 “ *C.* his wife so long live ; and if *C.* survive *B.*, then to the use
 “ of *C.* for life, and after her death to the use of the first son of
 “ *B.* and *C.* in tail ; and for default of such issue, to the use of
 “ *D.* and *E.* and the heirs of their bodies, remainder to the right
 “ heirs of *A.* ; then *A.* dies, and *C.* dies, leaving a son, who dies
 “ without issue, and thereupon *D.* and *E.* enter and make a lease
 “ to the plaintiff, upon whom the defendant, as son and heir of
 “ *A.*, enters : and if the remainder in tail to the first son of *B.*
 “ and *C.*, and the remainder to *D.* and *E.* were executed, or were
 “ contingent upon the estate for life to *C.*, was the question ? and
 “ adjudged, that they were executed and not contingent ; for
 “ though the estate for life to *C.* was contingent, *viz.* if she sur-
 “ vived her husband ; yet this shall not hinder the vesting of the
 “ remainders limited after, but they shall take place in the persons
 “ *in esse* ; and when that contingency happens, they, being limited
 “ by way of use, shall open to let in the contingent remainder to
 “ the wife. And a case is there cited of the Earl of *Derby*, where
 “ a feoffment was made to the use of *A.* in tail, remainder to the
 “ feoffees for eighty years, if *B.* so long live ; and after his de-
 “ cease, to the use of *C.* and the heirs male of his body, remain-
 “ der to the use of *D.* ; and adjudged, that the remainders vested
 “ presently, and that the possibility of *B.*’s outliving the eighty
 “ years, and so there would be no particular estate to support
 “ the remainders, which are not to take effect till his death,
 “ that

“ that yet this possibility would not make the remainders con- Chancery
 “ tingent. *Quere* of these cases. (Beverley v. Beverley,

2 Vern. 131.) where *A.* devised lands to *B.* his eldest son for the term of sixty years, if he should so long live, and from and after his decease to his grandson *D.* (son of the said *B.*) in tail. *B.* and *D.* suffered a recovery; an objection was taken to the recovery, for that the devise to *B.* being only for sixty years if he should so long live, and after his decease to *D.*, the freehold during the life of *B.* was in abeyance. It was argued that the limitation of the estate-tail was good, expectant on the term of sixty years; and Lord Derby's case was cited as in point, that the devise over, from and immediately after the decease of *B.*, ought to be intended of his dying within the term; which was highly presumable, *B.* being then upwards of forty years of age. But the court said, it would be hard to make such construction on the words of the will, as to say, where land is limited to a man for sixty years, if he shall so long live, and from and after his decease to another, that it must be meant from and after his decease *within the term*; for suppose he outlived the term, should the remainder-man take in the lifetime of the first devisee? That would be a construction contrary to the words and intention of the testator. *Vide* Fearn's C. R. 22. (7th edit.)]

“ *A.* seised in fee, having issue two sons, *B.* and *C.*, devises lands 4 Mod. 255.
 “ to *B.* for fifty years, if he should so long live, and after the 1 Salk. 226.
 “ determination thereof, then to the heirs male of the body of Goodright v.
 “ *B.*; and for want of such issue to *C.* in tail, remainder to his Cornish.
 “ own right heirs, and dies: *B.* enters, and suffers a common || *Vide* Chol-
 “ recovery, to the use of himself for life, and to the heirs male mondeley v.
 “ of his body, remainder to the defendant and his heirs, and then Clinton,
 “ dies without issue: *C.* enters, and if *B.* had an estate-tail 2 Mer. R. 229.
 “ was the question? for then the recovery barred that, and the Fearn, 282.
 “ remainder to *C.* It was argued for *C.*, that *B.* had no estate- 553. (7th ed.)
 “ tail; for, first, he having but an estate for years, this cannot so
 “ close with the remainder to the heirs male of his body as to
 “ make an estate-tail in himself. Secondly, he shall not have an
 “ estate for life by implication to make out such an entail, be-
 “ cause he hath an estate but for years by express limitation; and
 “ without an apparent intent of the testator, no other estate shall
 “ be raised by implication. Thirdly, this cannot be good by way 4 Leon. 21.
 “ of remainder to the heirs male of his body, because this would
 “ be a contingent remainder of the freehold and inheritance,
 “ which an estate for years is not sufficient to support. There-
 “ fore, Fourthly, this is an executory devise to the heirs male of
 “ the body of *B.*; as if one covenant to stand seised for twenty
 “ years, remainder to the heirs of the body of the covenantor,
 “ this is an executory remainder, and not to be barred by a
 “ common recovery. For the defendant it was urged, that
 “ such construction ought to be made, that all the will may
 “ take effect; and it is a known rule in law, that it shall never
 “ be construed an executory devise, if it will admit of any other
 “ construction; and therefore this shall be construed an estate-
 “ tail in *B.* and an estate for life, raised by implication to him
 “ by reason of the words, *for want of such issue*, which of them-
 “ selves make an estate-tail in a will. And there is no dif-
 “ ference, whether those words follow an estate for life or years,
 “ if the limitation be to the heirs. And now *B.* being heir at
 “ law, so much of the old inheritable estate shall arise to him by
 “ implication as may make him tenant for life, and then he hath
 “ an estate-tail executed in him; and to construe it an executory
 “ devise

“ devise would be to introduce a perpetuity above the power of
 “ a common recovery to dock; and the court held — This could
 “ not be good as an executory devise, for then the limitation
 “ over would be void; (*quare* of this reason?) therefore it must
 “ be a contingent remainder, and then it is void, because the
 “ estate for years is not sufficient to support it. Note; then it
 “ follows, that afterwards judgment was given for the plaintiff,
 “ *viz.* *C.*, which proves, that they held it no estate-tail in *B.*;
 “ for then, by the recovery, that and the remainder to *C.* would
 “ have been barred, and, by consequence, it would have been
 “ adjudged for the defendant who claimed under the recovery.
 “ Secondly, This proves that it was held an executory devise,
 “ if the reason there given be good, that then the remainder over
 “ would be void; which I should think is a *non sequitur*; for
 “ if it were an executory devise to the heirs male of the body of
 “ *B.*, yet it would only give them an estate-tail, which will bear
 “ a remainder over; but being a contingent remainder, and *B.*
 “ having only an estate for years, the recovery was a forfeiture
 “ of *B.*’s estate for years, whereof *C.*, who was next in remainder
 “ for want of issue male of *B.*, may at any time take advantage
 “ by entry.

Cases in Par-
 liament, 157.
 Lloyd and
 others v.
 Carew.

||Fearne, C. R.
 275. 432. (7th
 edit.)||

“ The last case I shall here mention, to shew how far a limit-
 “ ation after a fee has been carried, was, in short, but thus: *A.*
 “ and *B.*, two sisters, seised of lands in fee for 4000*l.* paid *A.* by
 “ *C.*; and in consideration of a marriage intended, and after-
 “ wards had between *B.* and *C.* by lease and release, convey all
 “ their lands to the use of *B.* and *C.* for their lives, remainder to
 “ their first and other sons in tail male successively, remainder to
 “ the daughters of *B.* and *C.* in tail, remainder to the right heirs
 “ of *C.*, provided that if there be no issue between *B.* and *C.*
 “ living at the death of the survivor of them, and that the heirs
 “ of *B.* should, within twelve months after the death of *B.* and
 “ *C.*, dying without issue as aforesaid, pay to the heirs or assigns
 “ of *C.* 4000*l.*, then the remainder in fee so limited to *C.* and
 “ his heirs should cease, and that then the premises should remain
 “ to the right heirs of *B.* for ever. Afterwards *B.* and *C.*, for
 “ extinguishing any other right or title which *B.* or her heirs then
 “ had, or after might have, by any settlement, proviso, &c. on
 “ payment of 4000*l.* or otherwise to the heirs of *C.* levy a fine
 “ of the said lands to the use of *C.* and his heirs, and direct the
 “ trustees of the first settlement to convey accordingly: then *C.*
 “ devises the said lands to *D.* his brother, subject to his debts,
 “ which were near 5000*l.*, and after *B.* and *C.* die without issue,
 “ and *A.*, the sister and heir of *B.*, brings a bill in Chancery
 “ against *D.*, the brother and heir of *C.*, and against the trus-
 “ tees, to have the conveyance of the lands, on payment of
 “ 4000*l.*, pursuant to the proviso. And this bill being dismissed,
 “ an appeal was brought in parliament, and for the defendant or
 “ respondent it was insisted, that the proviso was void, the fee
 “ being before limited to *C.* and his heirs, and so not capable of
 “ a further limitation, unless to happen in the life of one or more
 “ persons

persons in being at the time of the settlement, which is the furthest the judges have ever gone in allowing contingent limitations upon a fee; and if they should be extended to contingencies to happen within twelve months after the death of one or more person or persons in being, they may as well be extended to contingencies to happen within 1000 years, and so all the inconveniencies of a perpetuity will be let in, and the owner of the fee simple, thus clogged, will be no more capable of providing for the necessities and accidents of his family than a bare tenant for life. Secondly, if this limitation were good, then the estate limited to the heirs of *B.* were virtually in her, and her heirs must claim by descent from her, and not as purchasers; and then that estate is barred by the fine, the design of limiting such power to the heirs not being to exclude the ancestor; but because the power could not, in its nature, be executed till after the death of the ancestor, it being to take effect upon a contingency that was not to happen till after that time, and that, by this means, *C.* would not only have no portion with *B.*, but *D.*, his brother, would lose all the money he paid for the debts of *C.*, which were charged on the said lands. For the appellants it was urged, that the proviso was not void, that it was within the reason of the contingent limitations allowed in the Duke of *Norfolk's* case, where it is said that future interests, springing trusts, or trusts executory, and remainders that are to arise upon contingencies, are quite out of the rule and reasons of perpetuities, if they are not of remote consideration, but such as will speedily wear out: that though there can be no remainders limited after a fee simple, yet there may a contingent fee simple arise out of the first fee: that the *ultimum quod sit* of a fee upon a fee is not yet plainly determined; that there could not, in any reason, be any difference between a contingency to happen during a life or lives in being, and within one year after, the reason of allowing them to be good, if confined to lives in being, or upon their extinction, was because no inconvenience could follow; and the same rule will hold to a year after: and that the true rule to set bounds to them is when they prove inconvenient, and not otherwise: that this settlement was made by good advice. Secondly, that the fine could not bar the benefit of this proviso, because the same never was nor could be in *B.* who levied it; and the decree of dismissal was reversed. Note; Mr. *Pooley*, who argued this case, added also this reason, that if the proviso had been, that if *B.* die without issue living at the death of the survivor of them, then if the heirs of *B.* do, upon the death of such survivor without issue, pay 1000*l.* to the heirs of *C.*, then, &c.; this, you agree, had been good, but being extended to a year after, it is otherwise, and may as well be 4000 years after: to this he said, if the proviso had been so worded, it would have been impossible to have been performed; for then the heirs of *D.*, who could not be known till her death, would have been obliged to have carried always

3 Chan. Ca.
31, 32. 36.

||The rule is now settled; that the contingency for the springing up of future and executory estates must not be more remote than the compass of a life or lives in being, and twenty-one years after, with a sufficient number of months for the birth of a child *en ventre sa mère*.

Fearne, 429.
(7th edit.)

12 Ves. 232. The rule formerly was more strict, and seems to have been first settled with this latitude in 1736, in the case of *Stephens v. Ste-*

phens, 2 Bar-
nard. 375.
2 W. Kel. 168.
Forest. 228.
Vide Mr. Har-
grave's elabo-
rate history of
Executory
Devises in
Thellusson v.
Woodford,
4 Ves. 254. ||

1 Lev. 135.
1 Sid. 153.
Raym. 162.
1 Keb. 567.
&c. Snow v.
Cutler.

“ 4000*l.* about them ready to pay, and to have the heirs of *C.*,
“ who likewise could not be known till his death, always ready
“ to receive it upon the instant of the death of the survivor.
“ And it might happen, that neither the one who was ready to
“ pay it, nor the other who was ready to receive it, might be
“ heirs of *B.* and *C.*; and surely when the heirs of neither could
“ be known till their deaths, twelve months was but a reason-
“ able time to procure and pay so great a sum as 4000*l.* Which
“ argument shews, that the limitation of a fee after a fee upon a
“ contingency, to happen within one or more life or lives in being,
“ or upon their deaths, being allowed to be good, may be ex-
“ tended further, when, as the limitation may happen to be, it
“ would be inconvenient, and impossible to be performed within
“ such a time; and that inconvenience is to be the only bound to
“ these limitations. But here it is so far from being inconve-
“ nient, that it would be inconvenient and impossible to be
“ performed otherwise.

“ Husband seised of lands to the use of himself and his wife,
“ and the heirs of the husband, by will devises thus: *The lands*
“ *which are A.'s for life, I devise them to the heirs of the body of my*
“ *wife, if they shall be of the age of fourteen years at her death.*
“ The devisor dies without issue: the wife hath issue by a second
“ husband: then she and her husband suffer a common recovery;
“ and then the wife dies, the issue being about fourteen years of
“ age. And two questions are made: first, if this devise to the
“ heirs of the body of the wife was good? And in this case the
“ court was divided; for by two justices this is void, being a
“ present devise to the heirs of the body of the wife, who being
“ alive could not have heirs: and so it is, as if a devise were to
“ the heirs of *J. S.*, who is living, which is clearly void. And
“ though *J. S.* had an estate for life, as the wife had here, yet
“ the devise would not be good, because it is not by way of a
“ remainder, but is a distinct present devise. And it was said,
“ that this was a contingency upon a contingency; *viz.*, if the
“ wife should have heirs of her body, and also if they should be
“ fourteen years of age at her death; and therefore not to be
“ allowed. But it was held by two other justices, (and, as it
“ seems, it is the better opinion,) that the devise was good as an
“ executory devise. They agreed to the case of the devise to
“ the heirs of *J. S.* though he had an estate for life, because
“ intended a present devise without other words; but when the
“ intent appears, that it shall take effect *in futuro*, it is otherwise.
“ And here the devisor recites, that the lands were his wife's
“ for her life, and therefore he did not intend the devise to take
“ effect till after her death; as, when lands are devised to *A.*
“ after the death of *B.*, or to the heir of *J. S.* which shall be
“ born, these are good executory devises, and the land shall
“ descend in the mean time to the heirs at law of the devisor.
“ So, a devise to a person that shall marry his daughter, &c.
“ And in case of executory devises, it is not necessary there
“ should be a devisee *in esse* at the death of the testator; and the
“ con-

“ contingency is frequent and ordinary, and confined to one life,
 “ and so not within the danger of a perpetuity, as it would be
 “ if it were after such a one’s death without issue. And all the
 “ court held clearly, that if the devise were good at all, it must
 “ be as an executory devise, and not as a remainder; for though
 “ the wife hath an estate for life, yet this is a new original devise,
 “ to take effect after her death, and not as a remainder joined to
 “ her estate. Also, as to the second point, all held that if this
 “ was an executory devise, it was not barred by the common
 “ recovery, according to *Pell* and *Brown’s* case; for it hath no
 “ existence at all till the contingency happens, and therefore
 “ there can be no recompence in value, for a valuation cannot
 “ be put upon that which is not.

||It is a rule
 that the estate
 supporting,
 and the con-
 tingent re-
 mainder sup-
 ported, must
 both be created
 by the same
 instrument.
Fearne, 301.
 And the great
 distinction
 between a con-
 tingent remainder and an executory devise is, that the latter cannot be barred or destroyed by
 any alteration in the estate, after which it is limited. *Id.* 416. (7th edit.)||

“ contingent remainder and an executory devise is, that the latter cannot be barred or destroyed by
 “ any alteration in the estate, after which it is limited. *Id.* 416. (7th edit.)||

“ Husband seised of lands in fee, in right of his wife, he and
 “ his wife by indenture covenant to levy a fine to the use of the
 “ heirs of the husband upon the body of the wife to be gotten,
 “ remainder to the right heirs of the husband: the fine is levied
 “ accordingly, and after they have issue a son, who died without
 “ issue in the life of the baron and feme; and then the feme
 “ dies; and after the husband dies without issue: and if the heirs
 “ of the husband or the heirs of the wife should have the land,
 “ was the question? And for the heirs of the husband it was
 “ argued, that this settlement being by way of use, was like a will
 “ to be construed according to the intent of the parties: and there
 “ the husband would have an estate for life by implication, which
 “ being united to the estate limited to the heirs of his body, it
 “ would make an estate-tail in him: and for this was cited *Pibus*
 “ v. *Mitford*, where upon a covenant to stand seised to the use of
 “ the heirs male of his body, on the body of his second wife, it was
 “ adjudged, that this limitation carried an use to himself, in whom
 “ all his heirs were included; and therefore he, having an estate
 “ for life by implication, till the future use came *in esse*, made the
 “ whole an estate-tail in himself: so here. And though the
 “ estate here was the wife’s, yet such use to the husband might
 “ well arise by implication, because both joined in the deed and
 “ fine, though it could not result back to the husband, because
 “ he had none before. Besides, it was urged that he had an
 “ estate for life as tenant by the curtesy. Secondly, if no estate
 “ arises to the husband by implication, yet it should be good to
 “ the heirs of his body by way of springing use, and the estate,
 “ in the mean time, should remain in the feme and her husband,
 “ till the death of the husband: and that it was no more than
 “ if the deed had declared the use after twenty years, or other
 “ future time, to the heirs of the body of the husband. But on
 “ the other hand it was argued, and adjudged, that here being
 “ no particular estate to support this last remainder, it was void,
 “ and then the fine was to the use of the wife and her heirs, she
 “ being owner of the estate: that here was no particular estate
 “ was plain, because the heirs of the body of the husband were

4 Mod. 153.
 Cases in Par-
 liament, 104.
Davis v.
Speed.
 [Ferne’s C.R.
 48. 284. (7th
 edit.)]

1 Mod. 98.
 121. 159. 226.
 237. 2 Mod.
 207. 1 Leon.
 75. Raym. 228.
 318. 5 Keb.
 129. 159.
 1 Roll. R. 240.

“ limited to take presently, and that during his life they cannot
 “ do. Secondly, If it was intended the heirs of the body of the
 “ husband should take *in futuro*, that there must be an estate
 “ somewhere to support the limitation till it could take effect ;
 “ that here was no such estate to the husband expressed ; and
 “ implied it could not be, for if any estate should arise by impli-
 “ cation, it must be to the wife who was owner of the whole ; and
 “ then, she dying before her husband, there again an estate was
 “ wanted to support the remainders during his life. That this
 “ was a case of a deed executed in the life of the parties, and
 “ not of a will where large allowances are made in favour of
 “ supposed intentions by reason of persons being surprised by
 “ sickness and wanting counsel ; but the rules of law always go-
 “ vern in construction of deeds. That the notion of a springing
 “ contingent use is hardly intelligible in itself, and by no means
 “ applicable in this case ; because no words here have a rela-
 “ tion to a future time or contingency ; and to allow such limit-
 “ ations in deeds, would make them as uncertain as wills, create
 “ intentions not expressed, raise uses by implications never in-
 “ tended, and in short destroy all the difference between good
 “ and bad conveyances ; produce a confusion in property, and
 “ render all purchases unsafe and precarious. And therefore
 “ the judgment for the heirs of the wife was affirmed.

Vau. 259. 261.
 270, 271.
 Gardner v.
 Sheldon.

“ One having issue a son who was heir apparent, and two
 “ daughters, devises in these words, *If it happen my son B. and my*
 “ *two daughters to die without issue of their bodies lawfully begot-*
 “ *ten*, then all my lands shall be and remain to my nephew D.
 “ and his heirs for ever. The devisor dies, and it was held, that
 “ here was no express estate given ; nor was there any by impli-
 “ cation ; because then it must be either a joint estate for life,
 “ with several inheritances in tail, or several estates-tail in suc-
 “ cession one after another. The last it cannot be, because un-
 “ certain which shall take first, which next. And the first it shall
 “ not be, because the heir at law shall not be disinherited with-
 “ out a necessary implication, which in this case there is not :
 “ for it is only a designation and appointment of the time when
 “ the land shall come to the nephew ; as if he had devised thus :
 “ *I leave my land to descend, or I give my land to my son and*
 “ *his heirs, till he and my two daughters die without issue, or so*
 “ *long as any heirs of the body of him and my two daughters shall*
 “ *be living ; and then, or for want of such heirs, I devise the same*
 “ *to my nephew* : this is good as a future and executory devise,
 “ and in the mean time the land shall descend to the heir at law,
 “ he having made no disposition thereof. So, a devise that
 “ J. S. shall have his lands after 20 years, &c. is good for the
 “ same reasons.

2 Saund. 111.
 1 Sid. 445.
 2 Keb. 600.
 Allen v.
 Rivington.

“ One by will devises thus : *I give to my daughter A. my*
 “ *lands in B., if my son C. happen to have no issue male, after the*
 “ *death of my wife ; and if my son C. have issue male, then the*
 “ *said A. to have 5l. only in lieu of the said lands ; and dies : C.*
 “ *hath issue male : the wife dies ; and after that, the issue male*
 “ *dies*

“ dies without issue; and then *C.* dies; and one doubt was, if *A.*
 “ should have an estate for life by the devise, because at the
 “ time of the death of the wife *C.* had issue male though that
 “ issue after failed, *viz.* If this was a remainder to *A.*, or a con-
 “ tingent or conditional devise? And it was said, that if I de-
 “ vise lands to *J. S.* if my son die without issue, that this is a
 “ conditional devise, and *J. S.* hath nothing till the contingency
 “ happens. (But *quere* of that case, for that devise tends to a per-
 “ petuity, and therefore is not to be allowed?) And the court
 “ were of opinion, that the devise was conditional, and that *C.*
 “ having issue male at the time of the death of the wife, *A.* is
 “ only to have the 5*l.* and not the land. Note also; *Keeling* was of
 “ opinion that this was an estate-tail in *C.*; but *Twisden contra*,
 “ that nothing was given to *C.* more than a mere stranger.
 “ And this seems most consonant to the cases before mentioned.
 “ And then it was no more than an executory devise to *A.*,
 “ if the son died without issue, which gives no more estate to
 “ the son than if he were a stranger; nor alters any estate
 “ which the law gives him if he were heir at law. But by reason
 “ of the words, *If he have no issue male after the death of the*
 “ *wife; and if he have, then A. to have 5*l.* only;* these words
 “ make the executory devise to *A.* conditional; and in this case
 “ the son having issue after the death of the wife, whereby the
 “ 5*l.* became due, *A.* cannot after have the land, though that
 “ issue fails; because a recompence was provided for each side of
 “ the contingency; and when one has taken place, the other is
 “ shut out, as if it had not been mentioned.

Supra, 761.

“ *A.* hath issue *B.* her son by a first husband, and *C.* and *D.*
 “ her son and daughter by *E.* a second husband. *F.* the brother
 “ of *A.* being seised in fee of lands, devises them to *A.* his sister
 “ and heir for so long time, and until her son *C.* should attain
 “ his full age of twenty-one years, and after he shall have
 “ attained his said age, then to him and his heirs for ever; and if
 “ he die before his age of twenty-one years, then to the heirs
 “ of the body of *E.* and to their heirs for ever, as they should
 “ attain their respective ages of twenty-one years. *F.* dies, and
 “ *C.* dies, and the question was, if *B.* as heir to *A.*, or *D.* either
 “ as heir to *C.* her brother, or as heir of the body of *E.*, should
 “ have the land? And for *B.* it was argued, that nothing vested
 “ in *C.* till he attained twenty-one, but the freehold and inhe-
 “ ritance in the mean time descended to the heir at law of *F.*,
 “ for *A.* had but an estate for years, *viz.* till *C.* attained twenty-
 “ one; then *A.* having but an estate for years, and *C.* nothing till
 “ twenty-one, the fee must in the mean time descend to the heir
 “ at law of *F.*, and there it shall continue, because the contingency
 “ never happened, *C.* dying before twenty-one. Also, the devise
 “ to *C.* being but contingent, *viz.* if he attained twenty-one,
 “ the estate for years of *A.* was not sufficient to support it; and
 “ for that reason it was void. And *D.* cannot take as heir of *C.*,
 “ and then the land descends to the heir at law of *F.* Secondly,
 “ *D.* cannot take by the devise to the heirs of the body of *E.*;

2 Mod. 289.
 Taylor v.
 Byddall.
 || Fearn, 432.
 520. (7th ed.)
 Stanley v.
 Stanley,
 16 Ves. 491.

3 Co. 19. Boraston's case.

“ for admitting it to be an executory devise, yet *E.* her father being alive when it was to vest, there is no person within the description to take it, for *non est hæres viventis* ; and there also it descends to the heir of *F.*, which is *B.* the plaintiff. But for *D.* the defendant it was argued, that the fee vested presently in *C.*, there being only an estate for years in *A.* ; and they relied upon *Boraston's* case, where was a like devise ; and there, from *C.* it descended to *D.* as his sister and heir. Secondly, If not as heir to him, yet as heir of the body of *E.* by way of executory devise, which needs no particular estate to support it ; for though *E.* her father was living at the death of *C.*, yet he was dead before *D.* attained twenty-one, when only she was to take ; and the estate in the mean time descends to the heir at law of the devisor ; and without making it an executory devise it would be void, being limited after the fee to *C.*, and therefore it cannot be good as a remainder, but the estate of *C.* which was vested, being now divested by virtue of the original condition, he dying before twenty-one, it returns to the heir at law of the devisor till the full age of the heir of *E.*, and until *E.'s* death, though it be after their full age, and then it is carried over to the heir of *C.* by virtue of the executory devise.

Cro. Eliz. 668.
Smith v.
Warren.

“ *A.* tenant for life levies a fine *come ceo*, &c. to the reversioner, to the use of the conusee and his heirs, upon condition to pay to *A.* 4*l.* annually, and that for default of payment it should be to the use of *A.* for life : the conusee makes a feoffment over, and then there is a default in payment of the 4*l.* And if by this feoffment the future use was destroyed, was the question ? And *per cur.*—It is not : for this is a charge or burden upon the lands, which goes with the lands into whose hands soever they come. And one judge thought that it was a condition, being to arise to the conusee himself who levied the fine ; but if it had been to have arisen to a stranger upon condition, the non-performance thereof would have created a springing use to him, for it is merely a tie and charge upon the land which is not destroyed by the feoffment.”

(E) Of Remainders that arise on Conditions precedent or subsequent.

[1 Br. 155. a.
pl. 85. 253. a.
pl. 18. Perk.
sect. 851. Litt.
sect. 721. Co.
Litt. 378. Co.
86. 88. Plow.
25. 29. 53. a.
35. 10 Co. 86.
b. Dr. and Stu-
dent. Lib. 2.
c. 20. 23.
fol. 192. 206.
Roll. Abr. 474.]

“ IT is a maxim frequently urged in our books, that a remainder cannot be limited to begin upon a condition annexed to the first estate, but that for breach of the condition the feoffor or lessor must enter, and by that entry, the first estate being determined, the remainder is destroyed, because it cannot take effect at the instant of the determination of the particular estate. For the remainder passing out of the feoffor or lessor at the same time that the particular estate is created, and being to take effect in virtue of the first livery, when the feoffor or lessor re-enters for the condition broken, that destroys the force of the first livery, being an act of equal notoriety therewith, and then

‘ then the remainder which was to take effect thereby can never
‘ arise, because there wants the solemnity required by law for
‘ that purpose.’

“ But, because the reasoning holds only where livery of seisin
“ is requisite, and yet the law seems to be the same in other
“ cases where no livery is requisite, as upon a lease for years,
“ grant of an advowson, common, rent *in esse*, &c. therefore it
“ will be necessary to consider the following distinctions, for the
“ better explanation and understanding hereof:

“ 1st. The first distinction to be observed, is between a con-
“ dition and a limitation: and in case of the condition, when it
“ precedes the vesting of the remainder as the cause thereof, and
“ is annexed to the first estate; and where it is annexed to the
“ first estate absolutely without any regard to the remainder.

“ 2d. Between a deed and a will, wherein both the same
“ words of condition are made use of for the vesting of the
“ remainder.

“ 3d. Between a limitation over in such case of a will, and
“ where no limitation is made over.

“ 4th. Between remainders that are to arise upon conditions
“ agreeable to the rules of law, and such as are to arise upon
“ conditions repugnant and against the rules of the law.

“ 5th. Between such words as actually make a condition, and
“ such as are only descriptive of the time and manner when and
“ how the remainders are to arise and take place.

‘ 1. *Of the Difference between a Condition and a Limitation,*
‘ *and in case of the Condition when it precedes the vesting of the*
‘ *Remainder as the Cause thereof, and is annexed to the first*
‘ *Estate; and when it is annexed absolutely without any*
‘ *Regard to the Remainder.*’

“ As to the first distinction between a condition and a limit-
“ ation,” ‘ a condition is properly such, as goes in abridgment
‘ and restraint of the estate first given, upon something to be
‘ done or not done by the person who takes the estate, or by
‘ him who makes the estate, or to happen during the continu-
‘ ance of the estate. (a) A limitation is such as limits and cir-
‘ cumscribes the estate to continue so long only, and no longer,
‘ than till such a thing happens, or till such a thing done or not
‘ done by the person who takes the estate, or any other; so that
‘ upon the happening, performance, or non-performance thereof,
‘ the estate *ipso facto* determines and expires as certainly as if it
‘ had been made for life or years; and upon such an estate a re-
‘ mainder may be limited, as well as after an estate for life or
‘ years,’ “ as has appeared already in part, and will so more
“ fully hereafter.

“ But in case of the condition when a remainder limited there-
“ after shall be good, and when not, depends upon the differ-
“ ence first mentioned: in the one instance, the remainder can
“ never take effect by reason of the condition; but in the other,
“ the remainder takes effect presently, and thereby destroys the
“ condition.”

Co. Litt. 201.
214. 10 Co. 42.
Plow. 27.

(a) Moor, 292.
Co. Litt. 214.
Poph. 99.
Plow. 415.
Cro. Eliz. 414.
10 Co. 41.

Perk. sect. 830.
Co. Litt. 214.

‘ Therefore, if a man makes a lease for life or years of lands, or grants an advowson, common, rent *in esse*, &c. to one for life or years, upon condition, that if the lessee or grantee do not pay such a sum of money that then his estate shall cease, and that it shall remain to *B.* for life, years, or in fee: this remainder is void, for these reasons. First, Because it does not vest as a remainder presently, but is to arise upon breach of the condition only. Secondly, Upon breach of the condition it cannot vest, because none can take advantage of the breach thereof, but only the party from whom the condition moves, and his heirs. Thirdly, When they have taken advantage thereof by entry or claim, the particular estate is thereby determined, and the lessor or grantor in of his first estate, as it were *ab initio*, by title paramount the estate given or granted; and then if the remainder cannot vest at the instant of the determination of the particular estate, it can never after take effect, and by consequence is defeated and gone.’

Cro. Eliz. 360.
Cogan v.
Cogan.

“ This case, though I do not find it *in terminis* in the books, seems to be well warranted by the case following,” ‘ where *A.* seised of lands in fee, let them to *B.* for life, remainder to *C.* for life, provided that if *A.* hath issue a son during his life, who should live to the age of five years, that then the estate limited to *C.* should cease, and that it should remain to such son in tail: *A.* hath issue a son, who lived to the said age, and if the remainder limited to *C.* should cease, and the remainder to the son be good, was the question. And *per totam curiam* it was *adjudged*, that the remainder to the son was void: wherein it appears *first*, That this was properly a condition, because upon the happening thereof it was to shorten and abridge the estate before given. *Secondly*, This case proves the law to be the same in case of things which lie in grant, as of those which lie in livery; for here it was not the particular estate that was to cease upon the condition, but the remainder, and that lies in grant. *Thirdly*, Though the condition here was not annexed to the first estate, yet it was annexed to the estate immediately preceding the remainder to the son; and so to this purpose is the same as if it had been for life, upon such condition to cease and remain over. *Fourthly*, It appears that the remainder was not to begin but upon the condition performed, and so the condition preceded the vesting of the remainder. *Fifthly*, This case proves, that none shall take advantage of a condition but the lessor and his heirs, and therefore the remainder to the son who was a stranger could not arise thereby. *Sixthly*, That this remainder being limited to begin upon a condition precedent, whereof none can take advantage but the lessor and his heirs, is for ever defeated and destroyed, because it cannot take effect according to the terms limited for vesting thereof.

Perk. sect. 831.
Co. Litt. 214.
338. Co. 40.
Roll. Abr. 472.
Cro. Eliz. 727.
92. Dyer, 127.

‘ But now, if one makes a lease for life or years, upon condition to pay so much at a day certain, or reserving rent, and for default of payment a re-entry, remainder after the death of the lessee, or after the years, to *B.* for life or in fee; or, if one makes a lease to *A.* for life, remainder to *B.* in fee, rendering

‘ rent,

||These observations on Cogan v. Cogan are inserted in Fearn's Essay, 264. (7th edit.)||

‘ rent, with clause of re-entry for default of payment by the
 ‘ tenant for life, and to retain during his life; in these cases the
 ‘ remainder vests presently in *B.*, and has no dependence on the
 ‘ condition for its taking effect. But, if the condition should be
 ‘ broken, or the rent arrear, *B.* cannot enter, being a stranger;
 ‘ and if the lessor should enter, he would be in of his first estate
 ‘ by title paramount the remainder, and then the particular estate
 ‘ being determined before the remainder could take effect, the
 ‘ remainder would thereby be destroyed. But this would be un-
 ‘ reasonable that he should destroy the remainder, which was well
 ‘ vested by his own grant; and since every man’s grant shall be
 ‘ construed strongest against himself, and this must be to sup-
 ‘ port and make good the estate he has parted with; therefore
 ‘ by such remainder over the condition is destroyed, and the
 ‘ power of re-entry gone, and then the first estate is absolute,
 ‘ with the remainder over: and the lessor has no remedy for the
 ‘ money or the rent, but in a court of equity.’

Doct. & Stud.
 l. 2. c. 21.
 Fearne’s C. R.
 270. (7th ed.)

‘ 2. *Distinction between a Deed and a Will, when in both the*
 ‘ *same Words of Condition are made use of for vesting the Re-*
 ‘ *mainder.*

‘ Here we must observe, that though in case of a deed, either
 ‘ the condition destroys the remainder, or the remainder the
 ‘ condition, as appears before, yet in a will it is otherwise.

‘ Thus, one seised of lands in fee, devisable by custom, by
 ‘ will devised them to *J. S.* a clerk, upon condition that he
 ‘ should be a chaplain, and sing for the soul of the devisor all
 ‘ his life; and that after his death the land should remain to *J.*
 ‘ *D.* mayor of *S.* and his successors, to find a chaplain perpetu-
 ‘ ally to sing for the soul of the devisor, and dies. *J. S.* being
 ‘ of the age of twenty-four years enters, and holds the land for
 ‘ six years, and is not a chaplain; the heir of the devisor ousts
 ‘ him; then *J. S.* brings an assise, and upon the pleading thereto
 ‘ by the heir, and all this matter found, the assise went for the
 ‘ plaintiff; whence my Lord *Coke* infers, that *this was no limit-*
 ‘ *ation*, because then the estate of *J. S.* would have been *ipso facto*
 ‘ determined, and the estate cast upon *J. D.*, and then *J. S.* could
 ‘ not have recovered; *secondly*, That this being a condition, *J. D.*
 ‘ in remainder could not enter for breach thereof; and, *thirdly*,
 ‘ Since it was adjudged likewise against the heir that he could
 ‘ not enter for the condition broken, therefore the condition by
 ‘ the limitation of the remainder over must be destroyed. But
 ‘ *Perkins* in citing this case holds, that for breach of the con-
 ‘ dition the heir might enter, and yet that the remainder should
 ‘ not be defeated thereby, but that after the death of *J. S.* it
 ‘ should well take effect; and with him agrees *Dyer* in a like
 ‘ case, and takes the diversity between a remainder by deed with
 ‘ livery, and a remainder by will; for in case of the deed, the
 ‘ entry for the condition broken *defeats the livery*, and, by con-
 ‘ sequence, *the remainder* which depends thereon; but in case
 ‘ of a will the remainder is good, though the particular estate
 ‘ never was good, or be defeated before the remainder can take
 ‘ effect,

29 Ass. pl. 17.
 Perk. sect. 563.
 Plow. 412.
 Dyer, 127.
 10 Co. 40.
 Roll. Abr. 407.
 474.

‘ effect, which must be as *an executory devise*, not as a *remainder* ;
 ‘ for then it ought to vest when the particular estate ends ; and
 ‘ without question, as *an executory devise*, such limitation over is
 ‘ good ; and therefore, where *Plowden* in citing this case holds it
 ‘ to be a *limitation*, and not a *condition*, because then by the
 ‘ entry of the heir the remainder over would be defeated, this
 ‘ reason holds not, when by construing it *an executory devise* it
 ‘ may be made good, and yet the condition be preserved.

16 Co. 41.
 Dyer, 127.
 Roll. Abr. 472.

‘ So where *A.*, seised of lands in fee, having issue three sons,
 ‘ *B.*, *C.*, and *D.*, devises the lands to his wife for life, *sub condi-*
 ‘ *tione quod ipsa educabit pueros testatoris in eruditione et bonis*
 ‘ *moribus*, the remainder to *D.* his son in tail, and dies ; the wife
 ‘ enters and breaks the condition : and if *B.*, as heir, should
 ‘ enter for the condition broken, or if *D.* should enter as by limit-
 ‘ ation, or if the condition was destroyed by the limitation over,
 ‘ were the questions ; *et per totam curiam*, as my Lord *Coke* cites
 ‘ it, it was held to be no limitation, because there are express
 ‘ words of condition ; and if it be a condition, then the heir, by
 ‘ his entry for breach thereof, would defeat the remainder like-
 ‘ wise, which is not reasonable ; therefore it was held, that by
 ‘ the limitation over the condition was destroyed. But in *Dyer*,
 ‘ which seems to be the same case, it was held *the condition was*
 ‘ *not destroyed*, but that, for breach thereof, the heir should
 ‘ enter, and hold during the life of the wife, and yet that after
 ‘ her death *D.* should have the land, which must be by way of
 ‘ *executory devise*.

Vide title
Conditions,
Letter (H).
 2 Mod. 26.

‘ But, however the law might have stood when devises of lands
 ‘ were not very frequent, it is now settled that, in case of a will,
 ‘ the *devisee in remainder shall enter for breach of the condition*
 ‘ *annexed to the first estate*, be it devised to a stranger, or to the
 ‘ heir himself. This construction was introduced to support the
 ‘ intent of the testator, which otherwise, in many cases, would be
 ‘ totally frustrated, and his will set aside : and, to make way for
 ‘ such construction, they held that, by nonpayment of the sum,
 ‘ or non-performance of the thing directed to be done, *the estate*
 ‘ *of the first devisee determined immediately without entry or claim,*
 ‘ and then *the remainder succeeded as if there had been no con-*
 ‘ *dition* at all ; and so they changed the condition into a limit-
 ‘ ation, which determines the estate to the first, and casts the
 ‘ possession on the second by way of *immediate remainder*.
 ‘ Another reason of this construction might be, that seeing, by
 ‘ the limitation over, the land was given from the heir at law,
 ‘ and a new heir made, it was now more reasonable that this
 ‘ *hæres factus* should take advantage of the condition, who was
 ‘ to have the benefit of the land, than the *hæres natus*, who, by
 ‘ such limitation over, was excluded and shut out from inheriting
 ‘ the land ; and since none can enter for breach of the condition
 ‘ but the heir, and now, by giving him the land, the devisee is
 ‘ become heir thereof, therefore they construed such *hæres factus*
 ‘ to be the *heir who should enter for breach of the condition*. And
 ‘ this was still more reasonable, when the first devisee was him-
 ‘ self heir at law, and was to perform the condition ; for, other-
 ‘ wise,

‘ wise, whether he performed it or not, the remainder could never take place, since none could take advantage of the breach thereof but he himself who was to perform it; and, by consequence, the remainder, which was to arise upon the breach of such condition, would be prevented and destroyed, and the intent of the testator eluded. (a)

tate, that condition shall operate as a limitation, circumscribing the continuance and measure of the first estate; and that upon the breach or performance of it (as the case may be) the first estate shall *ipso facto* determine and expire, without entry or claim; and the limitation over shall thereupon actually commence in possession, and the person claiming under it, whether heir or stranger, shall have immediate right to the estate. Thus, indeed, is the testator's intention effectuated, by substantiating the remainder, though limited to a stranger; and enforcing the performance of the condition by the determination of the particular estate upon the breach of it, notwithstanding that particular estate be limited to the heir himself; and limitations of this sort are properly called conditional limitations. *Fearne*, 272. (7th edit.) *Plowd.* 408. *Scholastica's case*, *et infra*, 811.

‘ Therefore, where a copyholder in fee of lands, descendible in *Borough English*, having three sons and a daughter, surrendered his land to the use of his will; and after by will devised his land to his eldest son in fee (for so it was construed), paying to each of his brothers and his sister 40*l.* within two years after his death, and died; the eldest son was admitted, and did not pay the money within the two years; the youngest son entered; it was adjudged, that his entry was lawful; for though in a will the word *paying* amounts to a condition, yet, if it should be construed a condition, in this case it would descend on the eldest son himself, who was to perform it, and also take advantage of the breach thereof; and then whether he performed it or not would be all one, since either way he was to have the land; and so the youngest children would be not only without remedy for their portions, but there would likewise be no penalty upon the eldest to enforce the payment thereof, which would frustrate the intent of the testator; therefore they construed the devise to the eldest son paying, &c., to be a limitation to him till he made default of payment only, and no longer; and then by such default, his estate ceasing, the nature of the land revives and lets in the youngest son, who was heir by the custom, since there was no limitation over.

‘ So, where one, seised of lands in fee, having issue two sons and a daughter, devised to his youngest son and daughter 20*l.* a piece, to be paid by his eldest son; and devised his lands to his eldest son and his heirs, upon condition, that if he did not pay the said sums, that then the land should remain to his youngest son and daughter, and their heirs, and died; the eldest son entered, and did not pay the money; it was adjudged that the youngest son and daughter should have the land; for *first*, this devise to the eldest son and heir, being no more than what the law gave him, without such devise, was void. *Secondly*, if this should be a condition, it would be defeated by the descent on the eldest son, who was to perform it. Therefore, *thirdly*, it was held to be a devise to the eldest son only, or no longer than till he failed to pay the said sums; and then to the youngest son and daughter, which gives them the land by way

(a) In other words, it is now agreed, that wherever in a devise a condition is annexed to a preceding es-

Welcock v. Hammond, 5 Co. 20. Cro. Eliz. 204. 2 Leon, 114. cited Cro. Jac. 592. Roll. R. 219. and in several modern books.

Hainsworth v. Pretty, Cro. Eliz. 319. 835. Moor, pl. 891. Roll. Abr. 411. Vaugh. 271. 2 Mod. 26.

‘ of limitation, upon his failing to pay the said sums. But
 ‘ *Vaughan*, in citing this case, holds, the devise to the eldest son
 ‘ being void, that then it was no more than if he had devised,
 ‘ that if his eldest son did not pay such sums, that then the land
 ‘ should be to the legatees; which makes a *good future executory*
 ‘ *devise*, and the land in the mean time descends to the heir at
 ‘ law, as if no devise had been made thereof. This construction
 ‘ is well warranted by the case, and answers the purpose for
 ‘ which it was cited by *Vaughan*; but the other construction, in
 ‘ making it an *actual limitation*, is more natural and agreeable to
 ‘ the words and intent of the will.

Leon. 285.
 Jennor v.
 Hardie.

‘ One devises lands to *A.* his wife, upon condition that she
 ‘ do not marry; and if she marry or die, that then the land shall
 ‘ remain to *B.* in tail; and if *B.* die without issue in the life of
 ‘ *A.*, that then the land shall remain to *A.* to dispose thereof at
 ‘ her pleasure; and if *B.* survive *A.*, and after die without
 ‘ issue, that then the land shall be divided betwixt the sisters of
 ‘ the devisor, and dies: *B.* dies without issue, in the life of *A.*;
 ‘ it was adjudged, that *A.* had a fee by the words *to dispose*
 ‘ *thereof at her pleasure*; and that the remainder to the sisters
 ‘ was upon a contingent, which never happened, *viz.*, *B.*’s sur-
 ‘ viving *A.*, but *B.* dying before *A.* the devise of the fee to *A.*
 ‘ was absolute. And though it was doubted if a remainder
 ‘ might be limited to begin upon a condition precedent, annexed
 ‘ to the first estate, as in this case it was, yet, being in a will, it
 ‘ was held to be a new executory devise of the reversion, if the
 ‘ estate had been defeated by the precedent condition, and not as
 ‘ a remainder; or at least the condition should be construed to
 ‘ amount to a limitation till she married; and so the remainder
 ‘ would be made good thereby upon such determinable par-
 ‘ ticular estate.

Plow. 27. 414.

‘ One devises lands, devisable to *A.* for life, upon condition
 ‘ that if his heir, to whom the reversion descends, disturb *A.* or
 ‘ the executors of the devisor of their administration, that then
 ‘ the land shall remain to the daughter of the devisor and her
 ‘ heirs, and dies; *A.* dies; the daughter brings a formedon in
 ‘ remainder against the son and heir of the devisor, and alleges,
 ‘ that he disturbed *A.* and the executors also; and issue was
 ‘ joined upon it; which proves that the limitation to the daugh-
 ‘ ter was good as an executory devise, to take effect upon such
 ‘ disturbance; and the fee, in the mean time, descended to the
 ‘ heir; and the book adds, that this could not be a condition, be-
 ‘ cause then, by the descent to the eldest son, who was to per-
 ‘ form it, it would be destroyed.’

“ This is true; but this in strictness was no manner of condi-
 “ tion, but only a designation of the time when, and the manner
 “ how, the future executory devise to the daughters was to take
 “ effect, as will appear hereafter.

Dyer, 117. b.
 Hubby’s case.

“ *Cestui que use* in fee before 27 H. 8. devises his lands to his
 “ wife for life, *ita quod non faceret aut permetteret aliquod vastum*,
 “ the remainder after her death to his second son in tail, and
 “ dies; and after the statute, the wife commits waste. *A quere*
 “ is

“ is made, Whether the feoffees, or heir of the devisor, or he in remainder should enter for the condition broken? And if, by entry of the heir or feoffees, the remainder be destroyed? No resolution is given in it; but, by the laws before mentioned, it seems clear, that if the heir does enter for the condition broken, and hold during the life of the wife, yet after her death the remainder to the second son will be good, by way of executory devise; for the remainder, not being to take effect by express words till after her death, he in remainder cannot enter upon breach of the condition by making it a limitation, till she does waste, and to vest presently upon such waste committed.”

‘ *A.* having issue three sons and two daughters, and the eldest daughter having issue *B.*, and the youngest issue *C.*; *A.* by his will devises lands to his wife for life; and after her death to his grandchild *B.* and the heirs of her body; provided always, and upon condition that she marry with the consent of *D.*, *E.*, and *F.*, or the major part of them; and in case she marries without such consent, or dies without issue, then he bequeathed the said premises to *C.*, and died; *B.* married *G.* without consent of any of the persons named for that purpose, and thereupon *C.* entered upon her. It was held clearly to be a limitation to her till she married without such consent, and not a condition: for then it would descend to the heir at law, and he, for breach thereof, might enter and defeat the limitation over; therefore it was construed to be a limitation, and that the marriage without such consent determined her estate-tail, and cast the possession upon *C.* by way of immediate remainder.’ “ And it was said, that this had received as many resolutions as ever any point did, and nothing but the opinion *Co.* 10. 40. against it, which was held not to be law; and that *Coke* himself was of another opinion in *Welcock’s* and *Hammond’s* case, where the doubt in *Dyer*, 316. *fo.* 5. which was upon express condition, was well resolved by construing it to be a limitation. Also, admitting it to be a condition, yet *C.*, who was the *hæres factus* by the limitation of the remainder to her, ought to enter for breach thereof.”

‘ One devises lands to *A.* his heir at law, and devises other lands to *B.* in fee, and if *A.* molest *B.*, by suit or otherwise, he shall lose what is devised to him, and it shall go to *B.*, and dies: *A.* enters into the lands devised to *B.*, and claims them. It was held, first, that this was a sufficient breach to give title to *B.* Secondly, That if this should be a condition, it would, by the descent thereof to *A.* who was to perform it, and also to enter for the breach thereof, be merged and defeated; therefore it was held to be a *limitation* which determined the estate of *A.*, and cast the possession upon *B.* without entry.’

“ And this construction hath been made, not only in cases of last wills and testaments, but hath likewise obtained in conveyances to uses, as appears by several cases before mentioned.”

Fry v. Porter,
or *Williams v.*
Fry, Vent. 199.
2 Lev. 21.
Mod. 86. 300.
3 Keb. 756.
787.

2 Roll. R. 225.
1 Ventr. 203.
2 Mod. 26.

2 Mod. 7.
Shuttleworth
v. Barber.
|| *Fearne*, 273.
(7th edit.); *et*
vide 4 Burr.
1929.||

‘ So,

Dyer, 314.
pl. 96.

‘ So, where one levied a fine to the use of *A.* and *B.* his wife for their lives, and the life of the longer liver of them; remainder after their deaths for six months to the use of the executors of *A.*, and after the six months ended, then to the use of *C.* and *D.* his wife, and the heirs of their two bodies; and for default of such issue, to the use of *A.* and his heirs; provided that if it happen the said *A.*, at any time after, have issue of his body, or any wife of the said *A.* at the time of his decease to be *enceinte* with any issue begotten by the said *A.*, that then, after such issue had, and after 500 marks paid or tendered to *C.* and refused, within six months next after the birth of such issue, that then the use of the said lands, immediately after the decease of the said *A.* and *B.* and the said six months, shall be to the said *A.* and the heirs of his body; and for default of such issue, to the right heirs of *A.*; then *B.* dies, and *A.* takes another wife; and by *Plowden* and *Dyer*, till issue and the six months past, *A.* hath not any larger estate than he had before. But *quære*, if by the first limitation *A.* hath not the fee till issue; and then upon payment, or tender and refusal of the 500 marks, and the six months past, the use limited to *C.* and *D.* in tail, with remainders to *A.* in fee, does not cease and settle in *A.* in tail with remainder to him in fee as by limitation? For where *A.* and *B.* joined in a fine to the use of *A.* in fee, if *B.* did not pay to *A.* 10*l.* before such a day, and if he did, then to the use of *A.* for life, remainder to *B.* in fee; in this case it was held, that if *B.* did not pay the 10*l.* before the day, *A.* should have the fee absolutely; which proves that he had it before *sub modo*, or subject to be determined upon such payment, and a use may well be limited to cease in one, and to go over to another; and the statute of 27 H. 8. c. 10. carries the possession after it; and, in the first case, the use being expressly limited to *A.* in fee, must, as it seems, vest in him till the contingency happens, which determines that use, and gives him another instead of it, to which the statute carries the possession accordingly. But *quære*.’

Roll. Abr. 415.
pl. 12. 469.
Vent. 201.
Spring v.
Cesar. Jon.
390. ** *Vide*
Dyer, 314.
pl. 96. Moor,
99. pl. 243.
and Ley, 54. **
|| *Fearne*, 275.
(7th edit.)||

Stocker v. Edwards, 2 Show. 398. *Vide* Edwards v. Hammond, 3 Lev. 152., where the same case seems to be somewhat differently reported.

|| Where there was a surrender of copyholds, to the use of the surrenderor for life, and afterwards to the use of his youngest son, and the heirs of his body, if he attained the age of eighteen, and if he died before eighteen without issue male, then to the right heirs of *A.*; it was held to be a condition subsequent with respect to the youngest son; and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue male before he attained the age of eighteen. Here it was evidently the intent, that the estate should not go to the heirs of *A.* if the younger son died before eighteen leaving issue male; but if the estate was not to vest till he attained eighteen, this intent could not have been satisfied.

Manfield v. Dugard, 1 Eq. Abr. 195.; *cf. vide* 2 Atk. 504.

In case of a devise to the testator's wife, till his son should attain to his age of twenty-one years, and when his son should attain to that age, then to his son and his heirs; the son died at the age of thirteen years; and it was held, that the wife's estate determined

terminated on his decease; and that the remainder vested in the son upon the testator's death, and did not expect the contingency of his attaining twenty-one years of age.

And where the testator devised lands to two trustees, and the survivor of them and his heirs, in trust to lay out the rents and profits for the maintenance of two nephews of the testator during their minorities; and when and as they should attain their respective ages of twenty-one years, to be and remain to those two nephews and their heirs equally; it was resolved, that the nephews took the fee immediately; and upon a devise to *A.* to the use of *B.* till *B.* attained the age of twenty-one, and then to *B.* in fee, it was held the fee vested immediately in *B.*

So, in a still later case of a devise to trustees and their heirs, until the testator's great nephew, then an infant of about thirteen years of age, should attain the age of twenty-four years, on condition out of the rents, &c. during that time to keep the buildings in repair; and he devised unto his said great nephew, and to his heirs and assigns for ever, when and so soon as he should attain the age of twenty-four years, the premises in question; and directed the trustees to surrender the premises (being copyhold) accordingly; it was held that the fee vested in him immediately, and upon his death intestate under twenty-four years of age, descended to his heirs at law; and here the distinction was noticed between the words *when* and *then*, &c. only denoting to the time of vesting in possession, and the conditional word *if*.

Here I might also notice, as in some degree connected with the cases I have been treating of, certain instances of conditions precedent, not founded on any contingency of the effect or determination of any antecedent estate created by the same instrument. But for the cases of this nature, not falling under the designation contingent remainders, I shall refer to the last part of this treatise. Some instances are also to be met with, where the contingency, upon which an estate is limited, has been considered as a condition subsequent instead of precedent, so that the estate becomes vested immediately, subject to be defeated by the condition when it happens, in the room of not taking effect till such condition happens: the case of *Stocker v. Edwards* above stated may be considered as an instance of this sort; but the cases of this class appear rather to belong to the descriptions of shifting uses or trusts, or executory devises.

The doctrine of *Stocker v. Edwards*, as far as it relates to the point under consideration, was fully recognised and established in the case of *Bromfield v. Crowder*. There the testator devised all his real estate to *E. D.* and *J. R.* for their lives respectively, and after the decease of the longest liver of them to *John Davenport Bromfield*, if he lived to attain the age of twenty-one years, but not otherwise; and in case he died before he attained that age, then in the manner therein mentioned. Both *E. D.* and *J. R.* died while Mr. *Bromfield* was under the age of twenty-one years.

Trodd v.
Downes, and
Boraston's
case, 3 Co. 20.

Goodtitle dem.
Hayward v.
Whitby, 1 Bur.
228.

Denn d. Satterthwaite v.
Satterthwaite,
1 Black.R. 519.

Doe dem.
Wheeldon v.
Lea, 5 Term
R. 41.; et vide
Nanfan v.
Legh, 7 Taunt.
85. Goodright
dem. Hoskins
v. Hoskins,
9 East, 306.
Foster v. Ld.
Romney,
11 East, 594.
Vide Browns-
word v. Ed-
wards, 2 Ves.
sen. 243.

Vide Moor-
house v.
Wainhouse,
1 Black.
R. 638. (D.)
Doe dem.
Vesey v. Wilk-
inson, 2 Term
R. 209.
Roundel v.
Currer,
2 Brown's
Chan. Cas. 67.,
Fearne, 508. n.
Vide Springle v.
Cesar, 1 Roll.
Abr. 415.
pl. 12.

1 New R. 515.;
et vide Doe v.
Nowell,
1 Maul. & S.
327.

Fearne, C. R.
247.

years. The cause coming on at the Rolls, his Honour ordered a case to be made for the opinion of the judges of the Common Pleas, upon the question, whether Mr. *Bromfield* in the events which had happened took any, and what, estate or interest in the freehold or copyhold estates of the testator? The judges were of opinion that Mr. *Bromfield* took, both in the freehold and copyhold lands, a vested estate in fee simple, determinable on the event of his dying under twenty-one.

Randoll v.
Doe, 5 Dow
P. R. 202.

So also, where there was a devise of freehold estates to *J. R.*, nephew and heir at law of testatrix for life, and on his decease, to and amongst his children lawfully begotten equally, at the age of twenty-one, and their heirs, as tenants in common; but if only one child should live to attain such age, to him or her, and his or her heirs, at his or her age of twenty-one years: and in case his said nephew should die without lawful issue, or such lawful issue should die before twenty-one, then over: it was held by the Court of K. B., and by the House of Lords, that the children of *J. R.* took a vested remainder.

Doe v. Moore,
14 East, 601.

And so, where there was a devise to *J. M.* in fee when he attains twenty-one, but in case he dies before twenty-one, then to his brother when he attains twenty-one, with like remainders over; it was held that *J. M.* the devisee took an immediate vested interest, liable to be divested upon his dying under twenty-one. ||

Plow. 34.

‘ One levies a fine, the conusee grants and renders the lands to the conusor in tail, upon condition that he and the heirs of his body should bear the standard of the conusee when he went to battle, and if they failed, that it should remain to a stranger in fee; this was held a good remainder, to begin upon such condition; but *quære* of this case, unless it be intended by way of limitation of use, which may cease in one, and be limited to another.’

2 Chan. Cas.
109. Booth v.
Booth.

‘ *A.* by lease and release settles lands to the use of himself for life, remainder to *B.* for life, remainder to the first, second, and other sons of *B.* in tail, remainder to *C.* for life, remainder to his first, second, and other sons in tail; provided that if *B.* married without the consent of *A.* during his life, and after his death, of *D.*, *E.*, and *F.*, then the uses limited to *B.* and his sons to cease, and then to the use of *C.* *B.* marries without such consent, and *C.* enters, and upon a bill brought in Chancery by *B.* to be relieved for want of notice of the settlement, they were dismissed to law. Which argues that the use to *B.* and his sons was determined by limitation, and the use in remainder to *C.*, which carried the possession after it, was well vested, and therefore they were sent to law.”

3 Mod. 28.
Malone v.
Fitzgerald.

‘ Upon a writ of error out of *Ireland* the case was this: *A.* seised of lands in fee, and having issue only one daughter, named *B.*, by lease and release conveys his lands to the use of himself for life, and after his death to the use of *B.* in tail, provided that she married with the consent of the trustees, or the major part of them, some person of the family and name of *Fitzgerald*, or who should

‘ should take upon him that name immediately after the marriage ;
 ‘ but if not, then the trustees to raise a portion out of the said
 ‘ lands for *B.*, and the lands to remain to *C.* ; *A.* dies, and *B.*
 ‘ marries one who neither was nor took upon him the name of
 ‘ *Fitzgerald* ; and the only point on which judgment was there
 ‘ given, was the want of notice in *B.* of the settlement, without
 ‘ which, being heir at law, and so having a title by descent, she
 ‘ was not bound *ex officio* to take notice of the condition. But this
 ‘ fully proves the point in question, that if she had had sufficient
 ‘ notice of the condition, her breaking it had determined her
 ‘ estate, and cast the possession upon *C.* who was next in re-
 ‘ mainder.

‘ 3. *Distinction between a Limitation over in case of a Will, and*
 ‘ *where no Limitation is made over.*

‘ The third distinction I observed, was between a limitation
 ‘ over in case of a conditional devise in a will, and where no
 ‘ limitation was made over upon breach of the condition ; and
 ‘ both parts of this distinction sufficiently appear from the laws
 ‘ already mentioned under the first and second head ; I shall
 ‘ therefore only add the two following cases for further illustra-
 ‘ tion thereof. The first whereof was this : ”

‘ *A.* seised of lands, and having issue two daughters only, de-
 ‘ vised lands to the eldest and her heirs, and that she pay to her
 ‘ youngest sister yearly 30*l.* And *per cur.* — This was a condi-
 ‘ tion, for otherwise the youngest sister would have no remedy
 ‘ for the rent ; and being a condition, it descended upon both
 ‘ the daughters as heirs, and for breach thereof the youngest
 ‘ might enter into a moiety of the land with her sister ; for there
 ‘ being no limitation over to the youngest for default of payment,
 ‘ if she had not been equally heir with her sister, she would have
 ‘ been without remedy.

Cro. Eliz. 146.
 Crickmere v.
 Paterson,
 Swinb. 115.

‘ So, where a copyhold in fee of lands in *Borough English*,
 ‘ having issue three sons, *A.*, *B.*, and *C.*, surrendered his land to
 ‘ the use of his will, and after devised them to *B.* in fee, upon
 ‘ condition that he should pay to his four sisters 20*l.* a-piece at
 ‘ their full age, and died ; *A.* the eldest son had issue two daugh-
 ‘ ters, and died ; *B.* was admitted, and did not pay the 20*l.*
 ‘ a-piece ; *C.* the youngest son entered : it was objected, that this
 ‘ was a limitation to *B.* till he failed to pay, &c. and so should go
 ‘ to the youngest son, who was inheritable by the custom. But
 ‘ it was adjudged to be a condition, and that for breach thereof
 ‘ the daughters of *A.* the eldest son should enter ; but it seems
 ‘ that after such entry the heir by custom shall enter upon them.
 ‘ But *quære*, if the devise had been to the eldest son upon such
 ‘ condition, this had been a limitation, which, upon nonpayment,
 ‘ would have carried the land to the youngest son, who was heir
 ‘ by custom : for otherwise, if it should be a condition, by the de-
 ‘ scent to the eldest son, it would be merged and defeated. But
 ‘ *quære*, if the land had been descendible to the eldest son as other
 ‘ inheritances at common law are, and such conditional devise had

Cro. Jac. 56.
 Curtis v. Wol-
 verston,
 Poph. 11.

‘ been made thereof to the eldest son without any limitation over
 ‘ for default of payment, *quære* if in such case the legatees had
 ‘ any other remedy than by bill in equity for their legacies; for
 ‘ the land not being given to them, it will be hard to maintain,
 ‘ that for breach of the condition the land should go over to them:
 ‘ therefore in such case it should seem they have no remedy but
 ‘ in Chancery, where the eldest son will be looked upon as a
 ‘ trustee for the payment of so much money to them.

‘ 4. *Distinction between Remainders that are to arise upon Con-*
 ‘ *ditions agreeable to the Rules of Law, and such as are to*
 ‘ *arise upon Conditions repugnant and against the Rules of*
 ‘ *Law.*’

“ As to the first part hereof, how far remainders upon such
 “ conditions, and so far as they may be called conditions, which
 “ do not go in restraint and abridgment of the first estate, are
 “ good, will appear under the 5th and last distinction. But as
 “ to the remainders that are to arise upon conditions repugnant,
 “ and against the rules of law, this has been already cleared in
 “ part under the first distinction, and will now fully appear by
 “ the cases following:”

1 Co. 83. Mo.
 pl. 831. 869.
 6 Co. 40. 9 Co.
 127. Cro.
 Eliz. 378. Cro.
 Jac. 698.
 10 Co. 36.
 Mo. pl. 496.
 Swinb. 112.

‘ Therefore, if one by his will, by covenant to stand seised,
 ‘ feoffment to uses, or other conveyance whatsoever, gives or
 ‘ conveys lands to, or to the use of *A.* his eldest son, and the
 ‘ heirs male of his body, remainder to, or to the use of *B.* his
 ‘ second son, and the heirs male of his body, and so to the third
 ‘ and other sons in like manner; and after adds a proviso, that
 ‘ if *A.* or his issue, or any other of his sons in remainder, shall
 ‘ attempt to alien, &c. or shall alien, &c. by which any estate
 ‘ shall be barred, &c. that then immediately after such attempt,
 ‘ and before any act executed, or immediately after such alien-
 ‘ ation, the use and estate of him so attempting or aliening, &c.
 ‘ shall cease as if he were naturally dead, and that then it shall
 ‘ remain immediately to such persons to whom it ought to come
 ‘ by the intent of the indenture or will, or to him in the next re-
 ‘ mainder, &c. In this case the remainders are actually vested
 ‘ as remainders in all the sons; but, as to their taking effect in
 ‘ possession upon breach of the condition, or sooner, or other-
 ‘ wise than they would have done if there had been no condition
 ‘ at all, the proviso or condition is totally repugnant and against
 ‘ law; for be it either a condition or a limitation, it cannot carry
 ‘ over the estate to him in remainder upon breach thereof. For
 ‘ if it be a condition, then the donor and his heirs only can take
 ‘ advantage of the breach thereof, not those in remainder who
 ‘ are strangers; and if the donor or his heirs enter for breach of
 ‘ the condition, they thereby defeat not only the present estate,
 ‘ but all remainders dependant thereupon. If it be a limitation
 ‘ till they alien only, yet it is repugnant, that when by the alien-
 ‘ ation the estate is actually settled and vested in the alienee, the
 ‘ same alienation should at the same time vest and settle the estate
 ‘ in another; and for the words *attempting, endeavouring, or*
 ‘ *going about to alien*, they are of too uncertain a signification to
 ‘ receive

‘ receive any countenance, and what shall be said a sufficient attempt, and what not, is hard to determine; besides that all such clauses tend to perpetuities, to fix estates in families unalienable, that they can upon no exigencies or emergencies whatsoever dispose thereof, to provide for payment of their debts, their wives, or younger children; and also they destroy and enervate the force of fines and common recoveries, the great and common assurances whereby men hold their estates, and therefore with just reason all such clauses are exploded and disallowed.

‘ One devises lands to his son *A.* and the heirs male of his body; provided that if *A.*, or any issue male of his body, alien, give, or grant the premises to any person for above twenty years, &c. that then the said premises, *for default of such issue male* of the body of *A.*, immediately upon every such alienation, gift, or grant, shall remain and come to his (the testator's) son *B.*, and the heirs male of his body, &c. and dies; *A.* enters and makes a lease for a thousand years, and dies without issue male, leaving *C.* his daughter and heir; *B.* enters upon her, *C.* re-enters. It was held *first*, That the remainder to *B.* was not to take effect but upon alienation and death without issue male, and not upon the death of *A.* without issue male only. *Secondly*, That the remainder being limited to take effect upon such alienation should never arise, because by the alienation the land is given to another, and then it is repugnant to make the alienation to one sufficient to carry the land to another.’

“ *Note*; This case appears in *Croke* to be adjudged in C. B. and *B. R.* for the daughter of *A.*, but in *Moore* it is said, that in error afterwards brought in *B. R.* the judgment was reversed, but no reasons for the reversal are there mentioned. This case agrees with the case of *Acton v. Hare* above mentioned, where it was holden, that without an attempt to alien, the remainder was not to arise; and upon that point only judgment was there given, without entering into the nature or validity of the limitation, which by the foregoing cases appears to be clearly against the law.”

Cro. Jac. 61.
10 Co. 86.
Moor, 772.
Loveit v.
Goddard.

|| *Vide* Mainwaring v. Baxter, 5 Ves. 458. Doe dem. Gill v. Pearson, 6 East, 175. 180. Fearne, 256. n. f. iv. (7th edit.)||

‘ One devises lands to *A.* in tail, upon condition that he shall not alien, and that *if he dies without issue* it shall remain to *B.* in fee; after *A.* aliens, yet *B.* cannot enter for the condition broken, but the heir at common law, because this is not a limitation, but a condition, by *Coke* and *Warburton*. But *quære*, if *A.* after dies without issue, if *B.* may not enter; for though the heir enter for the condition broken, and hold till the estate-tail determined, yet the remainder to *B.* seems good by way of executory devise, to arise out of the reversion vested in the heir by his entry for breach of the condition, and not as an immediate remainder, because it is not to take effect till the death of *A.* without issue, and yet the estate-tail of *A.* by breach of the condition may determine long before.

Roll. Abr. 412.
Skirn v. Lady Bond.

‘ One devises lands to *A.* and the heirs male of his body, provided if he does attempt to alien, that then immediately his estate

Vent. 321.
5 Keb. 787.

Piers v. Wynn;
et vide Plow.
408. Moor,
545.

estate shall cease, and *B.* shall enter: after *A.* makes a feoffment in fee, and thereupon *B.* enters; and it was adjudged in the grand sessions against *B.*, whereupon he brought a writ of error. And first it was agreed, That tenant in tail could not be restrained from alienation by fine or recovery. Secondly, That a bare attempt would be no breach; but then it was argued, that he might be restrained from aliening by feoffment, or other act which would amount to a tort, and make a discontinuance, and that this proviso imports as much; and therefore the feoffment was a breach, for that was an attempt, and more; and that therefore it should determine the estate-tail *quasi* by limitation, which would give an immediate title of entry to *B.* by executory devise, and that the current of authorities since 10 Co. 40. are, that a condition in a will shall be taken as a limitation. But the whole court held the condition void, because *non constat* what shall be adjudged an attempt, and how it should be tried; and so the judgment was affirmed.

2 Leon. 38.
Mo. 271. Spit-
tle v. Davis.

But where one, having two sons, devised *Blackacre* to his eldest in tail, and *Whiteacre* to his youngest son in tail, *proviso semper* that if any of his children alien or demise any of his lands to them devised before they come to the age of thirty years, then the next brother shall enter; the eldest enters, and lets *Blackacre* before his age of thirty years: this was held a good limitation till they aliened, and that upon alienation it should go to the other. But this case differs from the preceding cases, for here was no total restraint of alienation, but only till they arrived to such an age as they might be presumed to have full discretion, and to know well what they did, which was but a reasonable restraint; but in that case where the younger brother entered into *Blackacre* by virtue of the limitation, and aliened it before his age of thirty, it was held, that the eldest brother could not enter into it again, because by the entry of the younger brother that part was discharged of the limitation for ever.

Plow. 401.
Newis v. Lark,
or Scholastica's case. Mo.
543. pl. 721.
|| On this case
Mr. Fearne
observes, —
“ Though
Scholastica's
case (where
tenant in tail
under a pro-
viso of this na-
ture levied a
fine and suf-
fered a re-
covery, and it
was held by
the court to
have deter-
mined the

“ These cases being so adjudged, though none of them do in express terms deny *Scholastica's* case to be law, yet the resolution of that case can hardly stand, as it tends as directly to a perpetuity as any of them. The case was this:—A man devised lands to his eldest son in tail, remainder to his youngest son in tail, remainder over in tail, remainder to his own right heirs; and if any of the entails do wrong, vex, or molest any other of them for the said lands, or mortgage, bargain, and sell the said lands, or otherwise encumber them, &c. that then every such person, and his and their heirs, shall forthwith be excluded and discharged touching the said entail; and that the conveyance of the entail of the said lands against him or them shall be of no force, but that it shall descend and come to the party next in tail to him, as if such disorderous person had never been mentioned in the will. The eldest son enters and avoids a fine, and suffers a common recovery, and the youngest son enters upon him. It was adjudged that his entry was lawful, and that the estate

“ of

“ of every one in remainder was subject to the limitation to cease
 “ by alienation. And that the next in remainder might enter ;
 “ for that it was not a condition, because then it would descend to
 “ the eldest son himself, and by his alienation would pass extin-
 “ guished in the land ; but being a limitation, it is as if it were
 “ devised to every of them till they aliened, and so by alienation
 “ their estate *ipso facto* determines, and is cast upon him in the re-
 “ mainder before entry. And for construction of the condition
 “ by limitation in a will, this case seems to have led the way
 “ to all the cases that have followed upon it. But for the nature
 “ of the condition, all the cases before mentioned seem to con-
 “ demn it. And my Lord *Coke* says (*a*), that a contrary judgment
 “ was given in the same case afterwards by *Popham* and two
 “ justices; though *Moor*, in reporting the same case, mentions it
 “ to have been adjudged by *Popham* and two justices according
 “ to the resolution in the Commentaries. But the case at this
 “ day by good opinion is held to be no law, as being introduc-
 “ tive of a perpetuity which the law condemns.”

that the tenant in tail in *Scholastica's* case first levied a fine, which, for any thing that appeared, was a fine *at common law*; and then it was a discontinuance and wrong, and therefore might be restrained by condition.” *Fearne*, C. R. 259. (7th edit.)|| (*a*) 10 Co. 42. [*Vide* *Bateman v. Allen*, Cro. Eliz. 437.]

Upon a marriage settlement *A.* is made tenant for life, remainder to the heirs of his body by his wife *Jane*; and in the same deed *A.* covenants not to suffer a recovery, but that the lands shall be enjoyed according to these limitations; *A.* notwithstanding his covenant suffers a recovery, and devises the lands. It was held in Chancery, that *A.* being tenant in tail, and as such having power to suffer a recovery, the lands devised should not be affected, but that the covenant was good, and should therefore bind his assets.

|| Upon the principle of the above cases it has been held, that a trust term, created in a settlement for the purpose of enabling trustees, in the event of an agreement or attempt at alienation by a tenant in tail, to raise a sum of money equivalent to the value of the estates contracted to be aliened, and to pay it to the parties next in limitation after such estate-tail, was void; as being a device to prevent alienation, and inconsistent with the rights of the persons to whom estates-tail were limited.

But a devise to two of testator's five daughters and their heirs, as tenants in common, on condition that if they, or either of them, should have no issue, they or she should have no power to dispose of their or her share, *except to her sister or sisters*, has been held good.||

estate-tail by limitation, and have given a title of entry to the next in remainder, the point respecting the invalidity of restraining a recovery being not at all moved on the arguments on the case; j) was cited in *Mary Portington's* case, 10 Rep. 56. as an authority for the validity of the restriction, yet it was observed

that appeared, therefore might be observed, therefore might be observed, therefore might be observed.

1 P.Wms. 104.
 2 Vern. 635.
Collins v. Plummer.

Mainwaring v. Baxter,
 5 Ves. 458.

Doe dem. Gill et Ux. v. Pearson,
 6 East, 175.

- ‘ 5. *Distinction between such Words as actually make a Condition, and such as are only descriptive of the Time and Manner when and how the Remainders are to arise.*’

“ The fifth and last distinction I shall mention is, between such words as actually make a condition, and such as are only descriptive of the time when, and manner how, the remainders

“ are to arise and take place. And this is the more necessary,
 “ because in several of the foregoing and other cases great dis-
 “ putes have arisen, when the word condition has been in the
 “ deed or will, though in reality there has been no manner of
 “ condition at all; for a condition, as appears before, properly
 “ and strictly taken, must go in restraint and abridgment of the
 “ estate first given, otherwise it is no condition, but only a
 “ modus or particular qualification whereby such a person is to
 “ entitle himself to the estate in remainder, and has no manner
 “ of relation to the first estate either to shorten or abridge it.”

Plow. 23—29.
 Co. Litt. 378.

‘ Therefore, where one made a lease to *A.* for life, remainder
 ‘ to *B.* for life; and if it happen *B.* dies before *A.*, then the lands
 ‘ to remain to *C.* for life; *B.* dies in the life of *A.*, and then *A.*
 ‘ dies, and if the remainder to *C.* was good, was the question. It
 ‘ was argued that it was not, because it was appointed to begin
 ‘ during the particular estate, where it ought to be limited to take
 ‘ effect after the particular estate ended; and therefore a lease for
 ‘ life to *A.*, remainder to *B.* for life, and if *A.* dies, that then it
 ‘ shall remain to *C.* in fee, this remainder is void, because then it
 ‘ would subvert the remainder to *B.*, and therefore is repugnant
 ‘ to the estate first limited to *B.* So, a lease to two for their lives,
 ‘ remainder after the death of the first of them to *C.* in fee, is
 ‘ void, because it would defeat the survivorship given by the first
 ‘ words. So here, secondly, it was argued, That this remainder
 ‘ was void, being to begin upon a condition, whereof none should
 ‘ take advantage but the lessor and his heirs. Thirdly, that this
 ‘ remainder, being to begin upon a condition precedent, did not
 ‘ pass out of the lessor at the time of the livery, as all remainders
 ‘ ought, and therefore also was void. But on the other side it
 ‘ was argued and *adjudged*, that *first*, Here was no repugnancy;
 ‘ for it was not intended that if *B.* died, living *A.*, that then *C.*
 ‘ should have the land immediately, but that then it should remain
 ‘ to *C.* as a remainder, *viz.* after the death of *A.*, and as *B.* would
 ‘ have had it if he had lived. *Secondly*, that this was not a con-
 ‘ dition, but a limitation when the remainder should begin; for if
 ‘ it were a condition, it would go in restraint of the thing given
 ‘ upon something to be done or not done by the particular tenant,
 ‘ which here it does not: therefore if one makes a lease to *A.* for
 ‘ life, upon condition that if *B.* marries the daughter of the lessor
 ‘ during the estate for life, that then it shall remain to *B.*, this is
 ‘ no condition to defeat or abridge the estate of *A.*, but is only a
 ‘ limitation when and how the remainder to *B.* is to take effect.
 ‘ So, if a lease were made to *A.* for life, upon condition that if *B.*
 ‘ pay to the lessor 20*l.*, that then after the death of *A.* the land
 ‘ should remain to *B.*, this is good, because it does not go in
 ‘ abridgment of the first estate; but if it was that then imme-
 ‘ diately upon such payment the land should remain to *B.*, this
 ‘ would be void, because this would go in destruction of the first
 ‘ estate, without any thing to be done or not done by him, and of
 ‘ such condition the lessor and his heirs only can take advantage,

‘ not

‘ not a stranger ; and therefore the remainder to arise thereby is void. So, if a lease be made to two for their lives, upon condition that if one of them died within seven years, that then after the death of the other the land should remain to a stranger in fee, this is a good remainder, being not to begin upon a condition, but upon a limitation or *modus* appointed by the lessor. And they all agreed, that a remainder to begin upon an impossible or illegal limitation or condition would be void ; as, upon a condition that if *A.* the first lessee, or if *B.* kill a man, that then it should remain to him, these remainders shall never arise. So the case of *Plesington*, who made a lease for years upon condition that if he aliened the reversion, that then the lessee should have it to him and his heirs ; this limitation was void, because repugnant, that when he aliened the reversion to one, the same alienation should carry the land to another. Also, the better opinion seems, that the remainder passed out of the lessor presently, and is carried into abeyance, to be executed when the contingency happens.’

Plowd. 29. a.
34. a. b. Perk.
sect. 725. 729.
Co. Litt. 378.

“ But, though these words make no condition with regard to the precedent estate, yet as to the vesting of the estate in remainder to which they are annexed, they may properly enough be called conditions precedent. Therefore, where” ‘ *A.* by his will devised lands to *B.* his second son, and if he depart this world not having issue, then he willed that his land should remain over to another, and died ; *B.* had issue *C.*, and died ; then *C.* died without issue ; it was urged, that the remainder could not take effect, because it was limited to take place on a condition precedent, which in this case had not happened : for *B.* left issue, and so did not depart the world not having issue, as the words of the will are ; yet, *per cur.* it was adjudged, that though literally he could not be said to depart the world not having issue, yet, since that issue died without issue, by the intent of the will, and the construction of law, he was dead without issue whenever the issue failed ; as in a formedon in remainder or reverter, though the donee hath issue ; yet, if after the estate-tail determines for want of issue, the writ supposes that the donee died without issue ; *à fortiori* in case of a will, such construction shall be made to support the intent of the testator.

Leon. 285.
3 Leon. 106.
Cro. Eliz. 26.
Lee v. Vincent.

‘ So, where *A.* upon marriage conveyed lands to the use of himself for life, remainder to his first and other sons in tail male successively ; and if he dies without issue male, then to the use of the daughters for one hundred years, for raising 1500*l.* for their portions ; *A.* had issue a son and a daughter, and died ; and after the son died without issue ; and if the daughter should have the term was the question. And it was argued that she should not, because *A.* did not die without issue male, for he left a son, though such a son after died without issue ; and it could not be intended that whenever the issue male failed, that the daughters should have their portions, for that might be 100 years after when all the daughters were dead ; and such intention would make it ill in its creation. But it was answered and ad-

Lev. 35. Vent.
229. Sid. 102.
1 Keb. 73. 78.
169. 246. 462.
MSS. Goodyer
v. Clerk.
|| *Vide* observations on terms to commence after decease of a party without issue ; taken from a MS. *pene*s Mr. Butler. Fearn, C. R.

7th ed. (Butler) append. iv. ||

|| In the above-mentioned MS. this case is cited by the name of Pildred and Brett plaintiffs, and Gold defendant. ||

1 Keb. 247, 248. 463. 1 Sid. 102. Cro. Jac. 592. Sir T. Raym. 29. 1 Co. 62. b. || On this case Mr. Fearne observes, that as there was a preceding estate-tail, a recovery suffered by the tenant in tail would have barred this term and the daughter's portions; and therefore the allowing the limitation to

judged, that *quandocunque* the issue male failed, the husband in this case may be said to be dead without issue male; and the expectation of such a term in remainder is for their advantage in marriage; and such a term may be as well created to arise upon failure of issue male, as a power to sell upon failure of issue male; which hath been adjudged to be good.' "Note; A case was cited, 13 Car. 1., between *Brett* and *Pildredge*, where a father, upon marriage of his daughter, made a provision, that if his daughter died without issue within two years, that then her husband should repay 500*l.* of her portion: the daughter had issue; and after, she and the issue died within the two years. It was adjudged, that the husband should not repay the 500*l.*, because, by the having of issue, the condition was fulfilled. Note; My Lord Chief Justice *Holt*, in the case next after mentioned, said that the principal case of *Goodyer v. Clerk* was not put right in any of the books but *Keble*; for the true case was, that the husband before marriage, by a separate deed, made a lease for 100 years, to begin after his death without issue male on the body of his intended wife, in trust, for raising portions for daughters; and after made a settlement by lease and release, to the use of himself and his wife, and first and other sons, in the usual form, &c. And he said, this term being not subsequent to nor depending upon the estates limited by the settlement, but precedent in its creation, could not be barred by any fine or common recovery under the settlement. And though he did not deny but such lease was good, yet he thought it a very dangerous practice; and if such leases were countenanced, no purchaser under such settlement would be safe. But note; though such lease cannot be barred by a common recovery, because being precedent to the estate-tail, the recompence in value cannot extend to it, nor can he who recovers against the tenant in tail be supposed to have any right against the termor, who comes in paramount the estate-tail; yet it appears by the books, that *Manwood*, *Barnsley*, and *Twisden* held, that if a common recovery be against the tenant in tail, such lessee for years *in futuro*, or upon a contingency, shall not be admitted to falsify within 21 H. 8. c. 15. to defeat the recovery; and then it remains at common law, and his term is subject to the power of the tenant in tail, as it was before that statute; which sufficiently takes off the objection from the danger of introducing perpetuities by the allowing of such leases. And in another book it is held, That if there be *A.* tenant in tail, remainder to *B.* in tail, and *B.* make a lease for years, or grant a rent-charge, such lessee or grantee cannot falsify a common recovery had against the first tenant in tail; because he who suffered the recovery was not chargeable with the lease or rent. And though on the other hand it may be objected, that by this construction all provisions for daughters or younger children made by such precedent lease for years may be defeated; to this it is answered, that the Court of Chancery will no doubt support such leases according to the trust thereof declared for daughters

“daughters or younger children, but no further; and when that is satisfied, the term will then fall of course for want of power to falsify by the common law, and a further support in equity.”

take effect, was not running into the inconveniences of an executory devise limited on so remote a contingency, because this limitation was liable to be barred, whereas an executory devise is not. C. R. 476. (7th edit.) With regard to executory devises, it is settled that a devise over on failure of heirs or issue generally is void for the remoteness of the contingency (*Id.* 444. and cases there cited), except where the devisee over is a relation of the first devisee, and capable of being his collateral heir, in which case the first devisee will only take an estate-tail, and then the devise over can take effect as a contingent remainder. *Id.* 466. 12 East, 253. 6 Taunt. 485. 4 Maul. & S. 61. In cases of executory devises of terms and other personalty, the courts lean to construe the words “dying without issue,” to mean dying without issue *living at the person's decease*, in order thus to give effect to the devise over. *Vide* Fearn's C. R. 471. But in cases of realty, it seems, the construction is different, for there the interest of the heir at law is concerned. *Id.* 476. 1 P. Will. 663. 2 Term R. 720.; 5 *Id.* 143.; 7 *Id.* 589. 9 Ves. 197. 4 Maul. & S. 61.; *et vide* Mr. Douglas's note to *Doe v. Fonnereau*, Doug. 505. In this note Mr. D. states, that where there is a devise over after failure of heirs or issue of A., and there is a previous limitation to such heirs or issue, the principle of preventing perpetuities does not render it necessary to hold the devise over void in its creation; and certainly in the latter case, where the preceding limitation is expressly, or by implication, to *issue* only, there the devise over need not be held void; because it can only take effect as a contingent remainder, and consequently may be barred by the tenant of the previous estate-tail, which was the case of *Doe v. Fonnereau*. But where the previous limitation is to heirs, and passes the fee, there, in order to prevent a perpetuity, it is necessary to hold the devise over on failure of heirs void; for if it took effect it would be as an executory devise, and consequently it could not be barred by the tenant of the previous fee. *Vide* Fearn, C. R. 419, 420. and cases there cited; *et vide* title *Legacies and Devises*.||

“One makes a settlement upon marriage to the use of himself for life, remainder to trustees to support the contingent remainders during his life, remainder to his wife for life for her jointure, remainder to his first and other sons in tail male successively; and then follows this clause—And in default of such issue, and in case he (the husband) shall die or be dead without issue male of his body on the body of his wife born, or in *ventre sa mère*, at the time of his death, having one or more daughter or daughters, then to trustees for five hundred years, in trust to raise portions for such daughter or daughters, also yearly maintenances to be paid half-yearly from the death of the wife. The husband has issue male by his wife, and also daughters, and dies; then the issue male dies without issue; and if the term should arise, was the question. It was argued by Serjeant *Parker*, that it should not, because it was to arise upon a condition precedent; for the having no issue male was restrained to a particular time, *viz.* the time of his death, which here did not happen. He agreed, if it had been, that if he die without issue male generally, there issue is *nomen collectivum*; and though he has issue, yet if such issue male after die without issue, either in his lifetime or at any time after, yet the term should arise, but not in this case, and cited the laws before mentioned. *Raymond* argued, that here was no contingency, but a plain limitation of the term after failure of issue male, whenever that happened; for when he says *and in default of such issue*, it is plain, if he had gone no further, it had been so then, when by those words the term would have been well raised, the subsequent words, which are but tautology and a repetition of the same thing, shall not hinder it from rising: for that would be

Trin. 1706. in *B.R.* Stroud v. Andrews, [S. C. Rep. temp. Holt, 625., and 11 Mod. 88. But the report here is apparently from a different hand, and is in some respects more full.]

“ be to make one part of the deed destroy and subvert the other ;
 “ and the words following, *and in case he shall die or be dead with-*
 “ *out issue male of his body on the body of his wife born*, if it had
 “ gone no further, are but a repetition of the former words, *and*
 “ *in default of such issue*. But then, if the words, *or in ventre sa*
 “ *mère at the time of his death*, shall be joined to all the foregoing
 “ words and be taken as part of them, then it destroys and con-
 “ tradicts them ; for then all that is before spoken of issue male
 “ is to be confined to his death, as the operative words which
 “ govern and go through the whole sentence ; therefore, he
 “ argued, that the words, *at the time of his death*, should be
 “ restrained and confined only to the words next immediately
 “ before, *viz. or in ventre sa mère*, for otherwise it is not to be
 “ known what he meant by *ventre sa mère*, nor at what time such
 “ issue male was to be *in ventre sa mère*, for all issues are *in ventre*
 “ *sa mère* at one time or other ; therefore, to make sense of the
 “ deed, those words must be restrained, and then the whole is
 “ consistent and easy, and runs thus — *and in default of such issue,*
 “ *and in case he shall die or be dead without issue male* generally, or
 “ *shall die or be dead without issue male in ventre sa mère at the*
 “ *time of his death* ; and then whether the issue male die at his
 “ death, or being *in ventre sa mère* at his death, and born after, die
 “ without issue male, the term shall arise, and no condition in it,
 “ but a plain limitation of a term in remainder. But my Lord
 “ Ch. J. Holt said, that by such construction you destroy the last
 “ words, which are restrictive and explanatory of the foregoing,
 “ and tied down to the time of his death. Also, the maintenances
 “ being appointed to be paid half-yearly from the death of the
 “ mother, shew, that such maintenances and term were only to
 “ arise in case of no issue male at the time of his death ; for other-
 “ wise, the interest being to be paid from the death of the mother,
 “ in case there should be a failure of issue male forty or fifty
 “ years after, the interest or maintenance would be more than
 “ the principal, fortune, or portion ; and he was so strongly of
 “ this opinion, that this term was to arise upon a condition pre-
 “ cedent, which here was not performed, that he said they might
 “ argue all the days of their lives, they should never make him
 “ change it. And accordingly judgment was there given that
 “ the term should not arise. But afterwards, upon a writ of
 “ error brought in parliament, that judgment was reversed.

“ *A. makes a settlement upon the marriage of his son with one*
 “ *B. to the use of the son for life, remainder to trustees to*
 “ *support, &c. remainder to the first and other sons in the usual*
 “ *form, and adds this proviso, viz. Provided that if the said B.*
 “ *shall happen to survive her husband, not having issue of their two*
 “ *bodies lawfully begotten, then she, the said B., should have power to*
 “ *sell and dispose of such part of the lands as she should think fit.*
 “ The husband dies, leaving issue ; some years after that issue dies
 “ without issue ; and then the wife sells the lands in question to
 “ the defendants, against whom the heir at law of the husband
 “ brought this bill to have a discovery of the deeds and writings ;
 “ and

||Vide Thellus-
 son v. Wood-
 ford, 4 Ves. j.
 240. 312.
 1 New R. 385,
 386., where
 the rule, “ *Ad*
proximum an-
tecedentem,
fiat relatio nisi
impediatur
sententia.”
 was much dis-
 cussed ; and
 the words in
 the will, “ as
 shall be living
 at the time of
 my decease, or
 born in due
 time after-
 wards,” were
 not restricted
 to the class of
 persons last an-
 tecedent, but
 were applied to
 all such of the
 previously de-
 scribed classes
 to whom it
 was necessary
 to apply them
 in order to
 effectuate the
 manifest inten-
 tion of testa-
 tor.||

2 Journ. 702.
 5 Feb. 1706.

Holt v. Bur-
 leigh, Pasch.
 18 May, 1710.
 [Pr. Ch. 295.
 S. C. 2 Vern.
 651. S. C.]

“ and insisted that the wife had no power to sell these lands, because the condition was not performed ; for the husband left issue, and so she did not survive him, not having issue. But my Lord Chancellor said, that when an estate is made to one and the heirs of his body, and in case he die without issue, to go over to another, that limitation over is good, though he dies leaving issue, which issue afterwards dies without issue. And that is a stronger case than this ; for if he leaves issue, he cannot be properly said to die without issue, though that issue afterwards fails ; because death is a single act, and to be performed but once ; but here, surviving is a continuing act, and she survives her husband as much a year after as she did the first moment ; and therefore, if the issue fails during her life, she actually survives without issue, or not having issue, because the issue fails during her survivorship, which continues after the failure of issue. And this, he said, was the plain natural meaning of the parties, as well as agreeable to the words, which were to give the wife a power to dispose of so much of the lands, in case the issue to be provided for by that settlement failed during her life ; and accordingly dismissed the bill.

“ One *Fletcher*, being possessed of a term for years, by his will devises it to his wife for life, and after her death to *Rebecca Fletcher* for life, and after her death to *Thomas Fletcher* and his children ; and if it shall happen the said *Thomas Fletcher* to die before the expiration of the said term, not having issue of his body then living, then to go over to the now plaintiff for the residue of the term. The defendant's title was by an assignment from *Rebecca Fletcher*, and a release from *Thomas Fletcher*, of all their estate, title, and interest respectively in and to the premises : the two life-estates were at an end : and *Thomas Fletcher* was dead without issue ; and now the plaintiff brought this bill to have an assignment of the residue of the term, pursuant to the will. All that was insisted on for the defendant to difference this case from the *Duke of Norfolk's* case of a term, and from *Pell and Brown's* case of a fee, was, that this contingency of his dying without issue then living was not confined to his death, but that the words then living should relate to the words before the expiration of the term ; and so this went further than any of the cases had ever yet been carried, for he might have issue for several generations, and yet, if that issue failed at any time before the expiration of the term, then it was to go over ; and this in a long term plainly tended to a perpetuity, and therefore ought not to be allowed ; but that, by the devise to *Thomas* and his children, and the words if he die without issue, the whole term and interest was vested in him, and he might dispose thereof as he thought fit. And that it could not be restrained by the words *then living*, for they related only to the expiration of the term, &c. ; so the remainder over to the plaintiff was void. But it was agreed to be a good remainder to the plaintiff, by way of executory devise ; and that the words *then living* must relate to the time of

Fletcher's case, Trin. 12th July 1709, in Ch. [1 Eq. Ca. Abr. 193. S. C. *Fearne's Ex. Dev.* 470. (7th edit.

“ his

“ his death, for otherwise there would be no difference between
 “ this case and the common limitation of a term to one and the
 “ heirs of his body, and if he die without issue, to remain to an-
 “ other, which is void ; for there it must likewise be intended if
 “ he die without issue before the expiration of the term, because
 “ when the term is expired, nothing remains to limit over : but,
 “ here, being limited over upon this contingency, viz. *If he die*
 “ *without issue then living*, viz. *at the time of his death*, it is good,
 “ because the contingency must happen within the compass of
 “ one life, or not at all, and will be certainly known at his death.
 “ And this case differs in nothing material from the Duke of
 “ *Norfolk's* case.

“ In this case it was said by my Lord Chancellor to have been
 “ decreed in this court, and several cases cited for it, that where
 “ an estate is limited to a man for life, remainder to his wife for
 “ life, remainder to trustees for a term of years, upon trust out
 “ of the rents and profits, or by mortgage or sale, to raise portions
 “ for daughters of that marriage, to be paid at their age of
 “ eighteen years, or day of marriage, which should first happen,
 “ that these portions were absolutely due and vested at eighteen
 “ or marriage, though in the life of the father and mother ; and
 “ that the term for raising them should be sold in the lifetime of
 “ the father and mother, and this court would warrant the title.
 “ So, if the trust of the term were limited upon a condition pre-
 “ cedent, as if it was declared, that in case he should die without
 “ issue male on the body of his said wife, leaving daughters, that
 “ then the trustees should, out of the rents, &c. raise and pay
 “ portions to such daughters at eighteen or marriage, &c.; that in
 “ case the mother died without issue male, leaving daughters,
 “ who attained eighteen or were married in the father's lifetime,
 “ that such term in remainder should be sold presently, and the
 “ portions raised. So, where even the term itself was to arise
 “ upon such condition precedent, or, after a limitation to the
 “ first and other sons or before, it were limited, that in case he
 “ should die without issue male on the body of his wife, leaving
 “ daughters, then to trustees for a term of years, in trust to raise
 “ portions for daughters, payable at eighteen or marriage, yet
 “ after the death of the wife without issue male, such term shall
 “ be sold to raise the portions in the father's lifetime. The
 “ reasons of which resolutions, he said, were, because the death
 “ of the wife, which was all that was contingent in that case,
 “ had happened ; that it was now become impossible he should
 “ die leaving issue male by her, and then it was no more than if
 “ it had been limited when he shall die, or after his death. And
 “ the reason of the court's coming into this at first was, to
 “ promote suitable matches, and that women might have their
 “ portions when they were likely to do them most service ;
 “ though he said, if it had been *res integra*, he should not have
 “ decreed it so.

Corbett v. Maidwell, Trin. 1710, in Chancery.
 [1 Eq. Ca. Abr. 337. S. C. 1 Salk. 159. S. C. 2 Vern. 640. 655. S. C. 3 Ch. Cas. 190. S. C. Although this case, and the cases on which it was founded, have been constantly received as the law of the court, yet judges in later times have expressed their opinion of the inconvenience attending these determinations, and have anxiously sought for circumstances to distinguish the modern cases from them.
 Butler v. Duncombe, 1 P. Wms. 448.
 Sandys v. Sandys, *id.*
 707. Reresby v. Newland, 2 P. Wms. 93.
 Ravenhill v. Dansey, *id.*
 179. Brome v. Berkley, *id.*
 484. Evelyn v. Evelyn, *id.* 679.

Hebblethwaite v. Cartwright, Ca. temp. Talb. 51. Stanley v. Stanley, 1 Atk.

1 Atk. 549. Hall v. Carter, 2 Atk. 554. Stevens v. Dethick, 3 Atk. 39. Lyon v. Duke of Chandos, *id.* 416. Goodall v. Rivers, Mos. 395. Churchman v. Harvey, Amb. 335. Smith v. Evans, *id.* 633. Conway v. Conway, 5 Br. Ch. R. 267.]

(F) Of Cross Remainders, or those arising by Implication and Construction of Law.

“THE last thing to be treated of under this head is, concerning remainders arising by implication or construction of law, and therein of cross remainders. But these being already settled under the head of “DEVISES,” as being allowable only in last wills and testaments, I shall pass them by.”

A. having issue five sons, his wife being *enceinte*, devised two thirds of his lands to his four younger sons, and the child *in ventre sa mère* if he were a son, and their heirs; and (a) if they all died without issue male of their bodies, or any of them, that the lands should revert to the right heirs of the devisor. By this devise the younger sons are tenants in tail in possession, with cross remainders in tail to each other, and no part shall revert to the heirs of the devisor till all the younger sons be dead without issue male of their bodies.

And. 38. Savil, 92. Moor, 637. Raym. 455. Vent. 224.

But, where one having issue three sons, A., B., and C., devises one house to A. and his heirs, another house to B. and his heirs, and a third house to C. and his heirs, provided that if all his said children should die without issue, that then all the said mesuages should remain and be to his wife and her heirs; it was held by three judges, that upon the death of one of the sons without issue, the wife might enter, and that here there were no cross remainders from one son to another, because being devised to them severally by express limitation, there shall be no greater estate to them by implication. But Lee C. J. doubted; and Doddridge J. said, that though perhaps cross remainders may be by *implication* where there is a devise to (b) two several persons, yet not so if to more; for when one dies there cannot be several estates by moieties to several persons, and when another dies, remainder again to another, because of the uncertainty and inconvenience; and that it was never seen in any book, where an estate is limited to divers, that there could be cross remainders.

One seised of lands in fee, by his will in writing devises *Blackacre* to A. his daughter and her heirs, and *Whiteacre* to his daughter B. and her heirs: and if she die before the age of sixteen years, living A., then A. shall have *Whiteacre* to her and her heirs; and if A. die, having no issue, living B., then B. shall have the part of A. to her and her heirs; and if both die, having no issue, then to J. S. and his heirs, and dies; B. attains her age of sixteen years, and then dies without issue in the life of A. And first it was held by three justices against Dyer, That the daughters had an estate-tail upon the whole will, and not a fee determinable upon a contingent subsequent. Secondly, That by the words, *if both die without issue*, no cross remainders in tail were created by implication, but that upon B.'s death without issue, after sixteen,

Dyer, 303.

(a) That each shall be heir to the other, makes cross remainders.

Hob. 33.; *et vide* Cro. Jac. 260. 656. 695. Bulstr. 62. Owen, 25.

455. Vent. 224.

Cro. Jac. 655.

2 Roll. R. 281.

Gilbert v. Witty. Cart. 173.

S. C. cited and admitted to be law.

(b) As in

4 Leon. 14.

[*Vide infra*.]

Dyer, 330.

Benl. 212.

Roll. Abr. 839

Vaugh. 267.

Clatche's case.

J. S. should have her part presently without staying till the death of *A.* without issue.

A. seised of lands in fee, by his will devises all his lands in the county of ——— to his two daughters *B.* and *C.* and their heirs, equally to be divided betwixt them; and in case they happen to die without issue, then he devises the said lands to his nephew *J. S.*, and the heirs male of his body, and dies. It was adjudged, that upon the death of *B.* one of the daughters, the other sister took her moiety as a cross remainder.

Raym. 452.
Skin. 17. pl. 19.
2 Jon. 172.
2 Show. 136.
pl. 115. Pol-
lex. 434. S. C.
Holmes v.
Meynell; *et*
vide 2 Vern.
545. 5 Mod. 107.

Cro. Jac. 655. It hath been said in a great variety of cases, that cross remain-
Vent. 224. ders can never arise between more than two, from the great
Raym. 455. confusion it would otherwise create.
Fitz. 97. Shaw

v. Weigh, 2 Jon. 82. [This doctrine, that there cannot be cross remainders created between more than two persons, seems exploded. The rule now settled is, that where they are to be raised between *two*, the presumption shall be in favour of them; but where between *more than two*, it shall be against them. But it being only a presumption, it may in either case be rebutted by circumstances of plain, manifest intention. The words "*in default of issue*," and a devise over of all the testator's estates, have been holden to raise cross remainders. *Phipard v. Mansfield*, Cowp. 800. *Comber v. Hill*, *infra*. *Atherton v. Pye*, 4 Term R. 710. *Wright v. Holford*, Cowp. 51. S. C. by the name of *Wright v. Englefield*, Ambl. 468., and by the name of *Wright v. Lord Cadogan*, 6 Br. P. C. 156. *Holmes v. Meynell*, *supra*. *Marryatt v. Townly*, 1 Ves. 102. The disposition of the courts to presume against cross remainders, arose from their dislike to the splitting of tenures. 1 Ves. 164, 165.]

Co. Lit. 25. It is clearly agreed, that cross remainders can only arise in
Roll. Abr. 857. last wills, and are not to be allowed of in any deed or con-
2 Show. 156. veyance. (*a*)

pl. 115. [(*a*) This doctrine is not correctly stated, nor is it supported by the authorities to which it appeals. Cross remainders, it is true, cannot arise in a deed by implication, *Cole v. Livingston*, 1 Ventr. 224. *Doe v. Dorvell*, 5 Term R. 521.; but they may be raised in a deed, where they are limited in express, though, perhaps, rather informal terms. *Doe v. Wainwright*, 5 Term R. 427. Indeed, in executory articles, Lord *Camden* went farther; for in the case of articles upon a marriage to lay out the wife's fortune, to the use of all the children of the marriage as tenants in common and of their respective heirs, and for default of such children and their issue, to the use of the survivor of the husband and wife; his lordship held, that there were cross remainders. *Twisden v. Birt*, Nolan's edit. of *Strange*, vol. ii. 970. note (5); S. C. Ambl. 665. by the name of *Twisden v. Locke*.]

See 1 Saund. || But it is now settled, that though cross remainders cannot be
R. 186. note, implied in a deed, they may be created by the express words of
and Mr. But- the deed.
ler's note, Co.

Lit. 195. b., as to the proper words to raise cross remainders in a deed.

Doe v. Worsley, 1 East, 416. Where the limitation in a marriage settlement was "to the use of all and every the daughter and daughters of *L. C.* on the body of the said *M.* lawfully to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters, lawfully issuing, and for *default of such issue*, to the right heirs of *L. C.* for ever;" it was held, that though it was probably intended that no part of the settled estate should go over, as long as there was any issue of the marriage remaining, yet the parties had not said so in such words as the law requires to express such an intention in deeds, and it was an established rule that cross remainders could not be *implied* in a deed.

Meyrick v. So also, in *Meyrick v. Whishaw*, the deed, after limiting estates-tail

tail to all the children of *F. W.* as tenants in common, continues in these words, "and for default of such issue, and if any of such children, there being more than one, shall happen to die without issue of his or their bodies or body before he, she, or they shall attain the full age of twenty-one years, that then and in every such case the part and share, parts and shares, of every such child and children so dying shall go and remain and be to the survivors and survivor of such children, and the heirs of the bodies and body of such survivors and survivor as tenants in common, and not as joint tenants; and in case all such children should die without issue of his, her, or their body or bodies, then to the use of *F. W.*, his heirs and assigns for ever." *F. W.* had two children, *Luke* and *Mary Anne*. *Luke* died after attaining the age of twenty-one years without issue. And the court held, that under those circumstances, *Mary Anne* did not take by way of cross remainder, but that *Luke's* moiety went to the devisees of *F. W.*

So, where there was a similar settlement, and there were two children, one of whom died after attaining twenty-one without issue, it was held that the other did not take by way of cross remainder, but that the moiety of the deceased went to the heir of the settlor.||

Richard Holden seised in fee, and having issue a son and three grandchildren, by his will devised part of his estate to his wife for her life, and the reversion of such part expectant on her death, and all other his freehold tenements, &c. he gave to his son *Richard Holden* for life, and after his death to his first and other sons successively in tail male; and for default of such issue, and after the determination of the said estates, he gave the premises to his grandson *Richard Holden* and his grand-daughter *Elizabeth Holden*, to be equally divided between them, and to the heirs of their respective bodies issuing; and for default of such issue he gave the premises to his grand-daughter *Anne* in fee: the testator died seised, *Richard* the son died without issue male, whereupon *Elizabeth* and the grandson entered, and *Elizabeth* died without issue generally: *Anne Holden* married *John Jervis*; and the question was, Whether there were cross remainders between *Elizabeth* and *Richard* the grandson, or whether the moiety of *Elizabeth* should go to *Anne* or *Richard*? And it was resolved, That there were no cross remainders between them, because here are no express words, nor is there a necessary implication, without either of which cross remainders cannot be raised; that the words, *and for default of such issue*, being relative to what goes before, mean only and for default of heirs of their respective bodies, and then it is no more than as if it had been a devise of the moiety to *Richard* and the heirs of his body, and of the other moiety to *Elizabeth* and the heirs of her body, and for default of heirs of their respective bodies, remainder over; in which case there could be no doubt. And it was held, that this case differed from the case *suprà* of *Holmes and Meynell*, the word *respective* being wanting in that case, and the first devisees were the testator's daughters, and the remainder-

Whishaw,
2 Barn. & A.
810.

Levin v. Wea-
therall, 1 Brod.
& B. 401.
4 Moo. 116.;
and see Ed-
wards v. Allis-
ton, 4 Russell's R. 78.
2 Stra. 699.
Ca. temp.
Hardw. 22.
2 Barnard.
B. R. 367. 443.
2 Kel. 188.
Comber v.
Hill, Pasch.
7 G. 2. in B. R.
and M. 8 G. 2.
a like case in
B. R. between
Brown v. Wil-
liams, 2 Str.
996.

[Davenport v.
Oldys, 1 Atk.
579. Cowp.
799. Marryatt

v. Townly,
1 Ves. 102.]

Leach v. Jackson, *coram*
Ld. Apsley, Tr.
11 G. 3. in
Chancery.
Nolan's edit. of
Strange's Reports, vol. ii.
970. note (3).
||As to cross-remainders in
wills, see tit.
Legacies and
Devises (I),
Vol. V. p. 68,
69.]]

remainder-man only a nephew; whereas in the present case *Anne* was as near to the testator as *Richard*.

[*R. H.* devised to his six nieces to be equally divided between them, share and share alike, as tenants in common, &c. and of the several and respective heirs of the body and bodies of all such and every his said nieces; and in case one or more of his said six nieces should happen to die without issue of her or their bodies, then he gave, &c. the share or shares of her or them so dying without issue to the survivor or survivors of them his said six nieces, share and share alike, as tenants in common, &c. and to the several and respective heirs of the body and bodies of such survivor or survivors of them; and if all his said nieces should die without issue, then he gave, &c. all the same manors, &c. unto his own right heirs for ever. It was admitted, that the original share went to the survivors by way of cross remainders, but it was insisted that the shares which the two last dying nieces took by way of accruer did not survive.]

(G) “Of Vested Remainders, and of the Particular
“Estate to support them in their Creation; how
“long it must continue; and when by Determin-
“ation, Grant, or Refusal thereof, the Remainder
“is discontinued, barred, or destroyed, and when
“not.

“**A**S to a vested remainder, we are to consider, first, The na-
“ture of a remainder vested, that there must be a particular
“estate to support it in its creation; wherein to consider, 1st,
“What estate is sufficient for that purpose, when it must begin,
“and how long it must continue. 2^{dly}, When by determination,
“grant, or refusal thereof, the remainder is discontinued, barred,
“or destroyed, and when not; and therein of the remedies for
“him in the remainder or reversion by entry, action, or receipt.
“3^{dly}, Where the remainder or reversion shall be subject to the
“acts or charges of the particular tenant, and where and how
“the charges of him in the remainder or reversion shall take
“place.

“It has already appeared what estate is sufficient to support
“contingent remainders, and what not. As to remainders which
“vest presently, though there must be a particular estate to
“distinguish them to be remainders, yet, as to supporting them,
“there needs none; because they vest presently and certainly as
“remainders in the person to whom they are limited. And I
“find only one estate whereon it is held no remainder can de-
“pend; and that is an estate at will; for if such estate be made
“with remainder over, the remainder is void. The reason seems,
“because by the limitation over the will is instantly determined,
“and then the remainder cannot be good for want of a parti-
“cular estate whereon to depend; and in possession it cannot
“be good, because it was limited as a remainder.

8 Co. 75.

“A re-

“ A remainder may be limited upon a gift in frank-marriage either to the donees themselves, or to a stranger. But the diversity taken in the books is, that if the remainder be limited over in fee, then is the frank-marriage destroyed, and the donees have no estate-tail but only for life; because by the limitation over of the fee, the tenure of the donor, which is inseparable to frank-marriage, is destroyed, and then the words of the gift carry but an estate for life. But, if the remainder were limited over in tail only, or for any less estate, yet the frank-marriage continues; because the tenure by reason of the reversion left in the donor continues.

Co. Litt. 21. b.
Godb. 19, 20.

“ If one make a lease to *A.* for life, remainder to him for years; or to *A.* for his own life, remainder to him for the life of *B.*; these are good remainders, and both estates are vested in *A.*; for though he can have no benefit of the remainder in his own person, yet he may give, grant, devise, or assign either estate, and a greater estate may support a less, as in those cases, but not *è converso*; therefore, if one makes a lease to *A.* for years, remainder to him for life, the lease for years is drowned.

Co. Litt. 54. b.
Dyer, 310. a.
Cro. Eliz. 491.
3 Leon. 22.

“ Another rule is, that the remainder must be limited and given out at the same time that the particular estate is created; for otherwise the reversion settles immediately in the lessor or feoffor, and draws to it the rents and services, and then the remainder limited after comes too late. Therefore, if one makes a lease for life, and after confirms his estate for life, remainder after his death to another, this remainder is void; because the confirmation gave no new estate to the first lessee, or any ways enlarged his old estate, but he continued tenant only for his own life, as he was before, and then the remainder cannot be good, because it was limited after the particular estate had taken effect, whereby a reversion was vested and settled in the lessor: and as a grant of the reversion it is not good, because not so intended. And some of the books add another reason that it cannot be good as a grant of the reversion, because he was not party to the deed; and unless it be by way of remainder, none can take but those who are parties to the deed. But *Littleton* seems to reject this reason, where he holds, that in such case, if the tenant for life accepts the deed of confirmation, the remainder is thereby in him, to whom it is limited; because such acceptance is an agreement and attornment in law of the tenant for life; though without the deed he in remainder cannot maintain an action of waste, or have any other benefit against the tenant for life. But this reason seems rather to prove that the deed operates as a grant of the reversion, to which attornment is requisite; for to a remainder there needs none, because it takes effect by the same deed, and at the same time with the particular estate; and therefore his advice is for him that is to have the remainder, to get another part of the indenture to himself.

Doct. & Student, lib. 2.
c. 20. 1 Bro.
253. pl. 45.
Plow. 25. b.
2 Roll. Abr.
415. pl. 8.

Lit. sect. 573.
Co. Lit. 317
Plow. 160. b
Dyer, 126. b.

“ If the lessor disseise his tenant for life, and after make a new lease

Plow. 25. b.
Godb. 555.

“ lease to him for life, remainder over, this remainder is void ;
 “ because the tenant for life is remitted to his first estate for life,
 “ which was long before the remainder was appointed ; and then,
 “ as a remainder, it cannot be good, because there was no par-
 “ ticular estate created at the same time with it. So, if the heir
 “ endow his mother, remainder over, the remainder is void,
 “ though livery be made ; because the dower hath relation to the
 “ death of the husband, which was before the appointment of
 “ the remainder. But, if the lessor disseise his lessee for life,
 “ and make a lease to a stranger for the life of the first lessee,
 “ remainder over, and then the first lessee enter and be remitted,
 “ yet the remainder continues good ; because it was well vested
 “ before the entry and remitter.

Doct. & Stud.
 lib. 2. c. 20.
 1 Bro. 253.
 pl. 45. 2 Roll.
 Abr. 415. pl. 8.

“ If a lease be made to *A.* for life of *B.*, and after the lessor
 “ confirm the land to *A.* for his own life, remainder over, this is
 “ a good remainder ; because, by the confirmation, the estate of
 “ *A.* was enlarged and made absolute for his own life, which
 “ before was determinable upon the death of *B.* ; and by such
 “ confirmation a new estate being created, a remainder may be
 “ limited upon it, as it might at making the lease. So, if con-
 “ firmation be to the tenant for life in tail, with remainder over,
 “ this is good for the same reason ; because the estate for life is
 “ enlarged to an estate in tail, upon which a remainder may be
 “ limited, as it might upon the first making of such estate.

Cro. Car. 478.
 Dyer, 126. Lit.
 sect. 525. Co.
 Lit. 299. 1 Lev.
 38. Plow. 31.
 b. 1 Sid. 83.
 361.

“ So, if a woman be tenant for life, and the lessor confirm the
 “ estate of the husband and wife for their two lives, this con-
 “ firmation enures to the husband by way of remainder for life ;
 “ or, at least, by way of increase and enlargement of the estate
 “ of the husband ; and the estate for life of the wife continues
 “ distinct. But some call this a reversion in the husband, and
 “ not a remainder, because the estate of the wife is not enlarged
 “ thereby ; and this remainder did not pass till after the reversion
 “ vested and settled in the lessor.

1 Saund. 149.
 1 Sid. 360.
 2 Keb. 341.
 Wade v.
 Batch.

“ *A.*, copyholder for life, remainder to *B.* in fee: *B.* surrenders
 “ this copyhold to the use of *A.* for life, remainder after his de-
 “ cease to the use of *B.* and *C.* his wife for their lives, and the life
 “ of the longer liver of them, remainder to the use of the right heirs
 “ of *B.* It was argued, that this surrender to the use of *A.* for life
 “ was void, because he had an estate for life before ; and then the
 “ remainders limited thereon are void also ; and then the sur-
 “ render enures to the use of *B.* and his heirs, as it was before,
 “ and *C.* took nothing by it. And though a lease to *A.* for life,
 “ remainder to *B.* for the life of *A.*, of lands at common law be
 “ good, because *A.* may forfeit his estate for life, whereof *B.* shall
 “ take advantage and hold during the life of *A.* ; yet it is other-
 “ wise in case of copyholds ; for there the lord of the manor
 “ shall take advantage of the forfeiture, and hold during the life
 “ of the particular tenant, and not he in reversion or remainder.
 “ And so here, the first estate being void, to give *A.* any benefit,
 “ the remainder must be void too. On the other side it was
 “ argued, that if the estate limited to *A.* was void, yet the limit-
 “ ation

"ation to *B.* and his wife was good by way of present estate and
 "surrender of the remainder, as a grant of the reversion *cum*
 "*post mortem* of the tenant for life *acciderit* hath been construed
 "a good grant *in presenti* of the reversion; and the words *cum*
 "*post mortem* refer to the having the land in possession. So, here
 "*B.* and *C.* shall have the land for their lives in possession after
 "the death of *A.*, as by a mediate settlement, and not by way of
 "remainder. And so was the opinion of the whole court, as
 "*Saunders* reports it; and that it was not good by way of re-
 "mainder. But *Siderfin* reports it to be held by three justices
 "good by way of remainder: and the reason there given for it
 "is, because, say they, the continuance of the particular estate
 "*in esse* is not always necessary; as, if a rent be granted to the
 "tenant of the land for life, remainder over, this is good. So,
 "an estate limited to an infant, remainder over, and the infant at
 "full age disagrees to the estate for life. So, they thought, if a
 "copyholder in fee surrenders to the use of the lord for life,
 "remainder over, this is good. So, if tenant for life and he in
 "the reversion grant their estate to the tenant himself for life,
 "remainder over, this is good. But *quære*, if these cases
 "warrant such construction; for in the case of the rent, though
 "between the parties, it merges presently in the land as soon
 "as granted; yet, as to all strangers, it hath continuance, and
 "the grantee himself hath a continuing benefit by way of ex-
 "oneration of his estate therefrom. As to the case of the infant,
 "though he refuses at full age, yet that shall not divert the re-
 "mainder, which was once well vested by good title; but he in
 "remainder shall enter presently, as in his remainder upon such
 "refusal, because there was a good estate to support it in its
 "creation. As to the case of the surrender to the lord, he hath
 "benefit by actual possession of the land during the estate thereby
 "surrendered, and may grant it out again for his own life,
 "though, whilst it is in his own possession, he cannot properly
 "be called a copyholder thereof, because he cannot be said to
 "hold of himself. And as to the last case, if it were barely by
 "way of grant, it cannot be good, because the freehold cannot
 "pass without livery; and if livery were made by parol, it then
 "amounts to a surrender of his estate for life; and a new estate
 "for life is created by the same livery, upon which a remainder
 "may be limited, as it might have been at first. But, if it were
 "by deed and livery, it should seem it cannot be good; because
 "then every one passing only his own estate, the tenant for life
 "cannot give an estate to himself; but by his joining in the
 "deed and acceptance thereof, this may, as appears before,
 "amount to an attornment, and then the grant, as to the other,
 "will pass the reversion. But in the principal case, the surrender
 "by him in remainder cannot pass the reversion, because he has
 "it not as a reversion, but as a remainder. And for the same
 "reason the acceptance of the particular tenant cannot amount
 "to an attornment, (if it were necessary, which, in case of a co-
 "pyhold, being an estate at will only, seems not requisite,) be-

Cro. Eliz. 323.
 Dyer, 367.

Co. Lit. 298.
 2 Brownl. 155.

2 Roll. Abr.
 415. pl. 2, 3.
 Dyer, 140. b.
 pl. 41. held,
 this remainder
 of the rent not
 good, because
 the particular
 estates sus-
 pended are as
 soon as
 granted.
 But Co. Lit.
 298. a. *contrà*,
 that it is good,
 and vests in
 an instant,
 and the sus-
 pension in
 judgment of
 law grows
 after. So,
 those books
 hold the re-
 mainder of a
 seigniorie
 granted in
 such manner
 void for the
 same reason;
 and because
 no *formedon in*
remainder lies
 without alleg-
 ing the esplecs
 in the partic-
 ular tenant.
Ideo quære.

2 Co. 50. Mo.
542. Sir Hugh
Chomley's
case.

" cause no reversion is granted or surrendered; and then his
" estate continuing in all respects the same as it was before the
" remainder, as a remainder it cannot be good, though by way
" of present grant, to take effect in possession after the death of
" *A.*, it may.

" *A.* tenant in tail, remainder to *B.* in tail: *B.* by indenture
" enrolled for 20*l.* bargains and sells the lands, and all his estate,
" right, title, &c. to *C.* during the life of *A.*, remainder to the
" queen, her heirs and successors. This remainder was held void;
" first, because there was no particular estate; for the grant to
" *C.* was absolutely void, because it can never take effect in pos-
" session, nor can *C.* have any benefit by it, *A.* having an estate
" tail therein, which is subject to no forfeiture to let in the remain-
" der, and his entry into religion, which is a foreign possibility,
" and against law likewise, shall never be presumed. Secondly,
" *B.* having granted *totum statum suum* to *C.*, left nothing in him
" to limit over, and therefore the remainder is void, either be-
" cause *C.* took nothing, and then a remainder cannot be with-
" out a particular estate, or, if *C.* took any thing, he took the
" whole, and nothing remained to limit over to the queen; and,
" by consequence, such remainder is void. And as a grant of
" the reversion it cannot operate, because *B.* had no reversion,
" but a remainder only.

Sir T. Jo. 124.
Key v. Gam-
ble.

||(a) So, in Doe
dem. Fonne-
reau v. Fonne-
reau, Doug.
487., it was
decided that
an estate for
life to *A.* in
a deed and an
estate to the
heirs of his
body in a will
did not unite,
so as to give
A. an estate-
tail; *et vide*
Fearn, 502.
(7th edit.)||

Co. Litt. 298.
a.

" Husband makes a feoffment in fee to the use of himself for
" life, remainder after the death of his wife to *B.*, and dies; then
" the wife dies; and if this remainder to *B.* was good, was the
" question. The court seemed to be of opinion that it was not;
" because, during the life of the wife, it did not vest: and ad-
" mitting that the wife had an estate for life by a former con-
" veyance (a), as the case in fact was, yet that could not support a
" remainder, which was not created at the same time with it. On
" the other side it was argued, that here was no contingency
" but a remainder vested, and a difference was taken between a
" remainder at common law and by the statute of uses. This is
" the case *verbatim* as it is reported; but no judgment was given.
" but it seems the remainder must be contingent, and upon the
" wife's surviving her husband became void; because by his
" death the particular estate was determined, and yet the re-
" mainder could not then take effect; and the estate of the wife
" by a former conveyance could be of no regard, if it had had
" continuance, as it had not, being, by the feoffment, divested
" and put to a right.

" My Lord *Coke* lays down for a rule, that when the particular
" estate and remainder depend both upon one title, there the de-
" feating of the particular estate is a defeating of the remainder
" also; but, when the particular estate is defeatable only, and
" the remainder by good title, there, though the particular estate
" be defeated, yet the remainder continues good: as, if *A.* be
" lessee for life, and the lessor disseise him, and make a lease to
" *B.* for the life of *A.*, remainder to *C.* in fee; though *A.* enter,
" and defeat the estate for life, yet the remainder to *C.* being
" once

“ once well vested shall not be defeated ; for it would be unreasonable, that the lessor should have the land again, and contrary to his own livery. And in this case the remainder depends upon the same life it did at first, though that estate for life be in another person. And he there put also the case of the infant before mentioned, disagreeing at full age.

“ If one grant a rent to *A.* for the life of *B.*, remainder to the heirs of the body of *B.*, this is a good remainder ; because it takes effect at the instant of the determination of the particular estate, as all remainders ought, or during the particular estate.

Co. Litt. 298.

“ If one makes a lease to *A.* for the life of *B.*, remainder to *C.* in fee ; *A.* dies ; now till an occupant enters there is no particular estate, and yet the remainder to *C.* continues good, because it vested in *C.* presently by the first limitation ; and the want of a tenant to the first estate shall not vitiate the estate to the second, which was well vested.

Co. Litt. 298.

“ If rent be granted to *A.* for life of *B.*, remainder over ; if *A.* dies, he in remainder shall have the rent presently ; because the estate for life in the rent determined by the death of *A.*, and there can be no occupant of a rent. But *Yelverton* holds, that in the case of *tertenants* they shall have the lands during the life of *B.* discharged of the rent, and this is sufficient to support the remainder.

Mo. 664.

Yelv 9. Salter v. Bottler.

“ If one grant a rent to the right heirs of *J. S.*, who is then living, remainder over, this whole grant is void ; for *J. S.* cannot have heirs during his life, and so there is no person to take the particular estate, and without that there can be no remainder ; and therefore that is likewise void. So, if a lease be made to *J. S.* for life, where there is no such person, remainder over, the whole is void for the same reason. So, if a lease be made to a monk, or other person, who has no capacity by law to take, for life or years, remainder over, both are void. But in all these cases, if such estate were devised by will, he in remainder should take presently. So, if the first devisee refuse, or die in the lifetime of the devisor, the remainder shall vest in possession presently. The reason of which difference is, because in a will the intent of the devisor is principally to be regarded ; and if the particular estate fails, the devise over shall be construed as a new original devise to support the intent of the testator, and let in the *haeres factus* according to the estate thereby given him. But if one by his will devise, that his feoffees shall make an estate to *A.* for life, remainder to *B.* in fee ; if *A.* refuse, the feoffees ought to make an estate to another for the life of *A.* with remainder to *B.* in fee. And so if one devise that his executors shall make such estate, and *A.* refuse, yet *B.* shall not have the remainder presently ; because here he hath referred the estates to be made by the rules of the common law, and therefore they ought to be pursued. But *quære* in these cases, if the estates ought not to be made to *A.* pursuant to the will, which, though he refuse, will, *volens volens*, carry the estate to him with remainders

Perk. sect. 55.
567, 568, 569.
1 Bro. 255.
pl. 5. Plowd.
55. a. 2 Roll.
Abr. 415. pl. 4.
5, 6, 7. 417.
pl. 9. 1 Roll.
R. 158. Swinb.
125. Mo. 519.
1 Leon. 195,
196. 198.
2 Bulst. 292.
Raym. 162.
Dyer, 122.
pl. 20. 127.
310. pl. 79.
Plow. 244. 414.
a. Godolph.
356. (6). 357.
(15). 558. (19).
(25). 462. Cro.
Eliz. 423.
Fuller v.
Fuller.

“ over, and then, if he after refuse to take such estate, the
 “ remainder will vest in possession presently. But it is likewise
 “ held, that if a devise be to *A.* for five years, remainder to *B.*
 “ in fee, and *A.* die in the lifetime of the devisor, that this shall
 “ descend to the heirs of the devisor in the mean time, till the
 “ five years are past, and then *B.* shall have it, as by a new
 “ original devise. But *quære* in all cases of wills, since the
 “ intent of the party is to be the principal guide, if it appears
 “ that the remainder is not to take effect till such a determinate
 “ future time, why should it not in the mean time descend
 “ to the heir at law, and so of the use; and when the time is
 “ expired, take effect in the devisee in remainder as a new ori-
 “ ginal executory devise?

1 Bro. 253.
 pl. 35. Perk.
 sect. 566. 705.
 Godolph. 359.
 (20). 1 Leon.
 197, 198.
 1 Bro. tit. Es-
 tates, pl. 23.
 66. Dyer, 309.
 (69). pl. 32.
 pl. 14. 2 Mod.
 210. 1 Leon.
 195, 196. 199.
 200.

“ If one give lands to *A.* in tail, remainder to himself for life
 “ or years, remainder to *B.* in fee; this remainder to himself is
 “ void; because none can give lands to himself; and yet the
 “ remainder to *B.* is good, because there is a particular estate
 “ to support it. So, if the first remainder were to a monk or
 “ other incapable person, remainder over, this last remainder is
 “ good, and shall take effect in possession, upon the determi-
 “ nation of the particular estate, without any regard to the
 “ mesne remainder, which was void. But *quære*, if there be
 “ not a diversity between such remainder limited to himself by
 “ fine; for some of the books seem to hold it good by estoppel
 “ in such case; but how that can be I do not know; for
 “ estoppels are generally to conclude the party to his prejudice,
 “ when he does a thing, or grants an estate he had no right to;
 “ yet, having so granted it, he shall not afterwards be admitted
 “ to invalidate and make it void, by saying he had no power to
 “ make it.

1 Co. 101. a.
 154. b. Mo.
 195. 520.
 Plowd. 307.
 2 Sid. 66. 157.
 2 Lev. 77.
 2 Mod. 209.
 Ld. Paget's
 case.

“ Another diversity is between a feoffment to uses, and a
 “ covenant to stand seised to uses; for if one makes a feoffment
 “ in fee to the use of *A.* for life, remainder to the right heirs of
 “ *J. S.*, who is living, here the remainder passes out of the
 “ feoffor presently, and is carried into abeyance, till the death
 “ of *J. S.*; because by the feoffment he departed with the whole
 “ estate, and left nothing in him. But, in case of a covenant to
 “ stand seised to such uses, nothing passes out of the covenantor
 “ but what can then vest in the covenantees.

“ So, if a feoffment be to the use of *A.* for life, remainder to
 “ *B.* for life, remainder to *C.* in fee; if *A.* refuse, *B.* shall take
 “ his remainder in possession presently: but upon a covenant to
 “ stand seised, if *A.* refuse, *B.* shall not take presently, but the
 “ covenantor himself shall retain it during the life of *A.* So, if
 “ the first estate were void, as a covenant in consideration of
 “ long acquaintance to stand seised to the use of *A.* for life, and
 “ after his death, in consideration of consanguinity, to the use
 “ of *B.* in tail, or fee; here the first estate is void, for want of a
 “ sufficient consideration to raise the use to *A.* Yet *B.* shall
 “ have no use till the death of *A.*; but the covenantor shall
 “ retain the land during the life of *A.* The reason of which
 “ diversity

“ diversity is, that in case of the feoffment he divested himself
 “ of the whole estate, and therefore against his own solemn
 “ livery can have nothing further therein; and the feoffees
 “ being only instruments, through whom the estates were to
 “ pass over to others, were to have nothing to their own use.
 “ And since *A.* refused, *B.* must take in possession presently,
 “ because no other can have it. But, in case of the covenant
 “ to stand seised, the uses being executory and to arise out
 “ of the possession of the covenantor, if one refuse, or the use
 “ limited to him be void, yet this cannot carry the possession to
 “ the other sooner than was intended; because it is the con-
 “ sideration that draws out the use, and that by the terms of the
 “ covenantor himself begins not to operate as a consideration
 “ till after the death of *A.*; and the consideration for each estate
 “ was several and independent. So, in the principal case; there,
 “ *A.* covenanted by indenture with *B.* and *C.* that, in consider-
 “ ation they with the rents and profits should pay his debts, and
 “ such other sums of money as he by his will should appoint,
 “ he and his heirs should stand seised to the use of *B.* and *C.*
 “ for twenty-four years; and after the end or expiration of said
 “ term, then to the use of *D.* his son in tail, &c. Then *A.* is
 “ attainted of treason; and it was adjudged, *first*, that the limit-
 “ ation to *B.* and *C.* was void for want of consideration; because
 “ they were strangers to the payment of his debts, and were to
 “ pay them out of the rents and profits of the land limited to
 “ them, which was no consideration on their part, and therefore
 “ could raise no use to them, as it would if they had been
 “ made executors, or were to have paid the debts out of their
 “ own estates. *Secondly*, It was adjudged, that the limitation
 “ over, being after the end or expiration of the term of twenty-
 “ four years, and this term (which excludes the interest in the
 “ land) being void, the use shall arise to *D.* in remainder pre-
 “ sently. But, if it had been limited after the end or expiration
 “ of the twenty-four years, there, though the term had been
 “ void, yet the remainder should not have taken place till the
 “ twenty-four years run out by effluxion of time; because
 “ each estate was executory, and to arise out of the estate of the
 “ covenant or upon distinct considerations.

“ If copyhold land be surrendered to the use of *A.* for life, re-
 “ mainder to the use of *B.* for life; if *A.* commit a forfeiture,
 “ or refuse, *B.* shall not enter till his death, but the lord shall
 “ enter, and hold during the life of *A.* So, in such case, of a sur-
 “ render to the lord, *B.* shall not enter till *A.*’s death, because
 “ his estate is by the custom, and is not to begin till after the
 “ death of *A.*, and no incident of the common law which vests
 “ it sooner belongs to such estates without special custom; and
 “ then the lord, from whom all these copyholds originally moved,
 “ shall take advantage of such forfeiture, refusal, or surrender,
 “ as a benefit not originally departed with, when he gave out
 “ the lands. So, where *A.*, *B.*, and *C.*, copyholders for life suc-
 “ cessively; *A.* takes a conveyance from the lord of the freehold

Ld. Paget’s
case, *ubi sup.*

Mo. 195
contrà; but
quære—If the
difference up-
on the word
term was not
in the book
unobserved.

9 Co. 107.
Margaret
Podger’s case.
1 Saund. 151.
2 Brownl. 154.
|| *Vide* 3 Term
R. 173. ||

“ and inheritance; this does not divest the remainders to *B.* and
 “ *C.* And yet they cannot enter till the death of *A.*; because
 “ the custom was so, though the estate for life of *A.*, as copy-
 “ hold, was enfranchised and gone.

1 Leon. 196,
 197. 2 Leon. 5.
 3 Leon. 20.
 Moor, 100.
 Dyer, 309.
 Cranmer's
 case.

“ If *A.* limits an estate to the use of himself for life, remainder
 “ to his executors for twenty years, remainder to *B.* in tail; *A.*
 “ is attainted of treason, so that he can make no executors, by
 “ which the remainder to them is become void; the remainder
 “ to *B.* shall take effect in possession presently, without staying
 “ until the years run out by effluxion of time. So, if the re-
 “ mainder had been to the administrators of *A.*, which had been
 “ merely void for the time intervening after the death of *A.* till
 “ administration granted; in such case, the remainder to *B.*
 “ should vest in possession presently upon the attainder of *A.*;
 “ because the intermediate remainder being void, the last remain-
 “ der did then depend immediately upon the particular estate,
 “ and upon determination thereof takes effect in possession.

Plowd. 114.
 Amy Towns-
 end's case.
 1 Leon. 199.

“ Husband, seised of lands in right of his wife, makes a feoff-
 “ ment in fee to the use of himself and his wife for their lives,
 “ remainder to the use of *C.* in tail, or in fee, and dies: the wife
 “ refuses the estate limited to her by the feoffment, and brings a
 “ *cui in vitâ*, not against the heir of her husband, but against
 “ *C.* in the remainder; which proves, that upon such refusal the
 “ remainders, being by way of estate executed by feoffment,
 “ vested presently in *C.*

“ We come next to consider by what means remainders or re-
 “ versions may be discontinued, barred, and destroyed, and by
 “ what not; and therein of the remedies for him in the rever-
 “ sion or remainder by entry, action, or receipt. And here it will
 “ be necessary to distinguish between the acts of the tenant in
 “ possession solely, and the acts of the tenant in possession
 “ jointly, or with the concurrence of him in the remainder or the
 “ reversion; the acts of the tenant in possession solely, or such
 “ as are done or suffered either by the tenant for life or years, or
 “ by the tenant in tail. And of these, some only divest or dis-
 “ place the remainder or reversion, but make no bar or discon-
 “ tinuance; some both divest and displace the remainder or re-
 “ version, and also cause a bar or discontinuance: and some
 “ neither divest nor displace the remainder or reversion, and by
 “ consequence make no bar or discontinuance.

Co. Lit. 252. a.
 Lit. sect. 611.
 Co. Lit. 327. b.
 Cro. Car. 157.
 368. Plowd.
 373. b. Cro.
 Eliz. 220.
 1 Leon. 25.
 214. 2 Inst.
 519. Cro. Eliz.
 254. Saunders
 v. Tucker,
 7 Eliz. Jones's

“ As to the first — if tenant for life or years of lands, houses,
 “ or other things which lie in livery, make a lease for life, a gift
 “ in tail, or a feoffment in fee, levy a fine, or suffer a common
 “ recovery thereof; these acts divest and displace the remainder
 “ or reversion, but make no bar or discontinuance; for he in the
 “ remainder or reversion may enter presently for the forfeiture.
 “ But in case of the fine, if it be with proclamations, he in the
 “ remainder or reversion must enter within five years after the
 “ fine levied, else he is barred during the life of the tenant for
 “ life; but after his death, he has other five years to make his
 “ entry, within which if he does not enter or claim, he is then
 “ barred

“ barred for ever ; because his remainder or reversion being dis-
 “ placed and turned to a right, the operation of the stat. 4 Hen.
 “ 7. upon the fine bars such right, if no entry or claim be made
 “ within five years ; and here being two several rights, one to
 “ enter presently for the forfeiture committed in levying the fine,
 “ and the other after the death of the tenant for life, when the
 “ title of him in remainder or reversion falls into possession, the
 “ words of the statute have been expounded to give five years
 “ for the respective recovery of these several rights. But, in
 “ case of the feoffment or common recovery, if there be no fine,
 “ he in remainder or reversion may enter at any time, either
 “ during the life of the tenant for life by reason of the forfeiture,
 “ or at any time after his death in right of his remainder or
 “ reversion.

“ Lessee for years of some lands, and of others at will, and
 “ of others by copy of court-roll, having also lands of inherit-
 “ ance in the same town, leases all to *A.* for life ; and then levies
 “ a fine to *A.* of so many acres as included all the lands. Five
 “ years passed, he himself all the while continuing in possession,
 “ and paying the rent to the lessor. *A.* dies ; the lease for
 “ years expires : it was held by all the judges of *England*, ex-
 “ cept two, that the original lessor was not barred ; 1st, Because
 “ without making such lease for life, the lessee for years, at will,
 “ or by copy of court-roll, could not have levied such fine to bar
 “ his lessor by the intent of the statute of 4 Hen. 7. 2dly,
 “ Though such lease was a disseisin and turned the reversion of
 “ the lessor to a right, yet being made by fraud and covin, that
 “ statute never intended to establish such fines. And it has now
 “ been adjudged, that if lessee for years makes a feoffment, and
 “ levies a fine, and five years pass, the lessor shall have the other
 “ five years after the term expired to enter or make his claim, as
 “ well as when lessee for life makes a feoffment, and levies a fine ;
 “ for in that case he may have a writ of entry *in consimili casu*
 “ presently, as here he may have assise, and therefore this dif-
 “ fers from the case put in *Margaret Podger's* case, that if lessee
 “ for years be ousted, and he in reversion disseised, and the
 “ disseisor levy a fine with proclamations, and five years pass,
 “ the lessor is for ever barred, because his right first began upon
 “ the disseisin, and disseisor comes in without the consent of the
 “ lessee for years ; and therefore if he can defend his possession
 “ five years, he shall hold out the lessor for ever, who, by not
 “ pursuing his right within that time, hath let in the fine which
 “ works the bar by force of the statute ; but in this case all is
 “ transacted by the means and with the privity of the lessee, who
 “ is trusted with the possession. And though in *Farmer's* case
 “ there were many notorious circumstances of fraud, yet it does
 “ not follow but that the law is the same where no such evi-
 “ dence of fraud appears. And it would be of dangerous con-
 “ sequence to men's inheritances if it should be otherwise. But,
 “ where tenant for life is disseised, and the disseisor levies a fine,
 “ there, the right of him in the remainder or reversion does not
 “ begin

case. Mo. pl.
 192, 193. Co.
 78. 2 Brownl.
 157. MS. and
 1 Keb. 249.
 543 Fryer v.
 Kenn, 1 Chan.
 Cases, 279.
 1 Leon. 40.

3 Co. 77.
 Farmer's case.

Sir T. Raym.
 219. 1 Vent.
 241. 2 Vent.
 554. 2 Lev. 52.
 5 Keb. 57. 110.
 Whalley v.
 Tancred.

“ begin till the death of the lessee, as it does where the lessee
 “ for life himself levies a fine, or the lessee for years makes a
 “ feoffment and levies a fine; in which cases, if he in the rever-
 “ sion or remainder should be compellable to enter within the
 “ first five years, then, if the lessee for life or years should have
 “ charged or encumbered the land, they would hold it charged
 “ during the continuance of the particular estate in right. And
 “ the reason of the forfeiture in these cases being the breach of
 “ trust committed by the tenants in possession, it is reasonable
 “ he in reversion or remainder should have the same benefit
 “ where it is committed by a tenant for years, or where by a
 “ tenant for life in possession. *Quære*, if the law be the same on
 “ fine levied by copyholder for life or years; for if one ousts the
 “ copyholder, this is a disseisin to the lord, and both he and the
 “ copyholder on fine with proclamations, and five years, shall be
 “ barred for their several interests.

Leon. 99.

2 Lev. 202.
 Sir T. Jo. 65.
 3 Keb. 687.
 733. Smith v.
 Abell.

“ If tenant for life and a stranger levy a fine *come ceo*, &c.
 “ to him in the remainder for life, who accepts it, this is a for-
 “ feiture of both their estates; the one by giving, and the other
 “ by accepting, such fine, which passed a greater estate than both
 “ of them had; and therefore the remainder-man in fee may
 “ enter; because both are estopped by the fine. It was urged,
 “ indeed, that this was only the surrender of the first tenant for
 “ life, and could be no estoppel, because an interest passed; but
 “ the fine purports the contrary, in giving a fee, and therefore
 “ estops the parties to say against it.

1 Roll. Abr.
 854. pl. 5, 6.
 Hiblyn v.
 Slack, 857.
 pl. 5.

“ If there be *A.* lessee for life, remainder to *B.* in tail, re-
 “ mainder to *A.* in fee; *B.* and *A.* make a feoffment in fee to *C.*,
 “ this divests the remainder to *B.* and his own remainder like-
 “ wise; but *B.* may enter for the forfeiture, because his remainder
 “ hinders the closing of *A.*'s two estates, and then his estate for
 “ life, which was distinct, is, by the feoffment, forfeited and
 “ gone. But in this case, if *A.* had made a lease to *C.*, who af-
 “ terwards makes a feoffment in fee to *D.*, and then *A.* had re-
 “ leased all his right to *B.*, this had been no forfeiture to entitle
 “ *B.* to an entry; because *A.* did nothing to take out the
 “ remainder from *B.*, but the wrong and disseisin was done im-
 “ mediately to *A.* himself, and his release passed only his own
 “ right without affecting *B.*'s remainder.

1 Roll. Abr.
 858. pl. 5—12.
 15. 9 Co. 106.
 2 Inst. 118.

“ If lessee for life makes a feoffment in fee, he in the remainder
 “ or reversion, be it for life, in tail, or in fee, may enter for the
 “ forfeiture; and if he in the first remainder does not enter, he
 “ in the second or third remainder may enter to the use of the
 “ others, and by reason of his own interest; and so may the issue
 “ or heirs of any of those in remainder after their deaths; for
 “ the feoffment divests their several remainders, and gives them
 “ title of entry in their turns.

9 Co. 104.
 Margaret
 Podger's case.
 2 Brownl. 134.
 153. Mesme

“ *A.* copyholder for life, remainder to *B.* for life; *A.* accepts a
 “ bargain and sale of the freehold from the lord to him and his
 “ heirs, and then levies a fine with proclamations with five years;
 “ then *A.* dies. It was adjudged, that *B.* may lawfully enter,
 “ for

“ for the acceptance only of the freehold from the lord did not
 “ divest the remainder to *B.*, for *A.* was only passive in it, and
 “ accepted that which it was lawful for him to take, and for the
 “ lord to grant; and then the remainder of *B.* not being turned
 “ to a right, the fine could not attach upon it. And though, as
 “ between the lord and *A.*, the copyhold was determined and
 “ enfranchised by the accession of the freehold; yet, as to *B.*, it
 “ still continued copyhold, and then the fine levied of the free-
 “ hold by *A.* could not bind the copyhold of *B.*, unless it had
 “ been turned to a right, any more than a fine levied of land
 “ shall be a bar to the rent issuing out of it; and *B.*’s remainder
 “ by the custom not being to take effect till after the death of
 “ *A.*, he cannot enter sooner, nor take advantage of the for-
 “ feiture. But, if such fine had been levied after the death of *A.*,
 “ and then five years had passed, this had barred the remainder
 “ of *B.*, because then his title came in possession.

case, *per nosme Bagnall v. Tucker.*
 || But where the remainder is *contingent*, it is barred by the enfranchisement of the estate of the particular tenant. *Vide* 16 East, 406. ||

“ *A.* tenant for life, remainder to *B.*, remainder to *C.* in fee:
 “ *B.* being in possession levies a fine *come ceo*, &c. to a stranger;
 “ *A.* dies. It was agreed by the whole court, that by that fine
 “ the remainder in fee is not touched, or discontinued: but be-
 “ cause *B.* had done as much as in him lay for the disposing of
 “ the fee-simple by the fine, and had taken that upon him, the
 “ same amounts to a forfeiture. *Quære* of this case, how *B.*
 “ could be in possession unless by disseisin of *A.*, and then that
 “ displaces all the remainders, and turns them to a right, which
 “ right, as to his remainder, being but for life, is forfeited by
 “ the fine, as it would be by a feoffment in such case, though
 “ the fine or feoffment cannot touch or displace the remainder
 “ in fee, that being divested and displaced before. But, if the
 “ fine were levied by *B.* being in possession of a remainder, as a
 “ remainder only, then indeed it does not divest or displace the
 “ remainder in fee, and yet amounts to a forfeiture; as a fine
 “ levied by tenant for life of rent, common, &c. or other things
 “ which lie in grant, would be. Wherein the fine differs from a
 “ grant by deed, though it be enrolled; for such deed of things
 “ which lie in grant neither displaces the remainder, nor amounts
 “ to a forfeiture of the particular estate. *Quære* the reason of
 “ the diversity.

1 Leon. 40.
 Braybrook’s case.

Co. Litt. 251. b.

Ibid.

“ A right of a particular estate may be forfeited; and he who
 “ hath but a right of a remainder or reversion may take advantage
 “ thereof: as, if lessee for years be ousted, or lessee for life be
 “ disseised, and levy a fine to a disseisor, or a stranger; or, if the
 “ lessee for years bring an assize, or the lessee for life a writ of
 “ right, accept a fine *come ceo*, &c. of a stranger; these are for-
 “ feitures of their several rights, for which he who hath but a
 “ right of remainder or reversion may enter presently upon the
 “ disseisor.

Co. Litt. 252. a.
 Co. 2. 55.
 1 Leon. 264.

“ At the common law, if lands were given to one for life, re-
 “ mainder to another in fee, and a stranger brought a feigned
 “ action or *præcipe* against the tenant for life, who suffered judg-
 “ ment to go against him by default or confession, without pray-

Co. Litt. 280,
 281. a. 362.
 2 Inst. 345.
 Co. 88. 10 Co.
 44, 45.

“ ing

2 Leon. 64.
 4 Leon. 129.
 Booth, 151.
 60. 70. Brook,
 tit. Forfeit, 8.
 1 Co. 15. 59.
 Ed. 3. 16. 24.
 Ed. 3. 68. 5.
 Ass. 2. 22.
 Ass. 51. Co.
 Litt. 251, 252.
 a.

“ ing in aid of him in the remainder, this divested the remainder,
 “ and turned it to a right. And yet he in the remainder had no
 “ remedy to recover it, unless he were once seised, as by entry
 “ upon the tenant for life before such recovery; in which case,
 “ after his death, he might maintain a writ of right against the
 “ recoveror upon such seisin. And whether any formedon in re-
 “ mainder lay in such case, the books are not agreed. But if such
 “ feigned *præcipe* were brought against tenant for life, and he let
 “ judgment go by default, or confession, without praying in aid of
 “ him in the reversion, this was a forfeiture of his estate for life.
 “ And yet he in the reversion had no other remedy but by a writ
 “ of right. The reason seems to be, the credit which the law
 “ gave to such recoveries being had in courts of record; and be-
 “ cause, for aught appeared to the contrary, the demandants might
 “ have good title to the land; and therefore the law would not
 “ suffer such recoveries to be impeached, but in an action of an
 “ higher nature, as the writ of right was. There were likewise
 “ other acts of record by the tenant for life or years, which
 “ amounted to a forfeiture of their estates; as, if tenant for life
 “ in a feigned *præcipe* brought against him pleaded in chief,
 “ vouched, or prayed in aid of a stranger, or in a writ of right.
 “ So, if in a writ of entry *in casu proviso* by a stranger, sup-
 “ posing the reversion to be in him, the tenant for life confess-
 “ the action; or in waste against him by a stranger plead *null*
 “ *waste*; so, if lessee for years being ousted bring assize or lose in a
 “ *præcipe*, and bring error for error in the process; these and such
 “ like are agreed to be forfeitures of their estates. But, whether
 “ he in the reversion or remainder might enter, or were driven to
 “ his writ of right, or what other remedy he had, does not seem
 “ clear from the books: but the cases where the tenant for life lost
 “ in a feigned *præcipe* by default or reddition, that is, confession,
 “ being the most frequent, and the prosecuting the writ of right
 “ by those in remainder or reversion being both tedious and ex-
 “ pensive, the first statute that provided remedy in those cases was
 “ the statute of W. 2. c. 3., which gives power to him in the re-
 “ version to come in before judgment, and pray to be received
 “ to defend his right; or, if he did not come in, and judgment
 “ was given by default or reddition, then the statute gave him the
 “ writ of entry *ad communem legem* against such recoveror after
 “ the death of the tenant for life, wherein he might set forth his
 “ title; and if the tenant could shew no better title than only the
 “ recovery, that should not avail him. So, where the recovery
 “ against the tenant for life was by *nihil dicit*, this being an equal
 “ mischief, was taken to be within the same statute. And so was
 “ he in the remainder as well as he in the reversion. But where
 “ the recovery was upon feint or feigned pleading of the tenant
 “ for life, this, not being within the statute, was remedied by
 “ 13 R. 2. c. 17. which gives rescuit likewise in that case. But,
 “ to elude the force of this statute, the tenant for life would con-
 “ trive to have the *præcipe* and recovery against him carried on so
 “ secretly, that he in the reversion or remainder should have no
 “ notice

“ notice of it time enough to pray to be received, and then, if
 “ the recovery were against him upon feint or false pleading, this
 “ not being within the former statute of W. 2. or remedied by
 “ this of R. 2. otherwise than by giving rescuit, which by such
 “ secret recovery was prevented, he in the reversion or remainder
 “ had no other remedy than what he had at common law be-
 “ fore either of the statutes; therefore, to obviate this mischief,
 “ another statute was made, 32 H. 8. c. 31., which makes void
 “ all recoveries had by assent of the parties against tenant for
 “ term of life, unless it were by good title, or the assent of him
 “ in the remainder or reversion. But the tenants for life found a
 “ way to get out of this statute likewise, by making a feoffment
 “ in fee with warranty, and before he in the remainder or re-
 “ version could have notice to enter for the forfeiture, would
 “ cause a *præcipe* to be brought against the feoffee, and come in
 “ themselves by way of voucher; and so the recovery, not being
 “ against the tenant for life, as the statute speaks, was out of the
 “ statute, and remained at common law. So, if such tenant for
 “ life was not disseised, and a *præcipe* brought against the dis-
 “ seisor by covin, and he vouched the tenant for life, and so a re-
 “ covery was had; this likewise was out of the statute; for which
 “ reasons this statute, being defective, was repealed, and another
 “ statute made, 14 Eliz. c. 8., which makes void all recoveries by
 “ agreement and covin had either against the tenant for life him-
 “ self, or where he comes in by way of voucher only, unless he
 “ in the reversion or remainder assent of record, *viz.* upon
 “ voucher, aid prier, or rescuit. But if recovery be had against
 “ tenant for life without consent or covin, though without title,
 “ this divests the remainder or reversion, so that they cannot
 “ enter within any of the statutes, but remain yet at common law.
 “ And all these statutes extend to all sorts of tenants for life.

1 Bend. 152.

pl. 194.

Co. 15.

|| *Vide* 3 Taunt.
375.||

Co. Litt. 362. a.

1 Co. 15.

“ *A.* tenant for life, remainder to *B.* in tail, remainder to *C.*
 “ in fee; *A.* by indenture inrolled in Chancery bargains and sells
 “ the lands to *D.* and his heirs, and then *D.* suffers a common
 “ recovery with voucher of *A.* before the statute 14 Eliz., and
 “ execution was had thereupon. Yet it was adjudged a for-
 “ feiture, for which he in the remainder might enter presently
 “ without aid of any of the statutes; for a common recovery is
 “ but a common assurance or conveyance; and, if no use be de-
 “ clared, shall be to the use of tenant for life. And by the pro-
 “ ceedings in it *constat curiæ*, that the recoveror hath no title.
 “ And the suing of execution, which is but in pursuance and
 “ contemplation of the first act, cannot be any bar to the entry
 “ of him in the remainder or reversion. Note: where tenant for
 “ life bargains and sells lands to *A.* and his heirs, and after levies
 “ a fine *come ceo*, &c. to *A.*; this was held a forfeiture of the bar-
 “ gainee, not of the bargainor, who at the time of the fine, which
 “ alone made the forfeiture, had nothing to forfeit.

1 Co. 14.

Mo. pl. 423.

2 Leon. 60

4 Leon. 125.

Co. Litt. 362. a.

10 Co. 44, 45.

2 Co. 74.

5 Co. 40.

Sir William

Pelham's case.

1 Leon. 264.

“ *A.*, tenant for life, remainder to *B.* for life; *B.* reciting that
 “ he had an estate in fee, levies a fine *come ceo*, &c. to a stranger,
 “ who brings *quid juris clamat* against *A.*, and *A.* makes de-
 “ fault,

Cro. Eliz. 757.

Hold v. Lister.

“ fault, and thereupon judgment was, that he should attorn,
 “ which he accordingly did. And the court held, that his
 “ estate for life was not forfeited, because the attornment
 “ was by compulsion of the court upon his default of appear-
 “ ance, and not voluntarily. And there two justices held,
 “ that the estate of *B.* was not forfeited by the fine, because
 “ this made no discontinuance, and nothing passed by it but
 “ what he might lawfully grant. But two other justices held
 “ the contrary, and that it is not the discontinuance only that
 “ makes the forfeiture, but where he doth any thing in a court
 “ of record whereby his will appears to disinherit him in the
 “ remainder or reversion; as, praying in aid of a stranger, &c.
 “ And this seems the better opinion. For attornment *in pais* to
 “ the grant of a stranger works no forfeiture; but attornment of
 “ record does, where *in quid juris clamat* the tenant for life
 “ comes in, and submits in court to attorn. But the attornment
 “ in the principal case being by judgment of the court upon the
 “ default makes the difference.

“ In *quid juris clamat* the tenant says, that he holds in tail of
 “ the gift of one *A.*; the plaintiff says, that *A. ne dona pas*: and
 “ upon issue it was found for the plaintiff. And *Brown* held
 “ that the plaintiff might enter presently, because by such claim
 “ the tenant for life had forfeited his estate; but whether the
 “ plaintiff should upon the verdict have judgment to recover the
 “ land, was the doubt.

“ In an assize of fresh force by *A.* against *B.* and *C.*, it was
 “ found, that one *D.* was seised of the lands in question, and by
 “ indenture made a lease for three years to *B.* at such a rent; and
 “ after, by indenture inrolled, bargained and sold the reversion
 “ to the plaintiff *A.* and his heirs, who after, for rent arrear,
 “ brought debt in *C. B.* against *B.*, and he pleaded, that after the
 “ said lease, and before the grant to *A.*, *A.** by deed inrolled ac-
 “ cording to the custom (*a*) bargained and sold to him, upon
 “ which they were at issue. And if this was a forfeiture of *B.*’s
 “ lease was the question, on which the jury doubted, and referred
 “ it to the court: and it was adjudged to be a forfeiture.

“ It would be too large a field here to enter into all the cases
 “ and diversities wherein the particular tenant ought to pray in aid
 “ of or vouch him in the reversion or remainder, and where he
 “ in the reversion or remainder may pray to be received, and
 “ where not; and what acts of the particular tenant shall amount
 “ to a forfeiture, whereof and when he in the remainder or re-
 “ version shall take advantage, and in what manner, &c., these
 “ being large enough to make distinct heads of themselves.

“ I shall proceed therefore to the second diversity, to shew
 “ what acts of the tenant in possession make a discontinuance or
 “ bar of the remainder or reversion, and what not.

“ If tenant in tail in possession of lands, houses, or other things,
 “ which lie in livery, make a feoffment in fee, a gift in tail, or a
 “ lease for another man’s life, or levy a fine thereof; these acts
 “ divest and displace the remainder or reversion, and amount
 “ to

Co. Litt. 252. a.
 2 Leon. 64. 66.
 4 Leon. 129.
 132.

1 Mo. pl. 108.

Walston
 Dixe’s case,
 Moor, 211.
 pl. 352.

||*D.||

||(a) Of the
 city of Lon-
 don.||

Co. Litt. 327. a.
 3 Co. 85.
 ||Et vide Mr.
 Butler’s note
 (2). Co. Lit.
 327. a.||

“ to a discontinuance; for avoiding whereof, after the death of
 “ the tenant in tail without issue, those in reversion or remainder
 “ are put to their formedon, and cannot enter; because then the
 “ alienee might lose the benefit of the warranty annexed to such
 “ alienation.

“ So, if a man seised of lands in tail, in fee, or for life, in
 “ right of his wife, made a feoffment in fee, a gift in tail, or a
 “ lease for another man's life; this divested the wife's estate, so
 “ that after her husband's death she could not enter, but was
 “ driven to her *cui in vitâ*; for the safeguard of the warranty
 “ that might be annexed to such alienation of the husband made
 “ a discontinuance of the wife's estate-tail, and of the reversion
 “ or remainders depending thereon, for avoiding whereof after
 “ her husband's death she was driven to her *cui in vitâ*, and
 “ after her death without issue, those in remainder or reversion
 “ to their several formedons.

Co. Litt. 326.
 2 Inst. 342,
 343. 681.
 8 Co. 71.

“ So, if in a *præcipe* brought against the husband and wife, of
 “ the wife's lands, the husband lost by default, reddition, or *nihil*
 “ *dicit*, if he were seised for life, or in tail, in her right, she was
 “ driven to her *cui in vitâ* after his death; but, if in fee, then
 “ she had no other remedy but a writ of right after his death.
 “ Which last case was remedied by the statute of W. 2. c. 3., which
 “ gives her a power to come in and pray to be received before
 “ judgment, or to bring her *cui in vitâ* after his death. But for
 “ an effectual remedy both for the wife and those in remainder or
 “ reversion against all alienations of the husband solely or jointly
 “ with his wife, except it were by fine or common recovery,
 “ wherein both joined, and as well of lands given to them jointly
 “ during the coverture as of lands whereof the wife was solely
 “ seised; and also for remedy against all recoveries by default,
 “ reddition, *nihil dicit*, or feint pleader of the husband, the statute
 “ of 32 H. 8. c. 28. gives the wife, and those in remainder or re-
 “ version, power to enter in their several turns; and so it does to
 “ their several issues or heirs, notwithstanding any fine, feoffment,
 “ or other act, made, done, or suffered by the husband only.
 “ And yet, if the husband and wife join in a feoffment of the
 “ wife's lands, this being in effect the feoffment of the husband
 “ only, is within the relief of the statute; so, if the lands were
 “ given to the husband and wife and their heirs during the co-
 “ verture, all acts of the husband to defeat this estate are equally
 “ provided against by the equity of this act, as if the wife had
 “ the sole seisure thereof. But, if the husband levies a fine with
 “ proclamations of his wife's lands, and dies, the wife or her
 “ issue must enter within five years after his death, and those in
 “ remainder or reversion within five years after the death of the
 “ wife without issue, else they will be barred by another statute,
 “ viz. 4 H. 7. for such fine makes a discontinuance of the wife's
 “ estate, and of those in remainder or reversion at common law.
 “ And though 32 H. 8. aids the discontinuance by giving them
 “ an entry; yet it does not take away the bar which is wrought
 “ by their laches upon the other statute. Also the issue cannot
 “ enter

“ enter during the husband’s life, either by the common law or
 “ this statute.

“ If tenant in tail in possession suffers a common recovery, this
 “ not only divests and displaces the estate-tail, and all remainders
 “ and reversions depending thereon, but also by reason of the
 “ supposed recompence bars them for ever ; as is confirmed by
 “ every day’s practice. But then he who suffers such recovery
 “ ought to be perfect tenant in tail, and also seised by force of
 “ the tail.

3 Co. 6.
 Moor, 210.
 Owen v. Mor-
 gan, 3 Co. 6.
 Cuppledike’s
 case.

“ For, where husband and wife were seised of lands to them
 “ and the heirs of their two bodies, or to them and the heirs of
 “ the body of the husband with remainder over, and the stranger
 “ brought a *præcipe* against the husband only, who vouched over,
 “ and thereupon a common recovery was had ; the wife died ;
 “ and then the husband died without issue ; it was adjudged, that
 “ this recovery should not bind the remainder ; for between the
 “ husband and wife are no moieties, nor has the husband power
 “ to sever the jointure, or to dispose of any part of the land with-
 “ out his wife, so that the *præcipe* being brought against him
 “ only, the recompence cannot enure ; because the wife had a
 “ joint estate with him at the time of the recovery, and did not
 “ join ; and to a moiety it cannot enure, because here are no
 “ moieties between the husband and wife ; and therefore the re-
 “ compence, recovered by the husband only, cannot enure to the
 “ remainder, which depends upon a joint and undivided estate
 “ made to the husband and wife. And then the recovery, which
 “ binds only in regard of the recompence in value, cannot in this
 “ case bind either the issue, if there were any, or the remainder,
 “ since neither of them can take advantage, or sue execution of
 “ the recompence in value. And though the husband survived,
 “ this will not mend the case ; because the law is to judge of it
 “ as it was at the time of the recovery, and not as it falls out by
 “ an after accident. But, if the estate had been to the husband
 “ and wife, and the heirs of the body of the husband, and he
 “ had levied a fine, or made a feoffment in fee, and then come in
 “ as vouchee in a common recovery, this had barred both the issue
 “ in tail and him in the remainder ; because, by the feoffment
 “ or fine, the whole estate was discontinued, and the feoffee
 “ or conusee sole and perfect tenant to the *præcipe* ; and then,
 “ when the husband came in only as vouchee, he came in in
 “ privity and representation of all the estates he ever had, and
 “ was to make his defence by them, which if he does not, but
 “ calls upon another to defend him, and that other undertakes it
 “ accordingly, and by his misbehaviour suffers the demandant to
 “ get judgment, he is bound to make a recompence equal to
 “ what the other lost ; and such recompence, being to be in lieu
 “ thereof, is to go in the same manner as the estate he was bound
 “ to defend should have done, and, by consequence, to the issue,
 “ and those in remainders or reversion ; and then they having, in
 “ supposition of law, a recompence equivalent to what they lost,
 “ have the effect of the first supposed warranty, and cannot im-
 “ peach

“ peach the recovery, or complain of any hardship done them.
 “ But, if the husband and wife had been jointly seised to them
 “ and the heirs of their two bodies, with remainder over, and
 “ the husband had made such feoffment, or levied such fine, and
 “ then come in as a vouchee, it seems doubtful, if the issue in
 “ tail, or the remainder, should be barred; because the wife, hav-
 “ ing a joint estate of inheritance with the husband, was no
 “ party to the voucher, and therefore the recompence could not
 “ enure to the inheritance of the whole. And to a moiety it
 “ could not, because there are no moieties between them. *Quære*
ergo.

“ The tenant in tail at the time of the recovery, if the *præcipe*
 “ be brought against himself, ought to be then seised by force of
 “ the estate-tail in possession (*a*) otherwise the recovery will be no
 “ bar either to his issue or those in remainder or reversion; be-
 “ cause the recompence in value, which causes the bar, will go in
 “ lieu of the estate he then had, which was recovered, and not in
 “ lieu of the estate-tail which then he had not, nor, by conse-
 “ quence, could lose. Therefore, if tenant in tail be disseised,
 “ and the disseisor die seised, and his heir be in by descent, and
 “ then the tenant in tail enter upon the heir and disseise him,
 “ and, upon a *præcipe* brought against him, suffer a common
 “ recovery; or, if the tenant in tail take back an estate in tail,
 “ or in fee, from the disseisor himself; or discontinue the estate-
 “ tail, and enter upon the discontinuee, and then suffer such com-
 “ mon recovery on a *præcipe* against himself; these recoveries bar
 “ neither the issue in tail nor remainders; because the recompence
 “ in value goes to the estate which he had at the time of suffer-
 “ ing such recovery, which not being the estate-tail, cannot be a
 “ bar to the estate-tail, or the remainders or reversion depend-
 “ ing thereon. But, if the *præcipe* had been brought against the
 “ discontinuee, disseisor, &c., and the tenant in tail had come in
 “ by way of voucher, and vouched over the common vouchee,
 “ and so a recovery had been had, this would bar the estate-tail
 “ and remainders or reversions depending thereon: because he,
 “ coming in only as vouchee, comes in in privity and representa-
 “ tion of the estate-tail, and for defence thereof, and cannot come
 “ in for any other respect; and therefore the recompence in value
 “ which he recovers against the common vouchee goes to that
 “ estate-tail, and the remainders or reversions depending thereon,
 “ and so makes good the recovery against the tenant, none hav-
 “ ing any loss but the last vouchee, and that occasioned by his
 “ own default or contempt.

“ Tenant in tail covenants to stand seised to the use of himself
 “ for life, and after, to other uses, which were totally void; be-
 “ cause by such covenant only he could dispose of no more than
 “ for his own life: and after a *præcipe* being brought against
 “ him, and a common recovery had with single voucher; it was
 “ held, this recovery did not bar the remainder or reversion,
 “ because by such covenants *quoad* himself, the tenant in tail,
 “ was not seised by force of the tail, and then the recompence
 “ could

Plow. 8. Mau-
 zell's case.
 Co. 3. 5. b. 58.
 Mo. 256.
 8 Co. 77, 78.
 [(a) That the
 tenant in tail
 must be in
 possession,
vide 1 Co. 76.
 Cro. Eliz. 827.
 1 H. Bl. 269.
 1 Barn. & C.
 238. ||

Yelv. 51.
 Moor, pl. 940.
 Freshwater v.
 Ross. Moor,
 pl. 105. 2 Co.
 52. Cro. Eliz.
 279. 471. 895.

“ could not enure to the estate-tail and remainders. *Sed quare*,
 “ for *Moore* reports the same case otherwise, because, he says,
 “ he was tenant in tail as he was before notwithstanding such
 “ covenant.

Mo. pl. 226.

|| *Vide* Co. Lit.
 332. b. note
 (1).||

Co. Litt. 347.
 a. b. 333. Sir
 T. Raym. 57.

Co. Litt. 332.
 b. sect. 619.

Co. Litt. 333.
 sect. 620, 621,
 622. 339. sect.
 638.

“ Tenant in tail makes a lease for twenty-one years, and after
 “ makes a feoffment in fee with letter of attorney to enter and
 “ make livery; the attorney enters and ousts the lessee, and
 “ makes livery accordingly: and this was held a discontinuance
 “ of the estate-tail and remainders; for the lease being but for
 “ years, he was seised by force of the tail; and though livery
 “ by him or his attorney was a wrong to the termor by putting
 “ him out of possession, yet such livery gave away nothing from
 “ the termor, who may re-enter when he will, but passed only
 “ the freehold which the tenant in tail had or may give away by
 “ livery. But, if tenant for life be with remainders in tail, and
 “ he in the remainder in tail enter upon the lessee for life, and
 “ disseise him, and then make a feoffment in fee; or, if tenant
 “ in tail make a lease for life, and after disseise the lessee for
 “ life, and make a feoffment in fee, and the lessee die, and then
 “ the tenant in tail die without issue; he in the reversion or
 “ remainder may well enter, because the tenant in tail at the
 “ time of the feoffment was not seised of the freehold and
 “ inheritance of the estate-tail, but of another estate gained by
 “ disseisin. But, in the first case, if the tenant in tail after such
 “ lease for years had only granted the reversion in fee, and the
 “ lease had expired; though the grantee had entered in the
 “ life of the tenant in tail; yet this had made no discontinuance,
 “ because neither the lease for years, nor the grant of the re-
 “ version, divested any estate, but passed only what the grantor
 “ might lawfully grant, *viz.* an estate for his own life.

“ If tenant in tail make a lease for the life of the lessee, and
 “ after grant the reversion in fee, and the tenant for life attorn;
 “ or, if he by indenture enrolled bargain and sell the reversion,
 “ and then the tenant for life die, and the grantee enter in the
 “ life of the tenant in tail; this is a discontinuance equivalent to
 “ a feoffment, and puts the issue and those in remainder or re-
 “ version to their several formedons. And so it would be, if the
 “ tenant for life surrendered to the grantee, or the grantee re-
 “ covered in waste, or entered for a forfeiture in the life of the
 “ tenant in tail; the grantor by the attornment and entry comes
 “ in in continuance of the new reversion, which was gained on
 “ making the lease for life. But, if the tenant in tail had died
 “ in the lifetime of the lessee, and then the lessee had died, and
 “ the grantee entered; yet the issue or those in remainder or re-
 “ version might well enter upon him; because there was no dis-
 “ continuance executed in the life of the lessee longer than for
 “ the life of the lessee, and by his death, that being determined,
 “ the grantee, who *primâ facie* took only during the continuance
 “ thereof, has no right after the death of the tenant in tail to
 “ enter to enlarge the discontinuance. And though such grant
 “ of the reversion were with warranty, yet it would be all one;
 “ for

“ for the estate itself to which the warranty was annexed being determined, the warranty cannot have continuance or enlarge the estate. So, if after the death of the tenant in tail his issue had granted the reversion, though with warranty, and the tenant for life had attorned, and died, and then the grantees entered; yet the issue of that issue, or those in remainder or reversion, might well enter upon him; because the discontinuance was in effect but for life; and the issue who granted the reversion not seised by force of the estate-tail.

“ If tenant in tail make a lease for life, remainder over in fee, and die in the life of the lessee for life; yet this is an absolute discontinuance, and takes away the entry of the issue or those in remainder or reversion: because the estate for life and remainders make but one estate, and all pass by the same livery. So, if tenant in tail make a lease for life, and after release to the lessee and his heirs, this is an absolute discontinuance, because the whole fee is executed in the life of the tenant in tail.

Co.Litt.333.b.

“ It is a rule in our books, that the estate-tail cannot be discontinued but where he who makes the alienation was once seised by force of the tail, unless it be by reason of a warranty: as, if the grandfather tenant in tail be disseised by the father, who makes a feoffment in fee, and dies, and then the grandfather dies, the son may enter upon the feoffee, and by consequence so may they in remainder or reversion in their turns. For here can be no discontinuance of the estate-tail or remainders; because the father who made the feoffment was not seised by force of the tail, but of the estate gained by the disseisin. But, if the feoffment had been with warranty, this had wrought the effect of a discontinuance, and taken away the son's entry for preservation of the warranty, and to prevent circuitry of action. So, if tenant in tail be disseised, and he or his issue after his death release to the disseisor with warranty; this in effect amounts to a discontinuance, and takes away the entry of those who have right; which, without the warranty, it would not have done; and the issue, being never seised by force of the tail without such warranty, could not by any means have discontinued the tail.

Co. Litt. 265.
a. b. 333. b.
339. a. b. sect.
637. 601. 640,
641.

“ Another rule is, that to make a discontinuance, the alienee must be in by force of the alienation of the tenant in tail himself, and not of any other. Therefore, if tenant in tail makes a lease for life, and after grants the reversion to *A.*, and the lessee attorns, and then *A.* grants this reversion to *B.*, and the lessee attorns, and dies in the life of the tenant in tail; though *B.* enters, yet this is no discontinuance, because *B.* is not in of the grant of the tenant in tail, but of *A.* his grantee. *Quære rationem.*

Co.Litt.333.b.

“ *A.* tenant in tail, remainder to *B.* in tail, reversion to *A.* in fee. *A.* by indenture enrolled bargains and sells the lands to *C.* and his heirs, and after levies a fine thereof to *C.* and his heirs.

10 Co. 95.
Edward v.
Seymours,

1 Bulstr. 62.
Mesme case,
per nosme
Heywood v.
Smith.

“ heirs. *C.* enfeoffs *D.*, and then *A.* dies without issue, and *B.*
“ enters. It was adjudged, that by the bargain and sale to *C.*
“ he had only an estate descendible to him and his heirs during
“ the life of *A.*, and also the reversion in fee expectant upon the
“ estate-tail of *B.* *Secondly*, That the fine levied after made no
“ discontinuance, not so much as a divesting or displacing of the
“ remainder to *B.*, but only enured to corroborate the estate of
“ *C.*, and by force of the statutes 4 H. 7. and 32 H. 8. made it
“ to have continuance so long as *A.* should have issue of his body:
“ and that it operated only as a release or confirmation upon the
“ estate, which passed before by the bargain and sale, and was
“ guided by it. But, if the fine had been levied before the bar-
“ gain and sale, or before the enrolment of it, this had made a
“ discontinuance of the estate-tail and remainders. *Thirdly*, It
“ was adjudged, that the feoffment of the conusee made no dis-
“ continuance of the remainders to *B.*, so as to take away his
“ entry; for none can discontinue the reversion or remainders,
“ but he only who hath the estate-tail; and therefore if tenant
“ in tail grant *totum statum suum* to one who makes a feoffment
“ in fee, this will not take away the entry of him in the reversion
“ or remainder: and here, the remainder to *B.* was not so much
“ as divested or displaced, for the conusee had but a fee deter-
“ minable upon the death of *A.* without issue, and also the re-
“ version in fee: and therefore when he who had a fee, though
“ it were determinable, gave a fee, this did no wrong to the
“ heirs of *A.*, nor by consequence to *B.* in remainder; as a feoff-
“ ment by tenant for life or in tail does, who, having no fee
“ themselves, cannot give a fee to others without plucking it out
“ of the reversion or remainders; and therefore in one case it is
“ a forfeiture of the estate for life, and in the other a discontinu-
“ ance of the estate-tail and remainders. But here it is no wrong
“ or discontinuance to either, and therefore the entry of *B.* in
“ remainder lawful.

Cro. Eliz. 62.
Koen v. Cope.
8 Co. 34.
Co. Litt. 335.a.
Vaugh. 385.
accord. Cro.
Car. 156.
Salvin v. Clerk,
Dyer, 48, 49.
contra; but
there, in the
margin, is
cited 1 Ed. 6.
to be resolved
by all the jus-
tices, that
such lease
shall not bind
him in re-
mainder. Hil.
40 Eliz. in C.B.
Reeve v. Cox,

“ *A.* tenant in tail, remainder to *B.* in tail: *A.* makes a lease
“ for three lives, warranted by 32 H. 8., and dies without issue:
“ the warranty descends upon *B.* who was his heir. It was held,
“ that by the death of *A.* without issue, the lease for three lives
“ was determined, and was no discontinuance, nor could bind
“ him in the remainder; because the estate out of which it was
“ derived was at an end, and then the lease to which the war-
“ ranty was annexed being determined, the warranty was deter-
“ mined also, and cannot bar him in the remainders. And
“ *Vaughan* says, that the case of *Salvin v. Clerk*, in which it is
“ reported, that such lease is a discontinuance, and that there-
“ fore a subsequent fine with warranty by the tenant in tail, which
“ on his death without issue descended to him in the remainder
“ whose estate was discontinued, was a bar of the remainders;
“ *Vaughan* says, that this case is all false and misreported; for
“ the lease being warranted by 32 H. 8. was no discontinuance
“ or tort; and then there was no new reversion gained to which
“ the warranty could be annexed; but being annexed to the
“ estate-

“ estate-tail, determined with it, as did the lease, and so could not touch him in the remainder.

adjudged accordingly, and 4 Mar. accord. *per cur.*

“ Another point in *Salvin v. Clerk*'s case was this: *A.* tenant in tail, remainder to *B.* in fee. *A.* makes a lease for three lives, warranted by 32 H. 8. and after levies a fine with proclamations, and dies without issue. Five years after his death elapse, and then the lease for three lives expires. *B.* and his heirs are barred; because the right to have formedon in remainder, admitting such lease a discontinuance, or to enter, if it were not, accrued immediately on the death of *A.* without issue; and he had no other right after the determination of the lease for three lives than he had before; for by the death of *A.* without issue, that lease, or the right of his continuance, was at an end. And this differs from the case of a fine levied by tenant for life; for there, he in the remainder or reversion hath two titles, one to enter presently for the forfeiture, the other to enter within five years after the death of the tenant for life, when the remainder or reversion falls into possession; but here he hath but one title, *viz.* after the death of the tenant in tail without issue, and therefore ought to have pursued it by entry or action within five years after such death without issue.

Cro. Car. 156. *Salvin v. Clerk.*

“ *A.* tenant in tail, remainder to *B.* in fee. *A.* makes a lease for three lives, warranted by 32 H. 8., and dies without issue; and before any entry, *B.* grants his remainder by fine. And if the conusee might enter and avoid the lease, was the question. *Dyer* and *Mead* held he might; because by the death of tenant in tail without issue, the lease was not avoidable only, but absolutely void, the estate out of which it was derived being determined; and the lease being warranted by the statute made no discontinuance; for if it had, then such grant of the remainder before avoidance of the lease had established and made it unavoidable.

Godb. 9. pl. 12.

“ Another rule is, that none can discontinue an estate-tail without he also discontinues the reversion or remainder; for the discontinuance working a wrong, and passing a larger estate than the person who makes it has by law power to pass, such estate must be made up out of the reversion or remainder. If therefore the reversion or remainder be in such person that the tenant in tail cannot draw it out, or if he who takes the estate has already the reversion or remainder, so that there is no occasion to draw it out for making good the estate given him by the tenant, there the alienation of the tenant in tail makes no discontinuance; because, for want of the reversion or remainder, he deals only with his own estate, and that being in tail, he can give no more thereof than for his own life only, and by consequence after his death his issue may well enter.

Co. Litt. 339. sctt. 629.

“ Therefore, if there be tenant in tail, remainder or reversion to the king, and the tenant in tail make a feoffment in fee, a gift in tail, or a lease for life, this is no discontinuance; but after his death his issue may enter; for the remainder or re-

version

Co. Litt. 372.
 b. 335. Dyer,
 32. a. Plow.
 555. a. Poph.
 63. Brook, tit.
 Assurance, 6.
 tit. Fines levy,
 121. tit. Dis-
 continuance of
 Possession, 2.
 tit. Recovery,
 31. b. tit. Tail,
 41. Bendlow,
 223. Plow. 254.

Co. 878. Hob.
 335. 2 Co. 19.
 Mo. pl. 259.
 Jackson v.
 Darcy, 5 Leon.
 57. and 4 Leon.
 40. Mesme
 case. Co. Litt.
 372, 373.
 || On this stat.
vide Co. Lit.
 372. b. n. 3.
 Cruise on Rec.
 (2d edit.) 255.
 5 Cru. Digest,
 c. 13. s. 9. ||

2 Co. 15. Mo.
 195. Wise-
 man's case.

“ version being in the king, the subject cannot by any act of his
 “ without title draw it forth, and then whatever estate he departs
 “ with must be wholly derived out of his own possession, which
 “ being in tail only, he can dispose no more thereof than for his
 “ own life only; and by consequence after his death his issue
 “ may well enter. But, if such tenant in tail had suffered a com-
 “ mon recovery, this in respect of the supposed recompence had
 “ barred the estate-tail, and all remainders depending thereon, ex-
 “ cept the remainders or reversions to the king, which by such
 “ feigned recovery and recompence could not be touched. So, if
 “ such tenant in tail had levied a fine with proclamations after
 “ 4 H. 7. this had bound the issue by virtue of that statute,
 “ but made no discontinuance either of the estates-tail or the
 “ reversion or remainder depending thereon; because the re-
 “ version or remainder in the king prevented such discontinuance
 “ for the reasons before given: and then those in the interme-
 “ diate reversion or remainder might enter after the death of the
 “ tenant in tail without issue, as if no such fine had been levied.
 “ But now by 34 H. 8. c. 20. it is provided, that where the king
 “ gives or otherwise provides lands to one in tail, no feigned re-
 “ covery by assent of parties had against such tenant in tail of
 “ any lands, tenements, &c. whereof the reversion or remainder
 “ at the time of such recovery is in the crown, shall bind or con-
 “ clude the heirs in tail; but that after the death of such tenant
 “ in tail, the heirs in tail may enter, the said recovery or any
 “ other thing done or suffered by or against such tenant in tail
 “ to the contrary notwithstanding. Upon which last words this
 “ statute has been likewise extended to take off the force and
 “ effect of the fine levied by such tenant in tail of the gift or
 “ provision of the king, so as that the same shall not bind the
 “ issue; though *Hobart* says, this was an oblique and indirect
 “ strain upon the statutes. For the statute 32 H. 8. c. 36. which
 “ says, that that statute shall not extend to fines levied by tenant
 “ in tail, the reversion being in the crown, but that they should
 “ be of like force as if the statute had not been made; this did
 “ not at all mend the case of the issue in tail, and therefore that
 “ slip was helped by the judges upon the words of the following
 “ statute of 34 H. 8.; upon construction of which statute it was
 “ also held, that all intermediate reversions or remainders to
 “ common persons depending on such estate-tail of the gift or
 “ provision of the king, whereof the reversion or remainder was
 “ then in the king, were preserved likewise against such feigned
 “ recovery by the tenant in tail in possession; for their remain-
 “ der or reversion being barrable at common law, in regard the
 “ estate-tail whereon they depended was barred, now that statute
 “ having made provision against barring such estate-tail in pos-
 “ session, by consequence, preserves also the remainders or re-
 “ versions depending thereon.
 “ But this stat. 34 H. 8. extends only to estates-tail of the gift
 “ or provision of the king; therefore, if a common person by deed
 “ enrolled gives lands to *A.* in tail, remainder to *B.* in tail, re-
 “ mainder

“ mainder to the king in fee; or, if one who hath a remainder in
 “ fee, except upon an estate-tail of the gift of a common person
 “ by deed enrolled, grant such remainder or reversion to one for
 “ life, or in tail, remainder to the king in fee, and the tenant in
 “ tail in possession after suffers a common recovery; this bars all
 “ but the remainders to the king, as it did at common law. So,
 “ if he levies a fine with proclamations, this binds the issue as it
 “ did before; but, neither the king, nor those who have an in-
 “ termediate reversion or remainder; because it makes no dis-
 “ continuance, as has been shewn.

“ The king gave lands to one in tail, saving the reversion to him-
 “ self: the donee is disseised, and the disseisor levies a fine with
 “ proclamations, and five years pass. *Walmsley* held, this bound
 “ only the issue, in whose time the fine and non-claim was, and
 “ that his issue were at liberty to enter after his death by the sta-
 “ tute 34 H. 8. And though my Lord *Coke* cites this case to be
 “ resolved contrary, yet this is held in other books not to be law;
 “ for that would open an easy way to get out of the statute; and
 “ therefore, where such donee in tail, the reversion being in the
 “ king, bargained and sold the lands to one and his heirs, and
 “ died, and the vendee levied a fine, and five years passed with-
 “ out claim by the issue; yet the court seemed to be of opinion,
 “ that such issue was not bound; and if it were, that yet clearly
 “ his issue would be at large, and not bound by the fine.

“ Other diversities there are upon the said statute, which being
 “ not to the present purpose, I shall pass over, referring you to
 “ the books where they may be seen.

“ Another case wherein there can be no discontinuance of
 “ the estate-tail, unless the reversion or remainder be also dis-
 “ continued, is this: if tenant in tail enfeoffs him in the inter-
 “ mediate reversion or remainder, this is no discontinuance, but
 “ that after his death the issue in tail may well enter; because the
 “ livery being made to him who had the intermediate reversion
 “ or remainder, cannot be supposed to give him what he had al-
 “ ready, or to draw out an estate from him only to give it him
 “ again *eo instanti*; therefore, such livery being made of the pos-
 “ session can pass only so much thereof as the tenant in possession
 “ had power to depart with; and that being for his own life only
 “ leaves his issue at liberty to enter after his death. But, if *A.*
 “ were tenant in tail, remainder to *B.* in tail, remainder or rever-
 “ sion to *C.* in fee, and *A.* make a feoffment, gift in tail, or lease
 “ for life to *C.*, this discontinues the estate-tail and the remainders
 “ depending thereon; because there is room for the tortious oper-
 “ ation of the livery upon the first estates, before it comes to the
 “ last remainder or reversion in fee; and whether that be dis-
 “ continued or not, yet the force of the livery, reaching beyond
 “ the estate-tail in possession, must be a discontinuance thereof,
 “ and of the next remainder depending thereon, since it can have
 “ no other effect.

“ If tenant in tail make a lease for his own life, remainder to *Dyer*, s. pl. 15.

2 Co. 52. Mo.
 345. b. Sir
 Hugh Cholm-
 ley's case.
 Co. Litt. 572.
 Yelv. 149.
 Poole v. Need-
 ham, 2 Co. 41.
 10 Co. 59.
 1 Leon. 85.
 Cro. Car. 430.

Mo. pl. 665.
 Cro. Eliz. 595.
 Stratfield v.
 Dover.

Co. Litt. 375.
contra, 1 Sid.
 166. 1 Keb.
 620. Loyd v.
 Pollard.

Co. Litt. 372.
 b., and the
 books there
 cited.

Co. Litt. 335 a.
 sect. 629. 9 Ed.
 4. 24. Plow.
 559. 1 Co. 140.

“ the donor in fee, this is no discontinuance ; because the lease
 “ for his own life being lawful, the limitation over to the donor,
 “ who had the fee before, could make no discontinuance. For
 “ that would be to make the limitation to him by way of re-
 “ mainder work stronger than an immediate feoffment to them :
 “ and then he having, in the lease for his own life, given away
 “ all that he had, the limitation over is void. But if the lease
 “ had been for another man’s life, with remainder to the donor in
 “ fee, this had been a discontinuance ; because such lease, being
 “ more than he could lawfully make, plucked out of the re-
 “ version of the donor to serve and apply such lease ; and then
 “ the limitation, which he afterwards makes to the donor, being
 “ derived out of such new fee gained by the first livery, carries
 “ on the discontinuance as against the issue in tail.

Co. Litt. 335.
 a. Dyer, 12.

“ If tenant in tail enfeoffe the donor and a stranger, this is a
 “ discontinuance of the whole land ; because they take as joint-
 “ tenants, whereof each is seised *per my et per tout*.

Co. 3. 374.
 F. R. 21 E. 99.
 d. Palm. 226.
 229, 230. 245.
 253, 254.
 3 Co. 61.
 2 Inst. 345.
 10 Co. 44. a.
 1 Co. 84.
 1 Roll. R. 301.
 &c.

“ Another way whereby those in reversion or remainder might
 “ at common law have remedy upon a recovery, with or without
 “ title had against tenant for life, in dower, or by the curtesy,
 “ if such tenant, being empledaded, would not vouch or pray in
 “ aid of those in remainder or reversion, or they had no notice
 “ time enough to come in to pray to be received, was by bring-
 “ ing a writ of error to reverse the judgment given against such
 “ tenant for life, if there were error in it, not otherwise. But
 “ this they could not have till after the death of such tenant for
 “ life, unless they came in by way of voucher, aid prier, or
 “ rescuit, for then being parties to the record might have had
 “ such writ of error presently. And when the statute of W. 2.
 “ divided the fee conditional into a fee-tail whereon a reversion
 “ or remainder might depend, the judges extended the remedy
 “ which the common law gave by writ of error to those in re-
 “ mainder or reversion expectant on such estate-tail after the
 “ death of the tenant in tail without issue ; but the judgment
 “ against the tenant for life divesting the reversion or remainder,
 “ so that he could not after grant or transfer it over to any per-
 “ son, and it being doubtful whether he could punish waste after
 “ such recovery had, therefore the statute of 9 R. 2. c. 3. gave
 “ him in the reversion or remainder expectant on such estate
 “ for life a writ of error or attain in the life of the tenant for
 “ life. And if the judgment be reversed, the tenant for life is
 “ to be restored to the possession and mesne profits, unless the
 “ plaintiff in error can prove that he was of covin, and assent
 “ that the demandant should recover ; for then restitution is to
 “ be made of the possession and mesne profits to the plaintiff in
 “ error. And this proves that the parliament held such covin or
 “ recovery a forfeiture of the estate for life, otherwise it would
 “ have been hard to have given the possession and mesne profits
 “ to him in the remainder or reversion during the life of the
 “ tenant for life. But though it was a forfeiture, yet, as it ap-
 “ pears before, if it were not erroneous, no sufficient remedy
 “ was

“ was provided for him in the reversion or remainder to take advantage thereof, till 32 H. 8. and 14 Eliz. And if it were erroneous, yet till this statute he could not reverse it till after the death of the tenant for life. But this statute making no mention of recoveries against tenant in tail, they remain still as they were after the making of the statute *de donis*; and those in reversion or remainder expectant thereon can have no writ of error of an erroneous judgment given against the tenant in tail, till after his death without issue; nor can they be received upon the statute of W. 2. c. 3. which gives the rescuit, because the estate-tail is looked upon as an inheritance which by possibility may endure for ever: and therefore during the continuance of it those in reversion or remainder are little regarded.

“ I shall put but one case to shew what is a sufficient error for those in remainder or reversion expectant upon an estate-tail to take advantage of by writ of error, and how such writ of error may be barred or prevented by the tenant in tail.

“ *A.* having issue three daughters, *B.*, *C.*, and *D.*, makes a feoffment to the use of himself for life, remainder to *B.* in tail, remainder to himself in tail general, remainder to himself in fee; and dies. *B.* enters, and takes a husband, and they both levy a fine with warranty against *B.* and her heirs, *B.* being then within age; and after a common recovery is suffered with voucher of *B.* and her husband, who appeared by attorney, and vouched over the common vouchee; and so a common recovery is had, and the use declared to the husband and his heirs, *B.* being still under age: then *B.* dies without issue, and five years passed after her death; and now a writ of error was brought by *C.* and *D.* against one who claimed under the husband to reverse this recovery, and be let in by their formedon in remainder to avoid the discontinuance wrought by the fine for two parts of the land; and, after argument, it was held by all the court.

“ *First*, That the appearance of an infant by attorney was error, and as if the attorney had appeared without warrant; for an infant cannot give him authority *ad perdendum et lucrandum* for him as the warrant of attorney purports; but an infant might always appear by guardian assigned either by the court or by writ out of Chancery; and such guardian hath his warrant from the court, not from the infant, and ought to be one of an estate; for if he misbehaves himself, an action of desceit lies against him. And though *B.* here had a husband, yet he cannot make an attorney for his wife in a matter which concerns her inheritance, for then he might defeat her of her inheritance, especially in a common recovery, which is now but a common assurance, and their coming in as vouchees makes it the stronger, for the vouchee loses all the right to the land, and gives recompence to the tenant.

“ *Secondly*, It was held by all but *Haughton J.* that though by the fine the remainder was discontinued and put to a right, and the erroneous recovery was suffered after, yet those who had such right only at the time of the recovery shall have a

“ writ

Palm. 224.
Darcy v. Jackson. 1 Roll. R. 301. S: C. by the name of Holland v. Soe, 2 Roll. R. 85. S.C. *quoad* first part only.

First point.

Palm. 225.
228. 244. 250, 251.

Second point.
226. 229. 230.
245. 246. 253, 254.

“ writ of error to reverse it; for as by such recovery, if good,
 “ their right shall be bound by reason of the recompence; so, if
 “ erroneous, they shall have error to reverse it. And if it were
 “ otherwise, no common recovery would ever be reversed, for
 “ they always make a feoffment in fee, or levy a fine first, in
 “ order to have double voucher; and those in remainder or re-
 “ version have privity in right, though not in fact, by reason of
 “ the discontinuance; and as those who have but a right of a
 “ remainder or reversion shall take advantage of the forfeiture
 “ of a right of a particular estate, so shall those who have but a
 “ right of a remainder or reversion have error or attain upon
 “ erroneous recovery had against one who had but a right of an
 “ entail, 5 Ed. 3. 43. 6. 4. And by the voucher of the tenant in
 “ tail, he comes in in privity of the estate-tail, and revives the
 “ remainders to give them the recompence in value, without
 “ which they would not be barred. And though here the plain-
 “ tiffs cannot be restored to the land by the reversal of the re-
 “ covery, yet they will be restored to all they have lost by it, viz.
 “ their right to have formedon in remainder to avoid the discon-
 “ tinuance wrought by the fine. They agreed, if the remainder
 “ had not been *in esse* at the time of the recovery, but in abey-
 “ ance only as to the right heirs of *J. S.*, there, though *J. S.* died
 “ after, yet his heir should not have error of a recovery suffered
 “ by tenant in tail, 7 Jac. *Zouch v. Bamfield*. So, of a remainder
 “ to the eldest son of *A.*, who hath an estate for life; if *A.* suffers
 “ an erroneous recovery, a son born after shall not reverse it;
 “ otherwise, when the remainder was *in esse* at the time of the
 “ recovery, as here, though turned to a right. But *Haughton*
 “ *J.* held, that the plaintiff having only right of a remainder
 “ in fact, should not have a writ of error, unless their remainders
 “ had been turned to a right by disseisin of the tenant in tail, or
 “ such like tort; and that the privity of the remainders by the
 “ tenant in tail coming in as vouchee, was only restored to be
 “ barred and have recompence over, but not to be *de facto*
 “ restored to their estates.

216. 1 Co. 67.
 7 Jac. *Zouch*
 v. *Bamfield*.

237. 251.

Third point.

226. 231. 207.
 238. 246. 251.
 254.

3 Co. 50. b.
 43 Eliz. *Hobby*
 v. *Daniel*.
 25 Eliz. B. R.
 Roll. 407.
Carney's case.
 8 Co. 43.

“ *Thirdly*, It was held by all the court, that the infant appearing
 “ in this case by attorney was such an error as those in remainder
 “ may take advantage of, though strangers in blood; for this writ
 “ of error is not to reverse the recovery for the infancy of the
 “ feme covert, but because it was suffered by attorney without
 “ warrant, the infant having no power to make any warrant, and
 “ therefore it was not voidable only, but absolutely void: for the
 “ making of the warrant of attorney is an act of the party *in pais*,
 “ without examination of the justice, though the appearance by
 “ attorney after be recorded by the court. And upon shewing this
 “ in a writ of error, the defendant must plead that she was of full
 “ age at the time of making the warrant, and the other must take
 “ issue upon it, and so it shall be tried *per pais*, not by inspection.
 “ And cases were cited, that those in remainder may have error
 “ for the infancy of the tenant in possession. But they agreed,
 “ that for avoiding a feoffment made by the infant there ought to
 “ be

“ be privity of blood, and that privity in estate was not sufficient :
 “ but here, by the voucher of the tenant in tail the remainders
 “ were so received for the sake of the recompence in value, that
 “ they were *quasi* parties to the record.

“ *Fourthly*, It was held by all the court, that notwithstanding Fourth point.
 “ the objection that the warranty upon the fine could not bind
 “ this title to the writ of error upon the recovery, being matter
 “ subsequent and suffered after the warranty, that yet this war- 227. 231. 235.
 “ ranty descending on the plaintiffs in remainder was collateral 238. 248. 252.
 “ for two parts, and for these two parts barred them of their
 “ writ of error. For though the recovery was suffered after the
 “ warranty, yet their title to the remainders was prior to the
 “ warranty; and it is in virtue of that title they seek to reverse
 “ the recovery. And by the descent of the warranty their title
 “ to the remainder was divested and turned to a right. But, if
 “ the remainder be barred, so is their title to a writ of error to
 “ be restored to that remainder; for the remainder being barred,
 “ which is the principal, the writ of error, which is but accessory
 “ and depending thereon, is barred likewise. And a case was
 “ cited, 7 & 8 Jac., where father tenant for life, remainder to his
 “ son in fee, the father levied a fine with warranty to a stranger
 “ to the use of himself for life, remainder to his son for life, re-
 “ mainder over in fee, and died. It was resolved, that because
 “ the son had not entered in the life of his father, but suffered
 “ the warranty to descend upon him, that now this had crushed
 “ his right to the remainder in fee, and he must be contented
 “ with the estate for life. And though in the principal case, upon
 “ the recovery against the conusee, he had judgment to recover
 “ in value against *B.*, and therefore (as objected) the warranty
 “ was executed and satisfied by the recompence in value, and that
 “ no revoucher can be; yet it was held, first, that it does not
 “ appear that any actual recompence was had; secondly, the
 “ voucher upon the recovery was no execution of the warranty,
 “ because the recovery was part of the same assurance, and made
 “ in affirmance of it; and therefore the warranty upon the fine
 “ continues still unsatisfied; thirdly, admitting it were satisfied,
 “ so that he could not revouch, yet he may rebut by force of it;
 “ and here it is pleaded by way of rebutter. Also it was held,
 “ that though by this writ of error the land is not directly
 “ demanded, yet it is obliquely and by implication. And a
 “ return of all one's right in the land will be a bar of a writ
 “ of error, and the warranty here may be pleaded for avoiding
 “ circuity of action.

“ *Fifthly*, It was held by all, that the fine with proclamations Fifth point.
 “ and five years' non-claim after the death of *B.* without issue
 “ had been a bar of this writ of error, if it had been relied on;
 “ but there, defendant after he had pleaded the fine with pro- 227. 232. 255.
 “ clamations concludes *unde petit*, &c. if against the fine con- 240. 243. 247.
 “ taining such warranty plaintiff ought to have a writ of error,
 “ and so hath relied upon the warranty, not upon the fine with
 “ proclamations; and he having election to rely either upon the
 “ one

“ one or the other, by relying upon the one hath waived the
 “ other, and therefore it shall be intended only a fine at common
 “ law without proclamations, which only discontinues, but does
 “ not bar any right. *Nota.* In this case it was after held by
 “ *Doddridge J.* and *Leigh C. J.*, that for so much of the estate as
 “ was limited in use to the feme the warranty was extinguished
 “ and gone, and so plaintiff had judgment for all the point of
 “ the warranty, being the only point wherein the court was
 “ against him. And if the warranty were out of the way, he
 “ must have judgment for all. But *quere* here, for the use is to
 “ the husband and his heirs, and the warranty was against the
 “ feme and her heirs, and therefore this seems a mistake of
 “ putting the case.

“ As to such acts of the tenant in possession as work no
 “ divesting or displacing of the remainders or reversions, and
 “ by consequence no bar or discontinuance, this has already
 “ appeared in part, and I shall only put two or three cases more
 “ for further illustration thereof.

1 Co. 76. b.
 Co. Litt. 251. a.
 Poph. 50.

“ If there be tenant for life, remainder to the king for life,
 “ remainder to another in fee, and the tenant for life make a
 “ feoffment in fee; this works no divesting or displacing of the
 “ remainder to the king, nor by consequence of the remainder
 “ depending thereon, but passeth only his own estate for life.
 “ And yet this amounts to a forfeiture whereof the king may
 “ take advantage; because, by making livery thereof in fee, he
 “ hath done as much as in him lay to defeat and disinherit the
 “ king of his remainders, which is always a sufficient cause for
 “ the forfeiture of a particular estate. So, if the king make a
 “ lease for years, and the lessee make a feoffment in fee, this is a
 “ forfeiture of the term; and yet the reversion is not drawn out
 “ of the king.

1 Co. 16.
 2 Co. 53.

“ If tenant for life, the reversion or remainder to the king be
 “ pleaded in a *præcipe*, and a recovery be had against him by
 “ assent, without title, this does not divest the remainder or re-
 “ version of the king; because being by assent, and without title,
 “ it is but in the nature of a conveyance, which cannot take away
 “ the king's inheritance. But, if such recovery were upon good
 “ title and without covin, this would divest the king's remainders
 “ or reversion, because the judgment is matter of record, and no
 “ wrong is done to the king; as, if a disseisor recovers against
 “ the tenant for life, and enters, by this he defeats the king's
 “ remainder.

15 Ed. 4. 9.
 Co. Litt. 251.
 2 Leon. 61.
 4 Leon. 126.
 Ca. 385. Co.
 Litt. 327. 332.
 a. sect. 608.
 615, 616, 617.
 Poph. 63.
 || *Vide* Co. Litt.
 271. b. n. (1). ||

“ If tenant for life of rent or services on a *præcipe* brought
 “ against him pleads to the right, or confesses the action, &c.,
 “ or grants them in fee, this is no forfeiture to him in the
 “ remainder or reversion; because they cannot by any act of the
 “ particular tenant be drawn out of him in the remainder or
 “ reversion, or be conveyed for any longer time than such par-
 “ ticular tenant hath interest therein. Wherein there is a diver-
 “ sity between land, houses, and other things which lie in livery,
 “ as appears before, and rents, commons, advowsons, remain-
 “ ders,

ders, or other things, which lie in grant only: For if tenant in tail of such things as lie in grant, by deed or fine grant them to one and his heirs, yet this is no discontinuance; but the issue in tail, or those in remainder or reversion, may distrain for the rent, use the common, present to the church, or enter into the land; or they may, if they will, admit themselves out of possession, and bring their formedon. But then, a lineal warranty with assets, or a collateral warranty without assets, will be a bar to them, and therefore it is more dangerous to bring such action.

“ Another diversity is, between such things as lie in grant and are *in esse*, and such things as lie in grant and are newly created: as, if tenant in tail of land grant thereout a rent, common, &c. to one and his heirs, yet this is absolutely determined by the death of the tenant in tail upon the construction of the statute *de donis*.

3 Co. 85.
Co. Litt. 377.

“ If one let lands to *A.* for life, and *A.* let the same lands to *B.* for years, and after grant the reversion, yet the grantee hath an estate but for term of life of the grantor, and there is no divesting of the first reversion, nor cause of forfeiture; because, by such grant nothing passed but the estate which the grantor had. So, if *A.* had in this case released or confirmed the land to *B.* and his heirs, yet he would have only an estate for the life of *A.*, and no forfeiture or divesting of the first reversion.

Co. Litt. 330.
sect. 609, 610.

“ I come now to consider the acts of the tenant in possession jointly, or with the concurrence of him in the remainders or reversion, whereof some divest and displace the remainder or reversion, and cause a forfeiture and discontinuance, and some not.

“ *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in tail, or in fee. *A.* and *B.* join in a fine *come ceo*, &c. to *D.* in fee, who grants and renders a rent-charge to *A.* for life: *B.* dies without issue: then *C.* enters; and *A.* distrains and avows for the rent. It was adjudged lawful; for this fine made no discontinuance either of the first or second remainder, but each of them give only what he might lawfully give, *viz.* *A.* his estate for life, and *B.* a fee determinable upon his death without issue; and the remainder to *C.* was not divested or discontinued by the fine; and by consequence no forfeiture of the estate for life was wrought, by reason he in the remainder in tail joined therein. And there it was held, that, if need were, to prevent a forfeiture, it should be construed first the grant of *B.* of his remainder, and then the grant of *A.* of his estate for life. It was likewise held in the same case, that if *A.* and *B.* had joined in a feoffment by deed, this would be no discontinuance or divesting of the remainders or reversion, but that each should be said to pass only what they might lawfully depart with: and that if *B.* died without issue, yet the feoffee should hold during the life of *A.* But some books hold this case of the feoffment to be different from the fine, and though the fine makes no

1 Co. 76.
Bredon's case.
Hob. 227. 278.
6 Co. 15. a.
Treport's case.
Co. Litt. 302. b.
1 Roll. Abr.
855. pl. 7, 8.

|| *Et vide* note
(1). Co. Litt.
302. b. ||

Sid. 83. MS.

“ discon-

“ discontinuance, yet the feoffment, they think, does. And it was
 “ held in the principal case, that if the feoffment were by parol, it
 “ would operate as the surrender of *A.*, and the feoffment only
 “ of *B.*, which would discontinue the estate-tail and remainder.
 “ For in such case it cannot enure otherwise; because unless the
 “ remainder comes into possession by the accession of the estate
 “ for life, it would not pass at all; for a remainder, as such, can-
 “ not pass by parol without deed; and therefore to make *B.*’s
 “ joining of any effect, it must be taken to be the surrender of
 “ *A.*, and the feoffment of *B.* But a case was there cited, 41 Ed. 3.
 “ 21 & 41 Ass. pl. 2. where *A.* was tenant for life, remainder to
 “ *B.* in tail, and *A.* made a feoffment in fee to *B.* and his wife,
 “ who survived *B.*, this was held a forfeiture of *A.*’s estate for life,
 “ and that *D.* in remainder might enter: because between baron
 “ and feme there are no moieties, and the wife surviving is in of
 “ the whole by *A.* the feoffor, whose feoffment divested and dis-
 “ placed the remainder to *D.*, and, by consequence, made a for-
 “ feiture of *A.*’s estate for life. So, where tenant for life, and
 “ he in the remainder for life, join in a feoffment, though by
 “ deed, yet this is a forfeiture of both their estates, for which he
 “ in the next remainder may enter presently; because both of
 “ them joined in the tortious act which divested the remainders.

“ If *A.* be tenant for life, remainder to *B.* in tail, remainder to
 “ *C.* in fee; *A.* make a feoffment in fee to *C.*; this divests and
 “ displaces the remainder of *B.*, and is a forfeiture for which he
 “ may enter. So, if *A.* were tenant for life, remainder to *B.* in
 “ tail, remainder to *C.* in tail, remainder to *D.* in fee, and *A.*
 “ make a feoffment in fee to *B.*, who dies without issue, *C.* may
 “ enter for the forfeiture; for the livery divested his remainder,
 “ and *B.* could not dispense with the forfeiture as to his own
 “ estate. So, if *A.* be tenant for life, remainder to *B.* in tail,
 “ and *B.* release to *A.* in fee, and after *A.* make a feoffment in
 “ fee, and then *B.* die; yet his issue may enter for the forfeiture:
 “ for the release did not mend at all the estate of *A.*; and though
 “ it prevented *B.* himself from taking advantage of the forfeiture,
 “ yet it could not bind his issue, or those in remainder.

“ Husband tenant for life, remainder to his wife for life, re-
 “ mainder to the heirs male of their two bodies, remainder to *A.*
 “ in fee. The husband and wife levy a fine with warranty,
 “ and die without issue:—the warranty descends upon *A.*: yet it
 “ was adjudged, that neither the fine nor the descent of the war-
 “ ranty upon *A.* barred or discontinued his remainder, because
 “ the estates of the husband and wife for their several lives con-
 “ tinued distinct, and were not merged in the remainder to them
 “ in tail (*a*); and then not being seised by force of the tail, their
 “ fine could make no discontinuance of the estate-tail or the re-
 “ mainder, and by consequence the warranty could not attach
 “ upon *A.*, whose estate was not divested or turned to a right.
 “ But in all these cases the fine with proclamations binds the
 “ issue by force of the stat. 4 H. 7. and 32 H. 8.

“ *A.*

Co.Litt.251.a.
 502. Hob.277.
 Dyer, 359.a.
 1 Leon. 262.
 1 Roll. Abr.
 855. pl. 8.

1 Co. 140.
 Poph. 84.
 1 Roll. Abr.
 857. pl. 1, 2, 4.

1 Leon. 36.
 1 Sid. 83.
 Raym. 56.
 1 Keb. 76. &c.
 Stephens v.
 Brittridge.
 ||(*a*) For where
 the estates of
 freehold are
 successive and
 not joint, they
 do not unite
 with the joint
 remainder of
 the inherit-
 ance. Fearné,
 C.R. 35. (7th
 edit.)

“ *A.* tenant for life, and *B.* in remainder in tail levy a fine;
 “ *B.* dies without issue, and if the conusee should hold during the
 “ life of *A.*, was the question. The court thought this case the
 “ same with *Bredon's* case. But *Hale* said, the reasons given in
 “ *Bredon's* case make against the resolution; for where it is said,
 “ the remainder in tail passed first to avoid a forfeiture, he said,
 “ if it did, the freehold must then pass to it by way of surrender,
 “ and so drown; but they shall rather be construed to pass *insimul*
 “ *et uno flatu*: and he resembled the principal case to a feoffment
 “ by the husband and wife of the wife's lands whereof the hus-
 “ band is entitled to be tenant by the curtesy; the heir of the
 “ wife shall not avoid the feoffment during the life of the husband.
 “ But the case was ended by agreement.

“ Husband and wife, seised of lands to them and the heirs of
 “ the husband, make a lease thereof to the defendant, who cove-
 “ nants with them and each of them, and with the heirs and
 “ assigns of the husband, to do such a thing upon the land. The
 “ husband and wife convey the reversion to the plaintiff in fee, who
 “ brings covenant, and concludes *unde actio accrevit* to him as
 “ assignee of the husband, without averring the wife to be dead.
 “ And though it was urged, that he ought to have brought cove-
 “ nant as assignee to both, having his estate as well from the wife,
 “ who had an estate for life, as from the husband who had the
 “ fee, unless he had alleged the wife to be dead; yet it was held
 “ well, being brought by the assignee of him who had the in-
 “ heritance, and so no prejudice to any; and that the estate for
 “ life being transferred with the fee was thereby drowned and
 “ confounded, and so the action well brought as assignee of the
 “ husband.

Cro. Car. 285.
 Major v.
 Talbot.

“ *A.* tenant for life, remainder to *B.* in tail, remainder to *C.* in
 “ fee. *A.* and *B.* intermarry, and after levy a fine *come ceo*, &c.
 “ with remainder to *A.* for life, remainder to *B.* the husband and
 “ his heirs: then the husband and wife suffer a common recovery
 “ with single voucher to the use of the husband and his heirs, and
 “ die without issue. *C.* enters within five years. And it was
 “ adjudged clearly, first, That the fine levied by *A.* and *B.* made
 “ no discontinuance, and they would not suffer it to be argued
 “ for the reasons in *Bredon's* case; for none can discontinue an
 “ estate-tail but he who is seised thereof in possession, or at least
 “ of the freehold thereof. Secondly, It was adjudged, that the
 “ recovery was no bar or discontinuance of the estate-tail or re-
 “ mainders, because he who suffered it was not seised of the
 “ estate-tail at the time of the recovery; for by the fine an estate
 “ in fee determinable on *B.*'s death without issue passed, though
 “ there was no discontinuance; and by the render a new estate
 “ is given to the husband, to which the recompence in value
 “ upon the recovery enures, and not to the estate-tail, nor, by con-
 “ sequence, to the remainders depending thereon. And this
 “ recovery was not within 32 H. 8. because he in the remainder
 “ in tail joined with the tenant for life. But it was agreed, that
 “ the

Cro. Eliz. 827.
 Moor, pl. 870.
 Peck v.
 Channell.
 || 1 H. Black.
 269. 1 Barn.
 & C. 238.||

1 Roll. Abr.
855. pl. 9.
Owen, 146.
Styles, 192.
Garra v.
Blizzard.
2 Mod. 114.
infra.

Hob. 277.
1 Roll. Abr.
854. Earl of
Clanrickard's
case.

“ the fine would have bound the issue, if there had been any,
“ by virtue of the statutes.

“ *A.*, tenant for life, remainder to *B.* for life, remainder to *C.*
“ in tail, remainder to *B.* in fee. *B.* levies a fine *come ceo*, &c.
“ to *D.*: this is a forfeiture of his remainder for life; so that after
“ the death of *A.*, *C.* may enter; for by this fine *B.* is estopped
“ to say that he did not pass a fee in possession without any
“ fraction of estate. And therefore this differs from *Bredon's* case,
“ where the estate for life and remainders were immediate one
“ to the other, which here they are not.

“ Feme tenant in tail general, remainder to the husband and
“ his heirs during the life of *A.*, remainder to *A.* in fee. The
“ husband and wife levy a fine *come ceo*, &c. to *D.* and *E.*, to the
“ use of the wife and her heirs; the husband dies; the wife dies
“ without issue; *A.* brings formedon against the heir of the wife,
“ upon pretence that the fine levied by her, being tenant in tail in
“ possession, was a discontinuance, and that the estate in remain-
“ der of the husband for the life of *A.* was merged and extin-
“ guished in the fee granted by the fine to *D.* and *E.*, so that upon
“ the death of the wife without issue the remainder to *A.* was to
“ come into possession. But it was held that the estate-tail of
“ the wife, and the remainder of the husband for the life of *A.*,
“ were conveyed as two distinct estates in being to the conusees,
“ and that the estate for life was not extinguished or involved in
“ the estate-tail given by the fine; for then it must be either by
“ surrender, forfeiture, or confirmation. By surrender it cannot
“ be, because it is subsequent to the estate-tail; by forfeiture it
“ cannot be, because the tenant for life gave not the fee alone,
“ but gave only so much thereof as he had, and joined with the
“ tenant in tail, who had power to give a fee during the estate-tail
“ without wrong to any. And if need were, as in *Bredon's* case,
“ to avoid a discontinuance, they construed the remainders in tail
“ to pass first; so here, to avoid a forfeiture, the estate for life
“ may be said to pass first, though in the conusee they both made
“ but one entire estate. And if the fine were reversed for the
“ infancy of the wife, yet the conusee should hold the husband's
“ remainder for the life of *A.* So, if the fine were upon con-
“ dition, both estates on breach thereof should be restored in the
“ same plight as at first. But admitting it should be taken as a
“ discontinuance of the wife, being tenant in tail in possession,
“ and as the confirmation of the husband in remainder, yet *A.*
“ can no more enter during the continuance of the estate than if
“ the husband had not joined in the fine, but had kept his right,
“ or had released it to the discontinuee. For in such case, every
“ one must sue in their turn to avoid the discontinuance: first,
“ the issue, then he in the first remainder, and after *A.* Though
“ the issue will not, or there be no issue, or the issue be bound,
“ and the husband cannot by reason of his release, yet it is all one
“ to *A.*, for his right does not begin till after the two foregoing
“ estates ended. But in *Bredon's* case, if the tenant for life had
“ surrendered to him in the remainder in tail, and then he had
“ levied

“ levied a fine, and died without issue, he in the next remainder
 “ should have had a formedon presently, though the tenant for life
 “ were living; because by the surrender the estate for life was
 “ absolutely determined; but by his joining, as he did there, or if
 “ he had released or confirmed the land to the conusee, in such
 “ case he should have been said to give only his own single estate
 “ for life, and he in the second remainder should not enter till
 “ that determined. And therefore in the principal case it was
 “ held, that no formedon lay during the life of *A.*

“ *A.* tenant for life, remainder to *B.* in tail, remainder to *A.*
 “ in fee. *A.* and *B.* make a lease for three lives by indenture to
 “ *C.*; then *A.* dies, and *B.* grants the reversion to *D.* in fee, to
 “ the use of his last will, and by his will devises the reversion for
 “ years, and dies leaving issue. The three lives die; the devisee
 “ for years enters, and the issue of *B.* ousts him. And it was
 “ argued that this lease for three lives was a discontinuance,
 “ because, as it was said, it was more than they could both make,
 “ and so it was a tort; and the reversion gained by tort, though
 “ in whom the reversion was might be a doubt. But it was ad-
 “ judged no discontinuance, and that the entry of the issue was
 “ lawful; for the lease being by indenture was the lease of *A.*, and
 “ the confirmation of *B.*; but if it had been without deed, then
 “ it had been the surrender of *A.*, and the lease of *B.* only,
 “ because otherwise nothing could pass from him, his remainder
 “ as such not being transferable but by deed.

Cro. Eliz. 56.
 1 Leon. 243.
 Trevilian v.
 Lane.

“ *A.* tenant for life, remainder to *B.* in tail. *A.* makes a
 “ feoffment to the use of himself for life, remainder to *B.*, then
 “ *A.* and *B.* enfeoff *D.* *Gaudy* and *Shute* held clearly, that this
 “ was a discontinuance; for when *B.* enters to make the feoff-
 “ ment, he is remitted by reason of the forfeiture committed
 “ before by *A.*, and then by such remitter he gains the possession;
 “ and it is only his feoffment, and so it is a discontinuance; for
 “ both cannot have the possession. *Clench cont.* Because the
 “ intent of *B.*’s entry was only to join in the feoffment with *A.*,
 “ and to pass both their estates together, and not to take advantage
 “ of the forfeiture; and therefore it was no discontinuance. But
 “ the case was adjourned, and no judgment appears to be given.

1 Leon. 127.
 Cro. Eliz. 135.
 Toft v.
 Tomkins.

“ *A.* tenant for life, remainder to *B.* in tail. *A.* levies a fine
 “ to the use of himself; then he and *B.* join in a feoffment by
 “ letter of attorney. And it was held a discontinuance, because
 “ it was the feoffment of *B.*, and the confirmation of *A.* only.

Dyer, 324.
 pl. 35.

“ *A.* tenant for life, remainder to *B.* in tail, remainder to *C.*
 “ in tail, or fee; a *præcipe* is brought against *A.* and *B.*, who
 “ both vouch the common vouchee, and thereupon a common
 “ recovery is had; yet this shall not bind the estate-tail or re-
 “ mainders, because *B.* in remainder is not tenant to the *præcipe*,
 “ but *A.* the tenant for life only, and therefore the recompence
 “ in value cannot go to *B.* in remainder only, he being never
 “ seised by force of the tail; but shall go to them jointly accord-
 “ ing to the writ, which was against them jointly, and supposed
 “ them joint-tenants; and by consequence can be no bar to the
 “ estate-

Dyer, 252.
 3 Co. 6. Knife-
 ton’s case.
 Cro. Eliz. 670.
 Leach v. Cole.

“ estate-tail or remainder, whereof they were not jointly seised,
 “ but in remainder one after another.

10 Co. 45.
 3 Co. 60. Cro.
 Eliz. 562. 570.
 Mo. pl. 953.
 Jenning's case.
 10 Co. 39. b.
 Co. Litt. 362. a.

“ But in that case, if *A.* only had been empleaded, and had
 “ vouched *B.* in remainder in tail, and he the common voucher,
 “ and so a common recovery were had, this had barred the
 “ estate-tail, and all remainders or reversions depending there-
 “ on; because there *A.* was sole tenant to the *præcipe*, and by
 “ voucher of him in the next remainder in tail he does his duty.
 “ And if he in the next remainder in tail cannot defend the pos-
 “ session, or call in one who will, he must be contented with
 “ the recompence in value which the court adjudges the last
 “ vouchee to render to him according to the estate he hath lost;
 “ and such recompence is to go over to those in the future
 “ remainders, whose estates are likewise by the judgment taken
 “ out of them to make good the estate recovered.

Cro. Car. 387.
 405. Baker v.
 Hacking.
 ||Co. Lit. 335. a.
 n. 2.; et vide
 tit. *Discontinu-*
ance.||

“ *A.* tenant in tail, and *B.* in reversion in fee, join in a lease
 “ for life by deed, which is not warranted by 32 H. 8., then *B.*
 “ devises his reversion, and dies, and after *A.* dies without issue;
 “ and the question was, if this lease was a discontinuance of the
 “ estate-tail and reversion; for then the devise of *B.* is void, he
 “ having no reversion, but only a right of a reversion, which is
 “ not devisable. And three justices held this lease a disconti-
 “ nuance, and, by consequence, the devise to be void; for the
 “ livery is made only by the tenant in tail, for he only hath the
 “ immediate freehold, and his lease discontinues the estate-tail
 “ and reversion, and gains him a new fee during the lease. And
 “ they held likewise, that it was a discontinuance presently or not
 “ at all; for the after accident of the death of the tenant in tail
 “ without issue, could not make it a discontinuance of the rever-
 “ sion, if it were not so upon making the livery. But *Croke J.*
 “ held it no discontinuance, first, because it should be taken to
 “ be the lease of the tenant in tail during his life, and the con-
 “ firmation of him in the reversion; and after the death of the
 “ tenant in tail without issue, then it should be taken to be the
 “ lease of him in the reversion only. Secondly, because their
 “ joining in such lease shews they had no intent to make any
 “ discontinuance to divest or displace the reversion. But by the
 “ other three justices it was adjudged to be a discontinuance, and
 “ the devise void.

2 Lev. 154.
 2 Jon. 65.
 2 Mod. 109.
 3 Keb. 321.
 580. 632. 681.,
 &c. Piggott v.
 Ld. Salisbury.

“ *A.* lessee for years, remainder to *B.* wife of *C.* for life, re-
 “ mainder to *D.* in tail, remainder to *C.* husband of *B.* for life,
 “ remainder to *B.* in fee; the husband and wife, by fine *sur*
 “ *concessit*, grant *tenementa prædicta et totum et quicquid habent*
 “ *in tenementis prædictis* to *E.* and his heirs for the life of the
 “ husband and wife, and the longer liver of them, with warranty
 “ against them, and the survivor of them: *A.* attorns; after-
 “ wards *F.* father of *D.*, and the husband and wife, levy a fine
 “ *come ceo*, &c. with warranty severally against *F.* and his heirs,
 “ which descended on *D.*; and if the fine *sur concessit* by the hus-
 “ band and wife should enure to pass an estate in possession for
 “ their lives, and the life of the longer liver of them, then it was
 “ agreed

“ agreed by all that the remainder to *D.* was displaced, and then
 “ the warranty attaching upon him bound him : but, if it had
 “ passed only their several estates by fraction, *viz.* the estate of
 “ the wife in possession, and the estate of the husband as a re-
 “ mainder, then there was no such divesting of *B.*’s remainder
 “ as would let in the warranty upon him. But the better opi-
 “ nion seems, that by the grant of *tenementa prædicta* for the life
 “ of the husband and wife, and the longer liver of them, an estate in
 “ possession passeth for that time ; and that the words *totum et*
 “ *quicquid habent*, &c. cannot be taken by way of restriction to qua-
 “ lify it, so as to pass only their several estates by fractions, that
 “ being a distinct independent clause, and added by way of accu-
 “ mulation to include and take in whatever intent the first words
 “ might be thought insufficient to carry ; and then the remainder
 “ to *D.* was displaced, and the warranty of his father attaching
 “ upon him bound his right. For they all agreed, that the first
 “ fine, though executory only at first, was well executed by the
 “ attornment of the lessee for years ; and though the fine *sur*
 “ *concessit* be the most innocent of all others, and but as a grant of
 “ *totum statum suum*, if there be proper words of restriction, yet
 “ with such words it passes a fee as well as the fine *come ceo*,
 “ &c., which, if levied by tenant for life or years, is always a
 “ forfeiture of their estate, be the restriction what it will. And
 “ here they ought to have only granted *totum statum suum et*
 “ *quicquid habent in tenementis prædictis*, without saying for what
 “ estate, or, if any estate were named, it ought to have been
 “ only for the joint lives of the husband and wife, or for the life of
 “ the wife, and after the death of *D.* without issue, then for the life
 “ of the husband : but as it is here, it passes an entire estate in
 “ possession for a longer time than they had power to give it,
 “ and so displaces the remainder to *D.*, and lets in the warranty.
 “ And yet it was agreed by all, that the intent of the husband
 “ and wife was only to pass their several estates, because other-
 “ wise *D.*, by his entry for the forfeiture, might not only
 “ have defeated the estate of *E.* the purchaser, but might also
 “ (being in possession) by a common recovery have barred the
 “ remainder in fee to the wife ; to prevent which, as they thought,
 “ they contrived such fine, *E.* having agreed to the purchase
 “ of the whole estate, and *D.* being only to join in the sale when
 “ he came of age. Note — *Garra v. Blizzard* (*supra*) was cited
 “ and relied on ; but the parties after agreed, and no judgment
 “ was given.

“ *A.*, by lease and release on a marriage intended with *B.*,
 “ conveys lands to the use of himself for ninety-nine years, if he
 “ should so long live, remainder to trustees during his life to
 “ support contingent remainders, remainder to *B.* for life for her
 “ jointure, remainder to the first, second, and other sons in tail
 “ male successively, remainder to the heirs male of the body of
 “ *A.* on the body of *B.* to be begotten, remainder to the right
 “ heirs of *B.* ; the marriage takes effect ; and before the birth of
 “ any son, *A.* and *B.* mortgage the said lands for five hundred
 “ years to the plaintiff for securing 1000*l.*, and then levy a fine

2 Jo. 98.
 3 Keb. 822.
 2 MSS. 50.
 Lane v. Vane.

1 Co. 76.
6 Co. 15.

Co. Litt. 276.
Hob. 278.
1 Roll. Abr.
855.

“ *come ceo*, &c. to the plaintiff, in the first place for corroborating
 “ the term, and after to the use of the right heirs of *A.*; the
 “ trustees enter for a forfeiture: then a son is born, after *A.* dies,
 “ and the trustees continue possession in right of the son; the
 “ plaintiffs enter, and *B.* is yet living. And if the plaintiffs
 “ should hold during the life of *B.*, was the question; for there
 “ was no endeavour to prove the contingent remainders destroyed,
 “ there being a sufficient estate in the trustees to preserve them
 “ till they came *in esse*. For the plaintiffs it was argued, that
 “ they should hold during the life of *B.*; for if the remainder in
 “ fee had been in a stranger, and *A.* and *B.* and that stranger
 “ had levied such fine, this had been a forfeiture of *A.*’s estate,
 “ by reason of the intermediate remainder to the trustees, who
 “ did not join: but it could be no forfeiture of *B.*’s estate for
 “ life, because he in the remainder joined; and therefore they
 “ only passed what they lawfully might pass, *viz.* their several
 “ estates. (1 Co. 76. 6 Co. 15.) And though both are con-
 “ joined in the conusees, yet there being no forfeiture, surrender,
 “ or extinguishment of *B.*’s estate for life, the estate of the
 “ conusee shall open to let in the contingent remainders when
 “ they happen, as if no alienation had been made, there being a
 “ sufficient estate to support them. And if there was no for-
 “ feiture of the estate for life of *B.* upon levying the fine, the
 “ birth of the sons after cannot make it so, that being matter
 “ *ex post facto*; and 1 Co. 76. *English’s* case was cited, where
 “ tenant for life and an infant in remainder joined in a fine,
 “ which was after reversed for the infancy; yet the conusee held
 “ during the life of the tenant for life. Secondly, Admitting the
 “ estate for life of *B.* could not revive and separate from the
 “ inheritance to let in the contingent remainders when they
 “ happen, being conjoined in the conusee, yet, after the death
 “ of *B.*, they may take place without any such interposition; as,
 “ if *A.* be tenant for life, the remainder to *B.* in fee, and *A.* be
 “ disseised, and release to the disseisor, he shall have the whole
 “ fee during the life of *A.*, and *B.* cannot defeat it or take out
 “ his remainder till *A.*’s death. So, if *A.* be tenant for life,
 “ remainder to his first and other sons in tail, and before the
 “ birth of any son *A.* be disseised, and then after a son be born,
 “ and *A.* release to the disseisor, he, by this, shall have a fee till
 “ *A.*’s death, and then the son may defeat it by entry; because
 “ the right of *A.* supported it till it came *in esse*, and then his
 “ release after cannot destroy it. So here, the estate for life of
 “ *B.* is virtually *in esse*, though being conjoined with the re-
 “ mainder in fee in the conusee it should not survive. But in
 “ this case the remainder in fee being in the wife, she has no
 “ estate for life to forfeit or surrender, but has the whole fee in
 “ her, subject to divide and let in the contingent remainders
 “ when they happen, and she has then no new estate but the
 “ same she had before, then joined, now divided, and therefore
 “ the conusee shall hold during her life. On the other side it
 “ was argued for the defendant, that, till the contingent remain-
 “ ders

ders came *in esse*, the wife had the whole fee executed in her, and no estate for life; for that was not to arise till the birth of the sons: and therefore, by her joining in the fine, could not be granted or transferred over as any certain or fixed interest, but, being in contingency, was extinguished and destroyed by the fine before it took effect; and therefore the estate of the son shall be now in possession discharged of it. And a case was cited to be resolved in Chancery by the Chancellor, *Hales C. J., Wyld, Ellis, and Wyndham, February 1672*, where *A.* conveyed lands to the use of himself for life, and after his death and the death of *B.* then to the use of *C.*, this limitation to the use of *C.* was resolved to be contingent, by reason that *B.* had no estate, and he might survive. And there it was agreed, that if *C.* had levied a fine or made a feoffment, the estate to *C.* could never vest. But this case differs from *Bredon* and *Treport's* cases; for in those cases there was an estate for life *in esse*; but here there was none, but in contingency. But the principal case was adjourned, and no judgment appears to be given."

In the case of *Smith*, on the demise of *Dormer v. Packhurst et al.* (commonly called by the name of *Dormer* and *Fortescue*), there was a limitation in remainder (after several preceding estates for life and in tail) to the use of *A.* for ninety-nine years, if he should so long live, and from and after the death of *A.*, or other sooner determination of the estate limited to him for ninety-nine years, to the use of trustees and their heirs, during the life of the said *A.*, upon trust to preserve contingent estates, &c. and for that purpose to make entries and bring actions, &c. but to permit the said *A.* to receive the rents and profits, &c. during the term of his life; and after the end or other sooner determination of the said term, to the use of the first and other sons of *A.* successively in tail-male, with divers remainders over. By the expiration of all the preceding estates, *A.* came into possession of the estate limited to him for ninety-nine years; and, having a son, he, together with that son, when he came of age, levied a fine of the lands to make a tenant to the *præcipe*, and suffered a recovery of the same, in which the son was vouched. The son died without issue, and afterwards *A.* died without leaving any other son; the next surviving remainderman made his actual entry within five years, and the question was, Whether the recovery had barred his remainder? This point depended entirely on another question, Whether the freehold was in the trustees during the life of *A.* or not? For if it was, the recovery was not well suffered for want of a good tenant to the *præcipe*, and consequently did not bar the remainder; but if the trustees had not the freehold, then it was in the son, and of course he was capable of making a good tenant to the *præcipe*, and the recovery in that case was well suffered; for the court held, that the fine by lessee for years (*A.*), or the reversioner (the son), could only operate by way of estoppel, to bar the parties claiming under such lessee or reversioner; but did not

Smith ex dem.
Dormer v.
Packhurst,
 3 Atk. 135.
 4 Br. P. C.
 353. and 405.
 18 Vin. Abr.
 413. *Fearne's*
C. R. 220. (7th
 edit.), *ibid.* 8.
notis, 570.
 2 Str. 1105.
Andr. 315. *S. C.*
 || 6 Bro. P. Ca.
 357. *S. C.*;
 and see *Doe*
v. Martin,
 4 Term R. 39. ||

acquire the freehold, as a feoffment would have done. — To prove that the freehold was not in the trustees, it was insisted, *first*, That the remainder to the trustees was void in its creation, because to commence after *A.*'s death, and then hold during his life, which was repugnant, and could never take effect at all. *Secondly*, If not void in its creation, it was a contingent remainder, because it was uncertain whether it ever would take effect, as the term of ninety-nine years might not determine in *A.*'s lifetime. *Thirdly*, That if it was neither void nor contingent, yet it did not amount to a legal estate, but was only a right of entry. — But the court resolved, that the remainder was not void in its creation, its commencement not being restrained to the death of *A.*, but limited from the death of *A.* or other sooner determination of the estate for ninety-nine years, and therefore might take effect by surrender, forfeiture, or effluxion of time, in *A.*'s lifetime. *Secondly*, That it was not a contingent remainder, being limited to persons *in esse*, without any condition precedent to be performed; it did not depend on the death of *A.*, but on such other events (*viz.* forfeiture, surrender, &c.) as might determine the particular estate from the nature of the estate itself. *Thirdly*, That it was not a mere right of entry, but a legal estate; for a grantor cannot reserve a right of entry to a stranger, nor can a right of entry subsist without an estate. Therefore the trustees had the freehold for the life of *A.* And, upon the whole, the court held, that the fine and recovery did not bar the remainder.

Rowe v.
Power, 2 New
R. 1.; see
5 Maule & S.
271. 1 Barn. &
A. 85.

¶ *A.* was seized in fee, and devised to *B.* his son for life, remainder to the heirs of his body in tail, remainder to his own three daughters, and their heirs. On the death of *A.*, *B.* entered, and became seized of all *A.*'s lands; and, by deed between himself and his mother, assigned to her the possession of one third part of all the premises, to hold to her and her assigns for life, as if she had been in possession of the same by virtue of a writ of dower, and appointed *C.* and *D.* attorneys, to enter and give livery and seizin of one full third part: and the endorsement of the deed stated, that *C.* and *D.* delivered seizin of all the premises to the mother, to hold according to the uses and intentions of the deed. *B.*'s mother having become seized of an undivided third part of all the lands during her life, *B.* levied a fine *sur conuzance de droit come ceo*, with proclamations, of the whole of the premises, and suffered a recovery, and died leaving no issue, but having devised away all the lands of *A.* to a stranger. It was held, that the deed between *B.* and his mother, and the livery made thereon, was a good assignment of dower to her; and therefore the fine and recovery suffered by *B.*, and nonclaim within five years after the death of *B.*, did not bar the remainder in fee to the daughters of *A.*, in that one third part which *B.*'s mother had in dowry at the time of such fine and recovery. ||

Cro. Eliz. 255.
1 Leon. 243.
Jeffery v.
Coite.

“ *A.* tenant for life of certain lands, remainder to his son *B.*
“ in tail. *A.* and *B.* join in a lease by indenture to *C.* for life,
“ remainder to *D.* for life, rendering 10*l.* per annum rent. *A.*
“ dies; *B.* accepts the rent from *C.*, and dies, having issue, who
“ also

“ also accepts the rent from *C.*, and then enters, and makes a feoffment, and levies a fine to *J.S.*; then *C.* re-enters and dies, and *D.* enters as in his remainder. And the question was, If *J.S.*, the purchaser of the remainder, might avoid this lease in remainder to *D.*; or if the acceptance of the rent from *C.*, the first tenant for life, had made good the remainder to *D.*, so that he coming in under the issue of *B.*, who so accepted the remainder, should be bound by it? And it was adjudged, that the lease in remainder to *D.* was good, and not avoidable by *J.S.* the purchaser; for the power to avoid this lease was only given to the issue in tail in respect of his estate-tail, and when that by the fine is bound and gone, the purchaser, who is a stranger to the estate-tail, and not in privity thereof, cannot have the privileges annexed thereto, nor, by consequence, can avoid the lease, which the issue in tail as such only had power to do.

“ Copyhold was granted to one for life, remainder to an infant in fee; they both join in a surrender to one who was admitted tenant for life, and after the infant dies, and his heir enters. It was adjudged, that he might well enter without being put to his writ of *dum fuit infra etatem*; for such surrender was but a conveyance by matter *in pais*, which cannot bind an infant, but that he or his heirs may enter, or bring trespass before admittance.

Cro. Eliz. 90.
Knight v.
Fortipan.

“ *A.* tenant for life of certain lands, remainder to *B.* in tail male, remainder to *A.* in tail, remainder to *B.* in tail general, remainder to *A.* in fee. *A.* and *B.* join in a deed, whereby *A.* grants, and *B.* confirms to *C.* and his heirs, a rent-charge of 10*l.* per annum out of the said lands, *B.* being then within age; then *A.* and *B.* levy a fine of the same lands to the use of *A.* and his heirs, who enfeoffs the plaintiff, and dies, and *B.* hath issue yet living. And if the plaintiff was chargeable with this rent, was the question. It was argued, that if a rent be granted by tenant for life, and confirmed by him in the remainder in fee, being within age, that this issues out of the estate for life only, and is merely a void grant as to the remainder; so that if the tenant for life purchases the reversion or remainder, and dies, this shall not bind the inheritance. And though he had made a feoffment over, yet a feoffee after his death should avoid it. But here, because *A.* was not only tenant for life, but had also a remainder in tail, and after that a remainder in fee, the rent is issuing out of all his estates; and though it were void as against *B.*, who was the next in remainder in tail, and confirmed it, by reason of his infancy, yet now that estate-tail of *B.* being bound by the fine, and the whole estate limited to the use of *A.* and his heirs, the court inclined that the rent had still a continuance, and should bind the plaintiff; for the privilege which the tenant in tail could have had, of avoiding the rent by reason of his infancy, shall not help the plaintiff, who comes in under all the estates of *A.*, which of themselves would have been sufficient to go through

Cro. Car. 103.
Holt v.
Samback.

“ the whole grant of the remainder, were it not for the remainder
 “ in tail to *B.*, and that remainder is now by the fine barred and
 “ gone.

Mo. pl. 274.

“ A case in effect was this: *A.* tenant for life, remainder to *B.* in
 “ tail, reversion to *A.* in fee. *A.* grants a rent out of the lands,
 “ to begin after his death; then he and *B.* join in a fine to the
 “ use of *A.* for life, remainder to *B.* in tail, or in fee; then *A.*
 “ dies; yet the rent shall not charge the remainder of *B.*, for each
 “ passed their several estates only, *viz.* *A.* his estate for life, and
 “ reversion in fee, and *B.* his remainder in tail: and there was
 “ no estoppel, because a several interest passed from each of them;
 “ and then the remainder of *B.* is no more chargeable with this
 “ rent after the fine that it was before, he granting only his own
 “ remainder distinct from what *A.* granted; and by consequence,
 “ none of the charges of *A.* can affect such remainder after the
 “ fine any more than they would have done before. But *quære*,
 “ upon *B.*'s death without issue, if the rent shall not then take
 “ effect, being well chargeable at first upon the reversion
 “ of *A.*?”

(H) In what Cases a Remainder or Reversion shall
 be subject to the Acts or Charges of the particular
 Tenant.

“ I AM now to consider in what cases the remainder or rever-
 “ sion shall be subject to the acts or charges of the particular
 “ tenant, and in what not (which has been partly treated of be-
 “ fore), and when, and how, the charges of him in the remain-
 “ der or reversion shall take place.”

Co. 62. Poph.

6. Moor, 154.

2 Co. 52.

6 Co. 42.

Plow. 350.

“ *A.* tenant in tail, remainder to *B.* in tail; *B.* grants a rent-
 “ charge, *A.* suffers a common recovery, and dies without issue;
 “ the grantee of the rent-charge distrains the alienee of *A.*, and
 “ the distress was held unlawful: *first*, Because the alienee comes
 “ in under the tenant in tail in possession, whose estate was not
 “ subject to the charges of him in the remainder; for, if the
 “ tenant in tail in possession had made only a feoffment in fee, or
 “ a lease for years first, and then after a feoffment in fee, and
 “ died without issue, yet, till the feoffment avoided, the leases
 “ or charges of him in the remainder should not take place either
 “ against the lessee or feoffee of the tenant in tail. *Secondly*,
 “ The reason that these leases or charges out of such remainder
 “ are good, is for the possibility of the remainder coming into
 “ possession; for of itself it is a thing not manurable or visible,
 “ and consequently not liable to any distress; and therefore, if
 “ it be destroyed before it comes into possession, the charges
 “ granted thereout must fall too, as the shadow falls with the
 “ substance. *Thirdly*, Another reason is, that he who claims
 “ only out of such remainder after an estate-tail, cannot falsify
 “ the recovery had against the tenant in tail, for the recovery
 “ bars the remainder itself; so that he cannot falsify or any way
 “ plead to defend his remainder, unless he were vouched, nor, by
 “ consequence, can those who derive their interest under him.

“ But

‘ But where *A.* was tenant for life, remainder to *B.* in tail, and *B.* granted a rent-charge, or made a lease for years, to begin after the death of the tenant for life, and *A.* the tenant for life after suffered a common recovery, though with voucher of *B.* in the remainder in tail, yet the lease or rent shall take place according as they were made or granted; for there such a lessee or grantee may falsify the recovery either by the common law or statutes; for the tenant for life hath no power to bar the remainder, without the assent or concurrence of him in the remainder, as the tenant in tail in possession hath; and his assent or concurrence cannot operate to defeat his own acts, any more than a recovery against tenant in tail in possession can defeat his own leases or grants; because in both cases the recoveror comes in by the tenant in tail, whether in possession or remainder, who alone has power over the estate, and shall be bound by his own acts.

Cro. Eliz. 718.
Pledgard v. Lake.

1 Co. 62.
Poph. 6.

‘ If *A.* be tenant for life, remainder to his first and other sons in tail male, remainder to *B.* in fee, and *A.* before the birth of any son make a lease for years, grant a rent-charge, acknowledge a statute, &c. and afterwards surrender to him in the remainder, or make a feoffment, or commit other forfeiture, for which he in the remainder enters, yet he shall hold the estate subject to the charges of the tenant for life; for these being his own acts to determine his estate shall not turn to the prejudice of the lessee or grantee, who is a stranger; but his estate for life shall to this purpose be still said to have continuance, though as to all other purposes it is determined; and therefore the contingent remainders not being to arise out of the estate for life, but depending thereon till they come *in esse*, are, by the determination thereof before they come *in esse*, destroyed and gone.

Co. 67. Co.
Litt. 338.
7 Co. 65.
8 Co. 145.
9 Co. 107. Ld.
Raym. 521.

‘ So, where lessee for years of an advowson granted the next avoidance, and after surrendered the term to the lessor, yet this shall not defeat the grantee of the next avoidance; because the surrender was his own act, before which there was a good grant, and that shall bind him in the remainder, who to this purpose comes in under the estate of the grantor.

8 Co. 145.
Davenport's case.

‘ So, where two joint-tenants for life were, and judgment in debt was given against one of them, and then he released to the other joint-tenant, who died, and he in the reversion entered; yet it was adjudged, that he should hold a moiety subject to the judgment, during the life of the joint-tenant who released; for, as to this purpose, the estate for life in a moiety hath still continuance, though to all other purposes the lessor was in of his ancient reversion for the whole, and the joint-tenant, to whom the release was made, was in by the first lessor, and not by him who made the release.

6 Co. 79.
Ld. Abergavenny's case.

‘ One seised of lands in fee grants thereout a rent-charge to *A.* for life, and after makes a lease to *A.* for 500 years of the same lands; then *A.* surrenders his lease to the lessor, who accepts it; and after *A.* distrains, and avows for the rent. It was held that he might; because by the lease for years the rent

Cro. Car. 101.
Hutt. 91.
Sir Edward
Pete v. Pemberton.

‘ was

‘ was only suspended, and now by the surrender of that lease the
 ‘ suspension is taken off; and, by consequence, the rent revived;
 ‘ as, if the lease for years had been made upon condition only, by
 ‘ breach of the condition, the lease being determined, the rent
 ‘ would revive; though as to any stranger, who might have pre-
 ‘ judice by such surrender, the lease for years shall still be said
 ‘ to have continuance.

Cro. Eliz. 160.
 Dove v. Wil-
 liot; *et vide*
 Co. Litt. 338.
 Cro. Eliz. 547.
 ||(a) See 16
 East, 406.||

‘ Tenant for life of a copyhold, remainder in fee; he in re-
 ‘ mainder makes a lease by parol (which, as it seems, must be
 ‘ warranted by custom); then the tenant for life and he in the
 ‘ remainder join in a surrender to the use of him in the re-
 ‘ mainder in fee, and the question was, If this was a good lease,
 ‘ and should take effect in the life of the tenant for life? And
 ‘ it was held, that it should; for it was a good lease against him
 ‘ in the remainder; and by the surrender of the tenant for life,
 ‘ to the use of him in the remainder, his estate is merged in the
 ‘ fee, and cannot hinder the lease from taking effect, more than
 ‘ if he were dead; and the whole being in his hands can have
 ‘ no privilege severed from the inheritance; as if he in the re-
 ‘ mainder grant a rent-charge, and after the tenant for life
 ‘ surrender, the rent shall begin presently.

Plow. 198.
 Wrotsley’s
 case.

‘ So, where one made a lease for years, and after granted the
 ‘ reversion to another for years, to begin after the end or expira-
 ‘ tion of the first term, and then, during the continuance of the
 ‘ first term, made a lease for life to the first lessee, whereupon
 ‘ the grantee for years of the reversion brought an ejectment, it
 ‘ was held maintainable; because the first lease for years being,
 ‘ by the taking such lease for life, surrendered and gone, by the
 ‘ act and concurrence of the lessee and lessor, his grant of the
 ‘ reversion comes next to take place.

Litt. sect. 636.
 Co. Litt. 338.

‘ If a woman inheritrix takes husband, and they have issue a
 ‘ son, and the husband dies, and she takes a second husband who
 ‘ lets the lands to one for life, and then the tenant for life sur-
 ‘ renders his estate to the second husband, the son may enter
 ‘ upon the second husband during the life of the tenant for life;
 ‘ because as to the son the estate for life is drowned, and, by
 ‘ consequence, the inheritance, which the husband gained wrong-
 ‘ fully by making such lease, is now by the surrender thereof
 ‘ vanished and gone; and then the rightful inheritance falls
 ‘ upon the son, and he may enter as if no such lease had been
 ‘ made, that which hindered his entry being taken out of the
 ‘ way. But, if a reversion be granted with warranty, and the
 ‘ tenant for life surrender his estate for life to the grantee, yet
 ‘ shall not the grantee have execution in value upon the war-
 ‘ ranty against the grantor, during the life of the tenant for life.
 ‘ So, if the tenant for life surrender to him in the remainder, or
 ‘ reversion, within age, yet he shall not have his age, because in
 ‘ these cases such surrenders would work a prejudice to a third
 ‘ person, which the law will not allow; though when it is for
 ‘ the benefit of a third person, he shall take advantage thereof;
 ‘ as by the cases before mentioned appears.”

A., seised

A., seised of lands in fee, makes a feoffment to the use of himself and the heirs male of his body; remainder in tail to several others, remainder to his own right heirs; *proviso*, that if there shall be a failure of issue male of his body, and that *B.* be dead, and *C.* be married, or of the age of twenty-one years, then she shall have 200*l.* per annum for ten years; then *A.* dies, leaving *D.* his son, who makes a lease for one thousand years, then levies a fine and suffers a recovery, and afterwards dies without issue male; and the contingencies all happened; and the questions were, *first*, If this rent was barred by the recovery? *secondly*, If the lease for one thousand years was chargeable with it? And it was *adjudged per tot. cur.* that this recovery that barred all the remainders *did also bar this rent*, which was to arise out of them; for though it were to arise precedent to the remainders, yet it was subsequent to the estate-tail of him who suffered the recovery; and therefore being chargeable upon and to arise only out of these remainders, and they being barred by the recovery, so was this rent also, which was to arise thereout; and for the very same reasons which are given in *Capell's* case, which it was said was the same case with this. *Secondly*, it was adjudged that this rent could not be chargeable upon the lease for one thousand years; because that was derived out of the estate-tail, which was precedent to and paramount the commencement of the rent: and the lessee was in after the remainders barred by the recovery, in continuance of the first estate-tail; which lease being before the recovery, the recoveror took the estate subject thereto. And they agreed, that if a gift in tail be made, rendering rent, or upon condition of re-entry, that no recovery by the tenant in tail will bar the rent or the condition, they being coeval with the very estate-tail itself; and therefore the recoveror, who comes in, in continuance of the estate-tail, takes it subject to such rent or condition; and yet, in this case of the rent, the reversion is barred, though the rent continues as a rent-service distrainable for at common law; but the condition they say must be a condition annexed to the rent, and not a collateral condition, for that will be barred with the reversion by a common recovery.

Mod. 108. Sir T. Raym. 236.
2 Lev. 28.
3 Keb. 274.
287. Benson v. Baron Hudson, S. C.

(I) To what Purposes the Remainder is accounted but as one with the particular Estate, and where they are regarded as several Estates.

IF one make a lease to *A.* for life, remainder to *B.* for life, in tail or in fee, and *A.* die; the law adjudges the freehold in *B.* presently, and he is tenant to every *præcipe* till he disclaims (a) or disagrees to it; for both the particular estate and remainder make but one degree, and a writ of entry *sur disseisin* may be brought against him in remainder after the particular estate ended as well as it might against the particular tenant himself; and if there be tenant for life, remainder over of a seignory, and the tertenant alien in mortmain, they both shall have but one year and a day for entry; and if termor or guardian let

Hob. 71.
[(a) See Lord Eldon's observation on disclaimer, 1 Swanst. 57.] In a *will*, the seisin of the particular tenant is not seisin to the remainder

for

- to enable them to maintain a writ of entry, &c. until it is actually obtained. See 1 Inst. 111. 2 Schol. & Lef. 104.]]
- Litt. sect. 521. ' If a disseisor make a lease for life, remainder over in fee, and
Co. Litt. 297. ' the disseisee release to the tenant for life, this shall enure to him
' in the remainder, because by the release all his right is gone;
' but a confirmation only of the estate for life shall not enure to
' him in the remainder, because nothing is confirmed but the
' estate for life, and then the remainder lies open without any
' sanction given to it. But in the other case, by the release of
' the disseisee to the tenant for life, all his right is gone, and the
' tenant for life doing wrong only during his own estate, the
' release can extend only to cure that wrong; and therefore for
' the residue must fall into the remainder. So it is, if feoffee
' upon condition make a lease for life, remainder in fee, and the
' feoffor release the condition to the lessee for life, this shall enure
' also to him in remainder, because the condition went to the
' whole estate; and therefore, being discharged, must exonerate
' the whole estate, whereof he in the remainder has part.
- Litt. sect. 521. ' If the disseisee confirm the estate of him in the remainder,
' without any confirmation made to the tenant for life, yet the
' disseisee cannot enter upon the tenant for life, because the re-
' mainder is depending thereon; and if he should defeat the
' estate for life, he must also defeat the remainder which he has
' confirmed; but this he cannot do; therefore neither can he
' defeat the estate for life.
- Co. Litt. 298. ' So, if a disseisor make a lease for life, saving the reversion to
' himself, and the disseisee confirm the reversion of the disseisor
' only, yet he cannot enter upon the tenant for life, because then
' he must draw out and defeat the reversion likewise, which
' against his own confirmation he cannot do (and yet such rever-
' sion is not depending upon the estate for life, as the remainder
' is, but is paramount to it); for, if a disseisor make a lease for
' life, and after levy a fine with proclamations, and five years pass,
' so that the disseisee is barred for the reversion, he shall not enter
' upon the lessee for life.
- Co. Litt. 510. ' If a reversion or seignory be granted to one for life, remain-
2 Co. 67. ' der to another in fee, attornment to the tenant for life is good
' to him in the remainder likewise, because both make but one
' estate and degree; and for this reason it is, that if no attorn-
' ment be to the tenant for life, but after his death attornment is
' made to him in the remainder, this is void, because both making
' but one estate, if the first be not completed, the other cannot
' take effect.
- Cro. Eliz. 504. ' Admittance of the tenant for life of copyhold lands is also a
662. Moor, ' good admittance of him in the remainder to all purposes, except
pl. 448. 658. ' the lord's fines, if there be a custom for two several fines; and
Roll. Abr. 505. ' though the first tenant were only for years, yet admittance of
4 Co. 22. ' him is such an admittance of him in the remainder likewise, as
Cro. Jac. 51. ' shall make a *possessio fratris* of the remainder, and carry it to
Mod. 102. ' the sister of the whole blood.
120. 1 Vent.
260. 2 Lev.
107. [5 Keb. 263. 329. Gilb. Ten. 194. Watkins's edit.] || Church v. Mundy, 12 Ves. 426. How far

far equity interposes between the tenant for life and the remainder-man, in respect to the lord's fines, see 13 Ves. 246. 252, 253.||

' Custom of a manor was, that upon surrender of copyhold land made to one and his heirs, if three proclamations passed, and he did not come in to be admitted, the lord should have it as forfeited; and there a surrender was made to the use of *A.* for life, remainder to *B.* in fee. *A.* suffers three proclamations to pass without coming in to be admitted; yet it was held, that this should not forfeit the estate of *B.* in remainder, for they are divided estates; and the custom being to forfeit one estate only, shall be taken strictly, and intended of an entire fee-simple in possession.

Cro. Eliz. 879.
Yelv. 1. Bas-
pool v. Long.

' And yet where copyholds were devisable for three lives *successive*, whereof each to take in order as they were named; and the custom was, that they could not cut timber; the first tenant for life cuts timber: this was held a forfeiture of all their estates; the reason whereof may be, that this was but one entire estate in possession at first, though the custom after shares and divides it to go in succession; for it is held (*a*), that if a copyholder for life commit waste, this shall be no forfeiture of the estate of him in remainder. (*b*) Wherein this diversity appears, that for the benefit of him in the remainder his estate is accounted as one with the particular estate, and therefore one admittance goes to both; but as to any prejudice which he may receive by the act of the particular tenant, his remainder is accounted as a several and divided estate, and shall not share in it.' "And so in several of the other cases before mentioned."

Moor, pl. 149.
Cro. Jac. 437.
(*a*) Cro. Eliz.
598. [See Gilb.
Ten 246. 250.
305. Watkins'
edit. 2 Ld.
Raym. 999.
P. 3. Wms. 10.
note F.]
||(b) But, by
special custom
a forfeiture by
tenant for life
of copyholds
may bind the
remainder-
men. 9 Co.
107.||

Printed by A. Strahan, Law-Printer to His Majesty,
Printers-Street, London.



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